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Punishing the Last Citizens? On the Climate Necessity Defence

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Abstract
Faced with the inaction of liberal democracies to effectively tackle global warming, many climate activists engage in forms of protests that involve committing minor criminal offences. They seek to shape official decisions on climate policies by resorting to civil disobedience. Some of these activists, rather than accepting punishment, have successfully claimed to be acting in a justified manner by invoking the necessity defence. The aim of this article is to show that, within the framework of representative democracies guided by the rule of law, the climate necessity defence must be rejected, since such protests do not meet the 'non-legal alternatives' requirement. This does not mean, however, that protesters should be punished as common offenders. Their acceptance of responsibility and political motivation should be taken into account as a mitigating factor at sentencing.

Keywords Climate activism · Civil disobedience · Necessity defence · Rule of law · Punishment

Introduction

Although it is not a new phenomenon, more and more climate activists are opting to break minor laws in order to get maximum exposure for their climate protests. In fact, a number of climate justice movements—such as *Last Generation*, *Extinction Rebellion*, and *Ende Gelände*—explicitly call for civil disobedience and coercive forms of protest as a way of drawing attention to the catastrophic effects of global warming (Garcia-Gibson 2022). The most radical factions even argue that conventional public non-violent civil disobedience is insufficiently militant, preferring instead ecotage (sabotage and property damage), and condone doing it secretly to

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avoid legal sanctions (uncivil disobedience).[1] While in some cases protesters direct their actions at those perceived to be responsible for climate change, or at activities that directly contribute to global warming by violating the very rules which they are trying to change (direct civil disobedience), in most cases, protesters violate rules other than those they seek to change (indirect civil disobedience). Not only public or collective interests, but also individual interests (freedom, property…) are affected by such protests. Some of them involve the commission of minor offences, such as trespassing, disturbing the peace, blocking public services, damaging property, picketing, violating official orders, cyber-vandalism, etc.

In many cases, climate activists do not deny that these protest acts satisfy the elements of one of those crimes. However, what the defendants deny is that their acts are, all things considered, criminally wrong. In particular, several defendants have claimed that their actions are justified by the necessity defence, also known as the 'lesser evil defence'. Although the accurate legal requirements of this justificatory defence vary slightly from jurisdiction to jurisdiction, there is a common structure both in Anglo-American and Continental legal systems. A person is not criminally responsible for an offence if: (a) the defendant faced an imminent evil; (b) the criminal act was appropriate to avert that evil; (c) the evil caused by the criminal act was less serious than the evil avoided; and finally, (d) there was no reasonable legal alternative available to the course of action taken. If defendants meet these four requirements, even if they are fully culpable, the offences committed are not only excused, but justified. Broadly speaking, that means that political protesters are entitled to perform such acts, and others may aid the protesters, and no one can prevent the justified acts, not even police officers or the people directly affected.[2]

While appealing to the necessity defence, as a form of justification for criminal protest, is by no means new—it is one of the classic legal avenues for the justification of (criminal) civil disobedience (Cohan 2007; Parry 1999, pp. 400–401)—its use by climate protesters has recently enjoyed some success in many Western jurisdictions. In the last five years, climate protesters have been acquitted by using the necessity defence in different liberal democracies such as the USA, Switzerland, France, and Germany.[3] Although so far most of the acquittals have been overturned on appeal,

[1] On ecotage, see Milligan (2013, pp. 108–109) and Scheuerman (2022, pp. 792–793, 800–803), who distinguish between a pro-civil disobedience movement in classical terms (lawbreaking for the sake of law) and a more radical one that sees non-violent civil disobedience as insufficient and advocates to block and disrupt the fossil fuel-driven political economy. For a defence of the uncivil disobedience, see e.g., Delmas (2020, 2018). For criticism of the distinction between civil and uncivil disobedience, see Akbarian (2023, Chap. 4).

[2] There is some controversy about the distinction between justifications and excuses. However, it is generally accepted that justifications provide a basis for acquittal by denying wrongdoing or illegality (and by asserting the permissibility of acting as the defendant did, indicating a modification of the prohibitive norm), whereas excuses concede wrongdoing and the illegality of the act, but deny that the defendant is responsible or culpable for committing the specific wrong. Accepting the justification *de facto* modifies a norm by authorising identical actions in the future.

[3] See e.g. Michigan v. Alpert -Ingham Cir. Ct., Mich., No. 18—6143-SM, May 10, 2019- (USA); *Tribunal d'Arrondissement de Lausanne*, PE 19.000742, Jan. 13, 2020 (Switzerland); *Tribunal de Grande Instance de Lyon*, 19,168,000,015, Sep. 16, 2019 (France); or AG Flensburg, 07.11.2022–440 Cs 107 Js 7252/22 (Germany).

a door has been opened that previously seemed completely closed (Turenne 2004). This has also triggered debate among criminal law scholars, who have begun to argue intensely about the possibility of acts of political protest resorting to the necessity defence. The common judicial reasoning, in a nutshell, is that committing minor crimes as a way of communicating state inaction in the fight against global warming is an appropriate countering to the climate catastrophe. Given the proven inability of states (controlled by the fossil fuel industry) to change policies that lead to self-destruction, citizens have no alternative but to commit minor crimes to force legislators to change their policies. By conceding the defence of necessity, the courts are guaranteeing climate activists a genuine right to civil disobedience within the framework of a liberal democratic state. In doing so, they also legitimise the agenda of climate civil disobedience advocated by a number of climate movements.

