

COMMENTS

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Break the Law to Make the Law: The Necessity Defense in Environmental Civil Disobedience Cases and Its Human Rights Implications

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INTRODUCTION

In April 2016, protesters gathered on the Standing Rock reservation in North Dakota in solidarity with the Standing Rock Sioux Tribe, who opposed construction of the 1,200-mile Dakota Access Pipeline near their land.¹ The Standing Rock Sioux argue that the pipeline, a \$3.8 billion project