The aim of this article is twofold: first, I will argue that—from a strictly criminal law perspective—it is wrong to justify acts of climate protest by appealing to the necessity defence. Even assuming that climate protest can indeed mitigate the effects of global warming, this defence should not be conceived of as a mechanism for making amends to legislators and public officers, at least not within the framework of a democratic state with a justifiable claim to political authority.[4] Acts of criminal climate protest that are not covered by basic political rights (freedom of expression and demonstration)[5] must therefore be considered legal wrongs. This article therefore leaves aside the question of the ethical or moral political legitimacy of unlawful climate protests. Second, however, I will argue that criminal offences committed in the context of climate protests as acts of civil disobedience—insofar as they consist of deliberate disobedience of the laws for the purpose of advocating changes to a highly questionable climate policy—deserve to be treated differently from ordinary crime. As I will show, there are very good reasons for mitigating punishment in cases of climate protest. Although the regulation of both necessity and mitigating circumstances varies in each legal system, there are—at least in the context of Western criminal law systems—common denominators that allow my conclusions to have transnational appeal.

The article is structured as follows. In 'The Case for a Green Necessity Defence' section, I begin by outlining the case for the justification of criminal climate

[4] My argument operates within the framework of a relatively well-functioning democratic state. That state has a legitimate claim to demand obedience to the law, and it offers citizens meaningful, legal ways to oppose its laws. I assume here that Western democracies meet this standard, although I am aware that this assumption, which is shared by the classical liberal approach to civil disobedience, has been challenged. See e.g. Delmas (2019), pp. 184–185. Anyone who understands that even Western democracies lack the legitimacy to enforce the law will find my argument unconvincing. I thank an anonymous reviewer of *Res Publica* for pressing me to clarify this point.

[5] The aim of my article is to deny the possibility of relying on the necessity defence to justify criminal protests that fall outside of the scope of protection of fundamental rights. Both criminal and constitutional law scholars widely agree that not every imaginable act of political protest, even non-violent acts, is protected by such traditional fundamental rights. If this were not the case, there would be no room for civil disobedience, which conceptually requires breaking the law. This also explains why, recently, some scholars argue in favour of constitutionalising a specific right of protest (see e.g., Martí 2021, pp. 36–47; Gargarella 2005, Chap. XI).

protests. Then, in 'Against the Green Necessity Defence' section, I show why this conclusion is unconvincing. To this end, I will develop two different arguments. In 'Effectiveness' subsection, I defend the weaker claim that protest is an inappropriate means of mitigating climate change in the sense required by the necessity defence. In 'Non-Legal Alternatives' subsection, I defend the stronger claim that, even if we admit that protest is an appropriate means of averting an evil, protest (in the context of a liberal democratic state) does not meet the 'non-legal alternatives' requirement. The pro-justification interpretation is based on a moral conception of the necessity defence that cannot be endorsed in the framework of a rule of law-based democracy. Finally, in 'Punishing the Last Citizens?' section, I consider how to deal with the criminal wrongs committed by climate protesters. In 'Excusing Criminal Climate Protest' and 'Mitigating the Punishment of Climate Protesters' subsections , I argue that those wrongs cannot generally be excused, but that there are strong reasons for a significant mitigation of punishment.

The Case for a Green Necessity Defence

In recent years, there have been a number of acquittals in climate protest cases using the necessity defence in both Anglo-American and Continental jurisdictions. These rulings assume that climate protesters meet the legal requirements of the necessity defence. This thesis is endorsed and supported by many legal scholars who also claim that climate protest either meets the legal requirements of the defence as traditionally understood (Bönte 2021), or that a tightly limited reconceptualisation of these requirements by judges concerned with the climate emergency is now required (Brogan 2021, p. 268; Stucki 2020). Let us take a closer look.

First, resorting to a body of scientific work that is becoming increasingly incontrovertible, those scholars arguing for the necessity defence take for granted that climate protesters commit offences in order to prevent a more serious and imminent evil (Brogan 2021, pp. 270–271). While some authors define the evil as affecting a collective interest (a humane environment), others stress the particular impact of global warming on the most fundamental rights (life, physical integrity, property, etc.) of present and future citizens (intergenerational justice), or, less anthropocentrically, on the earth, particular ecosystems within it, and various living things in a natural environment. In the extreme formulation, it is claimed that protesters act to avoid human extinction (Bönte 2021, pp. 165–167). Moreover, according to the pro-justification approach, this evil is already imminent. Although the ultimate effects of global warming are still a long way off, protesters are facing a long-term evil that increasingly manifests its effects. Since it would be impossible to avert it if we waited until the last moment before its final realisation, assuming that such a moment could be determined at all, the climate challenge constitutes already an imminent evil that can be confronted by appealing to the necessity defence.

Second, the pro-justification approach assumes that criminal protest is an existing effective (and the least harmful) means of mitigating the devastating effects of climate change. As to the effectiveness of the protests, the assumption is that the aggregate effect (collective action) of future protests similar to those taken by specific

defendants is decisive to mitigating global warming (Bönte 2021, pp. 168–169; Reichert-Hammer 1992, pp. 186–189). While gluing a hand to the frame of a Goya painting or refusing to come down from a tree when ordered to do so will not prevent global warming, the sum of similar minor actions—to the extent that they might lead policy-makers to change climate policy—would indeed be an effective mechanism to address global warming. In other words, drawing attention to a specific issue by committing a crime (immediate objective), provided that this action is part of a mosaic of similar (future) actions, could effectively influence climate policy (intermediate objective). This should ultimately make it possible to counteract the effects of climate change (final objective). According to this train of thought, the specific act of protest, in itself insignificant to combat climate change, would meet the legal requirement of effectiveness.

Third, the pro-justification approach assumes that the harm caused by the commission of minor offences is minute compared to the harm that protesters are attempting to avert (Bönte 2021, pp. 171–172). If we accept that ultimately the lives and physical integrity of millions of people, of humanity as a whole, are at stake, it is undeniable that the damage caused (minor damage to property, limitations to freedom of movement, etc.) is substantially less than the evil protesters seek to prevent. This is true even if it is only through the aggregation of hypothetical future similar actions that criminal protests could be an effective mechanism for averting such evil. In short, the difference in the interests at stake is so radical that the evil caused would always be considerably less than the evil to be avoided, even considering the uncertainty surrounding the exact determination of the expected evil from global warming.

Finally, fourth, the pro-justification thesis assumes that, given the manifest failure of states to deal with global warming, protesters have no legal alternative means of effectively combating the catastrophic consequences of climate change (Bönte 2021, pp. 169–170). There would be no legal mechanism to achieve their objective, nor would they be able to achieve it in a way that was less damaging to the interests of third parties. To suggest that protesters could influence climate policy through democratic legal channels is naive—even in the framework of liberal democratic states—given the patent climate inaction of most Western states. In fact, according to some views, the democratic representatives are co-opted by the fossil fuel industry, so the only realistic option for changing climate policy would be to resort to direct action and civil disobedience.

The conclusion that arises from the above is that the minor offences committed by climate activists should be justified on the grounds of necessity. In short, these politically motivated acts would not be criminally wrong. Although the practical consequences of the necessity defence vary from jurisdiction to jurisdiction, Continental criminal law scholarship generally agrees that no one can resist someone who is acting justifiably, which means *de facto* that neither the police nor the individuals concerned can act in self-defence to prevent an identical act of protest in the future. Once it is accepted that an activist is justified in blocking a road when protesting against climate change, such behaviour becomes legal. Any protester could block such a road in the same circumstances. In this way, then, the necessity defence becomes a radical revolutionary legal mechanism for changing counterproductive

laws (Martin 2004-2005), or at least for legalising acts of criminal protest that expose the catastrophic consequences of global warming by imposing costs on third parties not directly responsible for climate change.

Against the Green Necessity Defence

I will argue that—from a strictly criminal law perspective—the pro-justification thesis is flawed, first, because climate protest can hardly be seen as an effective means of averting climate change ('Effectiveness' subsection). But even if we accept the effectiveness of climate protests, second, the interpretation of the requirement of non-legal alternatives assumed by the pro-justification thesis is wrong within the framework of a liberal rule of law-based democracy ('Non-Legal Alternatives' subsection).

Effectiveness

Taken in isolation, a single climate protest—for example, an activist refusing to climb down from a tree that is to be felled to build a hotel—is clearly not an effective course of action to counter the effects of global warming. Nevertheless, to deny justification in this way oversimplifies the problem. To assess the effectiveness of such a protest is to remove it from the collective context in which it is framed. Indeed, there are good reasons to accept that sometimes the effectiveness of the criminal act which must be justified depends on the performance of other identical or similar (future) actions (Reichert-Hammer 1992, pp. 186–189). For example: (X) notices that a car is on fire. He has the fire extinguisher of (A), the fire extinguisher of (B), and the fire extinguisher of (C) within reach. (X) knows that, given the magnitude of the fire, he will not be able to put out the flames with just one extinguisher. Nevertheless, (X) first takes (A)'s extinguisher, then (B)'s extinguisher, and finally manages to put out the fire with (C)'s extinguisher. Clearly, taking the extinguisher from (A) is justified by appealing to the necessity defence, even if there is damage to (A) and even if (X) is unable to extinguish the fire. Its effectiveness should be assessed taking into account the other expected rescue actions. All three thefts, in short, are justified on the grounds of necessity. Certainly, my example differs in some relevant ways from the basic case with which I am concerned in this article. In the case of the three fire extinguishers, we have a single agent (X) who will perform three identical actions in a very short period. It is easy to see each of the individual actions as part of a complex action and thus to assess effectiveness from this global perspective. The case of climate protesters is, however, surrounded by a double uncertainty.

First, the probability of identical or similar future actions achieving the same effect is lower. This depends on whether other climate activists engage in similar protests in the future. This uncertainty makes it difficult to understand the initial action as a form of collective agency and therefore to assess its effectiveness, taking into account the context of collective action. However, let us assume for the sake of argument that it is indeed highly likely that the initial protest will be followed by

similar protests, for example, because the initial action is part of a pre-established plan consisting of a multitude of already perfectly planned protests taken by certain activists in a short period of time.

Second, even accepting the collective dimension of a specific action, it is not obvious that the mosaic of protests can effectively combat global warming. I am not denying the effectiveness by the fact that the concrete act of political protest has only a mediate effect on the consequences of climate change (Horter and Zimmermann 2023, pp. 486–488; Reichert-Hammer 1992, pp. 186–187). For another example: (Y) has a heart attack in the street and the only way for (X) to get him to hospital is to steal (A)'s car. (Y) knows that (A)'s car is out of petrol. To save (Y), he steals a bottle of petrol from (A) and another from (B). When the car is refuelled, (X) takes (Y) to hospital. Can the theft of the petrol be justified, even if it involves a second, subsequent (criminal) action? I argue that the answer is clear: stealing the petrol is an effective course of action, as an indispensable first step to saving (Y)'s life. However, this case is different from the case at hand. Even if we assume that many protests will take place, it is highly doubtful that such protests will have a non-negligible probability of stopping global warming.

The pro-justification thesis assumes that such protests will be able to convince a majority of citizens in a short period of time, who in turn will be able to influence the attitudes of their political representatives, who will finally be able to modify their climate policies in a proper way to prevent the destruction of humanity (Bönte 2021, p. 164). This statement relies on two different premises. The first is empirical: criminal protest would be effective in mitigating the effects of climate change. It is common among criminal law scholars to claim that civil disobedience would be counterproductive to convincing a majority of citizens of the necessity to change climate policies (Zieschang 2023, p. 144; Rönnau 2023, p. 114). However, these judgements are based on intuitions that are not empirically grounded. Although there is a lack of systematic and generalised knowledge linking climate protest to mitigating climate change, most existing empirical studies on the effects of civil resistance, and in particular on how climate movements contribute to changing climate policy, point rather in the opposite direction: climate protest does influence public policy and does not alienate the public from sustainable lifestyles.[6]

Doubts arise when it comes to determining the exact extent to which criminal protest has an impact on climate change mitigation. As the scholars who defend the effectiveness of civil disobedience themselves acknowledge, it is very difficult not only to specify the degree and concrete manner in which it is effective as a specific way of protesting (Piggot 2018, p. 945), but also to predict or generalise the effects of an act of protest until after some visible gains have been made (Chenoweth and

[6] On the influence of social movements on public opinion and politics see e.g., Thiri et al. (2022), or Piggot (2018). See also Kountouris and Williams (2023), pointing out that there is no evidence that climate protest has any counter-productive effect. However, Giugni (2007) comes to different conclusions and states that social movements have little leverage on policy. According to Giugni, a social movement can be effective in producing policy changes only when it can take advantage of favourable political opportunities and public opinion. I am grateful to the two anonymous reviewers of *Res Publica* for encouraging me to clarify this point.

Stephan 2013, p. 221). Existing studies suggest that protests have positive effects in the fight against climate change, but they are indirect and of low intensity. Protests are associated with a lower probability of opposing pro-environmental behaviour and policies, and a lower willingness to pay a premium for green consumption (Kountouris and Williams 2023), and contribute to laying the groundwork for social change (Piggot 2018), but so far there is no direct correlation with significant policy changes able to mitigate global warming. And this relates to the second of the premises announced, namely the normative one: are criminally relevant protests sufficiently likely to be effective for the purpose of justifying the act by recourse to the necessity defence? It is one thing to say that mobilisations can create an environment in which green politics can emerge and expand, shifting the political discourse, moderating counter-proposals or creating resources such as social networks and organisation infrastructure that enable future movements to achieve success, and quite another to assume that a criminal protest (or the sum of such acts) meets the normative threshold of effectiveness. Based on the results of the empirical studies mentioned above, and even accepting that climate protests may have a certain influence on climate policies, this effect is still too unpredictable, weak, and indirect to claim that criminal protest meets the effectiveness requirement of the necessity defence: they do not have a non-negligible probability of reducing the effects of climate change.[7]

Non-Legal Alternatives

Now, given that the probability threshold for determining effectiveness is not legally stated, I admit that my first argument, despite significant support among criminal law scholars (for example, Engländer 2023; Payer 2020), could reasonably be rejected. However, as I will demonstrate now, even accepting that protest is an effective means for reducing climate change, criminal protests cannot be justified, because they do not respect the 'non-legal alternatives' requirement, also known as the 'subsidiarity requirement'.

The pro-justification approach presupposes a conception of the necessity defence that we can call 'moral' (Coca-Vila 2023). It is the legal mechanism to ensure that criminal law and morality always go hand-in-hand, allowing citizens to breach the letter of the law when it deviates from ideal law. On this view, the central and most problematic requirement of the defence is the 'balance-of-harm requirement'—that is, the requirement to establish whether the harm prevented is greater than the harm caused by acting on grounds of necessity. This discussion, however, merely reflects the deep disagreement in moral theory. Once it has been decided whether what the defendant has done is morally right or wrong—or, in other words, whether the

[7] In a similar vein, see Horter/Zimmermann (2023), p. 488–489. There is a tendency among some scholars (e.g., Reichert-Hammer 1992, p. 187) to confuse two levels: the interest saved and the effectiveness of the action taken to save it. However, the fact that the interest saved is fundamental should not eliminate the requirement of effectiveness. In other words, even in order to save humanity from extinction, the criminal action must also have a probability of success.

defendant has protected the greater interest—the question of whether the act should be justified under criminal law is automatically resolved (Thorburn 2012, pp. 6–7). The requirement of subsidiarity is therefore of secondary importance from this point of view. It is understood in a purely factual way: what is relevant is whether there is *de facto* a mechanism for effectively achieving the solution to the conflict that maximises the interests at stake according to the balancing of harms.

According to this view, the necessity defence has a profoundly revolutionary dimension, and it operates as a powerful transforming instrument, a vehicle for social change (Norrie 2014). It expressly permits individuals to ignore even validly enacted laws in order to act in the manner that is deemed fair in a particular case, making judges *ad hoc* legislators (Kadish and Kadish 1973, pp. 124–127). In fact, scholars who conceive of necessity in this vein see in the necessity defence the vehicle to legalise civil disobedience (Martin 2004–2005). Ensuring the survival of humanity will always take precedence over minor damage to the property or freedom of those who endure acts of protest. Since reality shows that states are unwilling to change their climate policies, there would be no alternative legal route. All of the legal requirements of the justification would have been met, so climate activists would be entitled to breach the letter of the law to force public officials to radically change their climate policies.

However, this understanding of the necessity defence in general and the subsidiarity requirement in particular is flawed (Coca-Vila 2023). The moral interpretation overlooks the fact that in a representative democracy based on the rule of law, it is primarily up to parliament to decide on climate policy and up to public officials to implement the law passed by political representatives.[8] This is true regardless of whether democratically established solutions are more or less right, or to the liking of more or fewer citizens. Respect for the legal solutions and procedural channels is even more important in areas of strong moral controversy, such as determining how a polity should reconcile economic prosperity with sustainable development. The democratic character of the norms that resolve such intricate questions, given its constitutionality, is sufficient reason for compliance, even when the law is objectively deficient or incompatible with the standards of justice held by most citizens. Therefore, to conceive of the necessity defence as a tool for maximising social interests would be to deprive democratic legislators of their power; at the very least, it would always be up to citizens to decide whether to obey the law when there is a course of action that is considered more efficient. In Continental criminal legal systems, in which the acceptance of the necessity defence falls to professional judges who are not democratically elected but who are instead appointed, the irregularity in terms of political legitimacy of the necessity defence understood in moralistic terms is even more evident.

[8] For a case against the democratic character of civil disobedience in liberal democracies, see Weinstock (2016), who, however, for the benefit of those who are excluded by the democratic system, is prepared to concede a remedial right to civil disobedience. For a contrary view, see Cervera-Marzal (2021), pp. 4–6: it is 'legalistic' and 'conservative' to deny the legitimacy of civil disobedience.

An interpretation of necessity compatible with democratic principles and the rule of law requires a different conception of this justification and, in particular, of the 'non-legal alternatives' requirement. As Pawlik (2002, pp. 103–104, 179–181) and Thorburn (2008, pp. 1118, 1126, 2011, pp. 34–36, 2012, p. 17, 2019, pp. 408–409) convincingly show, this defence is not intended to amend positive law according to any supra-positive standard of justice. Instead, it authorises citizens to step in when the state (represented by its public officials) is exceptionally unable to fulfil its mission. Assuming a general primacy of legal solutions and public procedural channels for addressing need leads to a substantially different interpretation of the non-alternatives legal requirement: what is relevant is not whether there is a *de facto* legal path to changing a law that is seen as unfair (moral interpretation), but instead who is responsible for deciding on climate policy (jurisdictional understanding). Since the determination of climate policy is the responsibility of a democratically elected parliament or of public officials implementing democratically enacted laws, any action that circumvents this responsibility must be considered contrary to the requirement of subsidiarity. Once again, this is completely independent of the importance of the harm the protesters are trying to avoid: it is not about the material reasonableness of their proposals, but is instead about the jurisdiction to change the law in the framework of a representative democracy. It is up to a democratically elected parliament to change laws or sets of laws that it considers unjust or incorrect, not up to citizens, no matter how numerous they may be.

Understanding the necessity defence in this way means that this justification loses all of its ground-breaking power. The necessity defence, at least in a democratic state founded on the rule of law, is not an instrument of direct social change, but purely a supplementary mechanism for the execution of the pre-established public programme for combating need. In short, the person acting in a necessity scenario assumes a state's jurisdiction *pro tem* (Thorburn 2011, pp. 34–36, 2012, p. 17, 2019, pp. 408–409), invoking a power that belongs to the state when no properly authorised state officials are available to deal with the situation. In operative states, this happens exceptionally, which explains why criminal law scholars often associate this defence with emergency situations and non-systemic harms (Neumann 2014, p. 596).

One important objection to the thesis just presented here is that it relies on an overly narrow or old-fashioned understanding of democratic principles. In particular, it is common in the philosophical literature to argue that there is nothing inherently undemocratic about civil disobedience; in fact, some forms of civil disobedience are particularly praiseworthy forms of democratic participation (Akbarian 2023, Chap. 5; Brownlee 2012; Celikates 2016; Markotivs 2005; Smith 2013, Chaps 1 and 5; Arendt 1972, pp. 75–76).[9] At least in the face of legislators incapable of heeding the democratic will and co-opted by the fossil fuel industry, resorting to civil disobedience, according to those views, could not be fairly described as an 'anti-democratic act', but instead as a necessary way of re-democratising climate politics. Moreover,

[9] In general, for discussion on the anti-legal turn in the civil disobedience literature, see Scheuerman (2015, pp. 441–447).

the rhetorical recourse to the primacy of legal solutions in dealing with civil disobedience is nothing more than an ideological cover for state violence, overlooking the fact that the law in question is a constant threat to democracy and self-government (Gargarella 2012; Lovell 2009, pp. 47–48). Therefore, to reject the necessity defence in climate protest cases, the democratic argument would not be decisive.

This argument is a serious one. I cannot go into detail here on the question of what kind of democracy we should strive for and how democratic civil disobedience can be. But I do think that there are good reasons to defend the general primacy of legal solutions and institutionalised channels in the application of the necessity defence in the context of tolerably well-functioning liberal democracies. On the one hand, as Garcia-Gibson (2022) shows, it is highly questionable that acts of climate protest represent the—democratically established—majority will, which is remaining unheeded by political representatives co-opted by the fossil fuel industry. It is one thing for protesters to be right in their demands, but quite another for those demands to reflect the will of the people. The particular demands of climate protesters often do not reflect the outcome of public deliberation, and certainly not all citizens affected by possible changing climate policy are involved. Claims that parliaments are under the control of the fossil fuel industry, or that a majority is tyrannising a green minority are not decisive objections either. It is clear that the fossil fuel industry exercises pressure on lawmakers, but lobbyism is by no means unusual in the democratic legislative process. Thus, it is more plausible to argue that—given the multiplicity of interests and values at stake, and the cognitive biases that may influence citizens in deciding how to deal with the climate conflict—most citizens still choose, arguably irrationally, to postpone effective action against global warming (Luo and Zhao 2021). If climate protests are intended to show the public at large the catastrophic effects of climate change, their demands do not represent the current will of the majority. Therefore, protesters arrogate to themselves a power that does not properly belong to them, elevating their opinions—on an issue that has definitely not fallen off the public agenda[10]—above those of other citizens in an epistemically and morally arrogant way. This is particularly questionable regarding a topic such as climate policy where reasonable disagreement will inevitably arise and the law regulating it should be the result of a complex process of parliamentary deliberation in the face of extensive disagreement.[11]

On the other hand, from a strictly constitutional perspective, the legally permissible channels of democratic participation are predetermined. In the context of Western democracies, it is the people's representatives who have the task of determining—in the context of a democratic parliamentary debate—climate policy. Implementing climate policies within democratically established legal frameworks is the responsibility of public officials. Surely, it is wrong to limit the concept of

[10] Climate protest does not put an uncontroversial issue on the table, nor can it be understood as a problem of a minority that the majority does not want to solve. Moraro's (2014) argument, which sees protest as the fulfilment of a positive duty to support the autonomous choices of the rest of the society, does not apply here.

[11] For a worth-reading defence of the rule of law against anti-legalist conceptions of civil disobedience, see Scheuerman (2015, pp. 442–443).

democracy to something that takes place only during elections. There are also in Western legal systems channels for more direct democratic political participation, such as the right to propose legislation, to strike, or, in some jurisdictions, to apply the law by serving on juries. However, attempting to engage in the political process outside these channels, by changing the law through the recognition of a justification, means depriving democratic parliaments and public officials of their rightful power to decide on climate policy and to implement it in accordance with the law. Insofar as climate protesters generally resort to forms of indirect civil disobedience, i.e., breaking laws over which the state's authority is in good standing, the arrogation of another's jurisdiction is particularly problematic (Bennett and Brownlee 2021, pp. 292–293). Why should I tolerate the violation of my rights (e.g., freedom of movement when blocking roads) so that you can spread a political message? There may be a case for constitutionalising more direct and less representative forms of democracy,[12] or maybe not, and we should insist on our preference for legislative rule-making, but today it is—in the constitutional design of our democratic system—up to democratically elected parliaments to set climate policy. This also applies in the context of states such as Germany, where the constitutional court has ruled that the *Federal Climate Protection Act* insufficiently protects the constitutional right to the natural foundations of life and animals (Theil 2023). It is one thing to declare national climate targets to be partly incompatible with fundamental rights insofar as they lack sufficient specifications for further emission reductions in the future, but it is quite another to justify acts of (indirect) civil disobedience. It is up to the German parliament to amend its legislation to meet the standards of protection set by the constitutional court.[13]

In sum, in a well-functioning liberal democracy, citizens cannot amend the law by appealing to justificatory defences. Even if there is *de facto* no effective alternative for immediately avoiding the evil climate protesters seek to address, the primacy of legal solutions and public procedural channels for addressing need speaks against the justification. Unless the specific form of protest could be covered by a fundamental right that would lead to a restrictive interpretation of the scope of the offence, which is not the case in the climate protest cases at hand, climate protests remain unlawful acts.[14] That said, the fact that criminal protests are not justified by appealing to the necessity defence does not prejudge the moral or political worth of civil disobedience. My argument only excludes the legal justification of acts of protest that meet the requirements of criminal offences (Hassemer 1985, pp. 336–344). Furthermore, it does not prejudge whether and how such offences should be punished. I will address this question in the final section of this article.

[12] See e.g., Martí (2021) or Celikates (2016).

[13] It may be possible to accept the necessity defence where the norm or public channel being challenged is blatantly unconstitutional (Coca-Vila 2023, p. 18), but this will probably never be the case in an area such as climate policy, where there are no specific constitutional mandates and the assessment of constitutionality will always depend on a complex balancing of many and varied rights and interests.

[14] For discussion, see Dreier (2015), arguing that certain acts of criminally relevant civil disobedience are justified by the constitutional rights of freedom of expression and assembly.

Punishing the Last Citizens?

The fact that climate protesters commit unjustified legal wrongs does not determine how the criminal law system should respond to such wrongs. The scholarly debate regarding how to respond to civil disobedience takes place on three stages: first, there are those who argue that the police should, wherever possible, adapt their intervention towards civil disobedience (Smith 2013, pp. 110–123, 2012). Second, in the Anglo-American debate, public officials are often expected to exercise their discretion by electing not to prosecute most cases of civil disobedience (Dworkin 2013, pp. 262–268). Third, there are those who address the problem within the substantive penal system, i.e., excusing such offences and/or taking actors' political motives into account at sentencing. Although it is worth thinking carefully about how to police and when to prosecute civil disobedience, I will concentrate here on the third approach, which is the most common in criminal justice systems governed by the compulsory prosecution (legality) principle.[15]

There are four responses of the substantive criminal law to criminal political protests. First, civil disobedients could be punished more harshly than other offenders. One could make the case that those politically motivated acts—in addition to harming the specific interest protected by the law that has been violated—threaten the stability of the legal system as a whole. This may also explain why some prosecutors seek to punish members of climate movements for a second offence, namely participation in a criminal organisation.[16] Second, one could argue that there is no reason to treat civil disobedients differently from other offenders.[17] Both kinds of offenders would be guilty of the same wrong. Proportionality and uniformity in the application of law would speak against treating civil disobedients differently. Others argue that legitimising civil disobedience renders it ineffective. According to some legal philosophers, true disobedients, especially when it comes to indirect civil disobedience, should not want the protection of any legal defence, since that would be hypocritical and counter-productive to the ultimate goal of the act of civil disobedience.[18] Third, there are those who argue in favour of excusing politically motivated crimes, either

[15] For discussion on prosecutorial discretion from a comparative perspective between the Anglo-American and Continental systems, see e.g. Fyfe and Heinze (2022, pp. 177–202). I leave aside the question of whether we should have a different kind of procedure and trial in cases of civil disobedience, allowing the accused to adequately explain the political reasons for their offences. In this vein, see e.g., Duff (2018, pp. 132–133).

[16] On the argument for harsher punishment (based on a retributive conception of punishment), see Cohen (1971, pp. 80–84). In the German context, on the prosecution of climate movements as criminal organisations, see e.g., Gärditz (2023).

[17] For discussion, see e.g. Greenawalt (1987, p. 273). For criticism of this approach, which he calls 'authoritarianism legalism', see Habermas (2015, p. 43). For a seminal philosophical case on the difference between ordinary criminality and civil disobedience, see Arendt (1972, pp. 74–81).

[18] See e.g., Edmundson (1998, pp. 57–58), who argues that a state that fails to punish protesters fails to recognise their political messages. For discussion of non-evasion as a conceptual feature of civil disobedience, see e.g., Delmas and Brownlee (2023), Delmas (2019, pp. 177–183), and Moraro (2018, pp. 506–509).

because there is no need for prevention or because of the protestor's conscience.[19] Fourth, some criminal law scholars argue for leniency for such offences.[20]

In what follows, I will leave aside the option of punishing the protester more severely, since it is not supported either by philosophical or contemporary criminal law literature (Delmas 2019, p. 183). I will therefore concentrate on showing why there is no reason to excuse climate criminal protest in general, but there are good reasons to accept the difference between ordinary criminal wrongdoing and criminal protest, and to punish the latter *ceteris paribus* less severely. Although climate protesters act unlawfully, the message conveyed by those who risk punishment in order to achieve a change in highly questionable climate policies suggests treating the civil disobedient differently. As Christopher Bennett and Kimberley Brownlee claim, '[c]onstrained lawbreaking that is conscientiously motivated, that is, motivated by a sincere, communicative intention, should be treated differently from lawbreaking motivated by, for instance, personal gain or other desires that conflict with the values underpinning liberal democratic citizenship' (Bennett and Brownlee 2021, p. 297).

Excusing Criminal Climate Protest

In favour of excusing politically motivated crimes, leaving aside some attempts to base the excuse on psychological grounds (e.g., compulsion), legal scholarship typically follows two strategies. Both have in common that they propose to exempt from punishment protesters who culpably commit unlawful criminal acts, albeit for different reasons. On the one hand, there are those, such as Brownlee (2012, pp. 167–172), who advocate for a conscientious defence. A liberal democracy could require its citizens to obey the law in general but—given the important role of individual freedom, and, in particular, freedom of thought and conscience—it could elect not to punish them when they engage in civil disobedience. On the other hand, it is common among Continental criminal law scholars to argue in favour of an excuse based on the lack of (prevention) needs. Influential German criminal law scholar Roxin (1993) makes the exculpation of civil disobedience conditional on a weighing of individual and collective interests, provided that the following six conditions are met: (1) the offence must involve existential issues affecting the population as a whole; (2) the offender must act out of concern for the common good; (3) the law infringement must have an obvious connection with the person or institution to whom the protest is addressed; (4) the offender must be clearly committed to parliamentary democracy; (5) the law infringement must be non-violent (excluding active resistance); and (6) the damages resulting from the protest must be minor and limited in duration.

The possibility of relying on a conscientious objection excuse in cases of civil disobedience is unconvincing because, as some have shown (Celikates 2016; Horder 2004, p. 224), it overlooks an important distinction between conscientious objectors

[19] See Roxin (1993).

[20] See e.g., Rönnau (2023).

and civil disobedients. Conscientious objectors choose to privately violate particular laws when obeying them means fundamentally violating their deepest (e.g., religious) convictions. Consequently, conscientious objection applies only to a limited range of acts of personal disobedience, such as refusing a blood transfusion or joining the armed forces, where the demands of the law clash with personal convictions that give us unassailable reasons to break the law. Conscientious objectors do not question the legitimacy of the law, but simply find that obeying it is incompatible with their personal beliefs. In a liberal state, it is reasonable in some cases not to punish such offenders. But civil disobedients are different: their acts are political and strategic, and they challenge the legitimacy of democratically enacted laws. Protesters who engage in indirect civil disobedience claim that it is legitimate to violate a democratic norm in order to assert their political views. To ascribe the motivation of climate activists who commit minor crimes to a problem of conscience denaturalises the meaning of excuse by conviction and does not do justice to the essential difference between these two forms of law-breaking (Arendt 1972, pp. 60–62).

From my point of view, resorting to an excuse based on prevention needs is also not the right solution when dealing with climate protest crimes. On the one hand, the alleged lack of need for prevention is a highly debatable hypothesis. If what is meant is that the minor seriousness of the offence obviates the need for punishment, this is true in general for minor criminal offences, not just for civil disobedience offences. If the political motivation is the crucial factor that removes the need for punishment, this is a questionable empirical claim. In the absence of empirical evidence, the exact opposite is plausible (Rönnau 2023, pp. 114–115): the political motivation of climate offenders in fact increases the need for special and general prevention so that criminal forms of climate protest do not become widespread. On the other hand, this excusing approach is based on a purely preventive understanding of the meaning of criminal responsibility and punishment, which is unpersuasive. In cases where climate protest is indeed considered unlawful and offenders are deemed culpable, declaring climate activists to not be responsible means not taking their criminal actions seriously; it also means not taking seriously the interests of direct victims, or of the community in censuring criminal wrongs (contrast Brownlee 2012, Chap. 8). The proper response to civil disobedience is less a question of prevention than of the punishment that this—politically motivated—breach of the law deserves (Fernández Perales 2022, p. 791).

To recap, criminal climate protests should generally be regarded as unlawful and non-excusable acts.[21] Although police and prosecutors in some jurisdictions—especially in Anglo-American ones—can use their discretion to avoid punishment in some cases, climate criminal protests should generally be punished. The question then becomes how to punish these politically motivated offences.

[21] In this vein, see also Radtke (2010). Regarding acts of indirect civil disobedience, in the same vein, see Cohen (1971), pp. 90–91: punishment is an essential part of the act of protest itself. A worth-reading summary of the philosophical arguments against punishing civil disobedients can be found in Delmas (2019). She acknowledges, however, that 'a fully accommodating stance would require significant legal reforms'.

Mitigating the Punishment of Climate Protesters

The criminal law system must take account of the particularities of politically motivated crimes at sentencing. This applies both to acts of direct civil disobedience and indirect civil disobedience. David Lefkowitz, making the distinction between the censure and the hard treatment dimensions of the punishment, claims that the moral right to civil disobedience only precludes the state from punishing, but not from penalising, those who engage in such conduct (Lefkowitz 2017, pp. 279–280, 2007, pp. 218–222; Smith 2013, pp. 123–127). In other words, it would not be legitimate to censure such offenders, but it would be possible to inflict some kind of hard treatment (fines, temporary incarceration, etc.) in order to mitigate the risk of over-consumption of civil disobedience. Contra Lefkowitz, I claim that we should take the opposite approach: it is vital that we declare the criminal responsibility of climate activists and censure their wrongs. However, when determining the severity of the punishment, judges should take into account the particularities of climate activists' crimes and mitigate accordingly punishment's hard treatment dimension (Dworkin 2013, pp. 267–268; Schüler-Springorum 2015, pp. 92–93). Since the question of the quantum of punishment calls for resolution on a case-by-case basis, taking into account specific legal statutes, I will simply outline here the foundations for mitigating the punishment for climate activists.

Statutes in most jurisdictions confer great discretion on judges to decide how severe sentences will be. I argue that climate activists who act according to the classic canons of civil disobedience—in particular, non-violently and publicly—generally deserve less harsh punishment than do ordinary offenders. First, the acceptance of responsibility for the crime as a conceptual premise of civil disobedience in the classical liberal approach (Cohen 1971, Chap. I), is according to most of the criminal law statutes, a reason to punish less harshly. Second, the chilling effect doctrine, linked to the principle of proportionality, also speaks in favour of mitigating punishment for offences that are linked to the exercise of a fundamental political right (demonstration and freedom of expression). However, the chilling effect doctrine does not serve as a basis for mitigation when the protest has nothing to do with such fundamental political rights.[22] Thirdly—and this is probably the most controversial issue—at least in cases where the protest does not involve the direct instrumentalisation of a person and is linked (even minimally) to the exercise of classic political rights (demonstration and freedom of expression)—[23]the wrongness of the climate

[22] See e.g., Cuerda Arnau (2022), pp. 105–107. This applies even if the form of protest is not covered by the fundamental right, as it is an excess in the exercise of that right. If the protest is covered by such a right, it is not unlawful and there is no act to punish. I thank an anonymous reviewer of *Res Publica* for urging me to clarify this point.

[23] Political motivation should not mitigate the punishment for protests that have a direct intended impact on the most fundamental rights of other citizens, in particular their physical integrity and freedom of movement. And the same applies when the act of protest has nothing to do with exercising (even in an abusive way) a political right. For example, kidnapping a politician to protest against the authorities' inaction on climate change does not merit more leniency. I am grateful to Tatjana Hörnle for pressing me to clarify this point.

protesters is also less, even if they were fully culpable in breaking the law. Although the wrongdoing is not objectively less serious, the message conveyed regarding the validity of the law violated and of the legal system as a whole is substantially different.[24] Political offenders deliberately violate legal norms, such as the offence of property damage, without ultimately challenging the institution underlying such norm (private property), but instead as a means of effecting a change in public policy that can be considered reasonable. This is explained by the fact that protesters act in a kind of conflict of civic duties that conditions the meaning of their offences (Moraro 2014, p. 73; Rönnau 2023, pp. 114–115): their duty to respect democratically enacted law clashes with their duty to effectively communicate that established climate policies are highly counter-productive. Just as bad motives are considered an aggravating factor in sentencing in most criminal codes, so too could the good motives of climate protesters be considered a mitigating factor when they give the commission of the wrongdoing a very different meaning from that of a crime committed for classical motives (contrast Hörnle 2019). And this conclusion holds regardless of whether one concedes that the protester may be acting with a certain civic arrogance in breaking the law in order to highlight what he or she perceives as bad climate policy.

Given that offences committed by climate activists are in general minor crimes, the mitigation advocated here should generally lead to non-custodial sanctions (e.g., fines and community service).[25] If the legal system requires judges to impose custodial sentences, the same mitigation factor speaks in favour of suspending custodial sentences. Therefore, in its consequences, the approach adopted here differs only slightly from that of the advocates of the excuse. The difference, however, lies in the fact that the mitigation solution makes it possible to declare the criminal responsibility of offenders by publicly censuring their acts through criminal sentences. I argue that this is the solution that best does justice to criminal climate protests: it takes offenders seriously as civil disobedients, recognises their particular motivations and the political significance of their acts, without infantilising them by declaring them to be not criminally responsible. This also reinforces the validity of the laws broken and the need to use legal channels to change existing law.

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[24] See also Duff (2018, p. 133): the dissenters 'should be censured now not as wrongdoers who committed an unarguably substantive public wrong, but rather as citizens who have shown a lack of proper respect for the democratic process by committing what they know that their fellow citizen have deemed to be a public wrong'.

[25] In similar vein, see Brownlee (2012, Chap. 8), who argues that in the exceptional cases where there could be moral grounds for overriding the right to civil disobedience, judges should opt for non-punitive restorative responses.

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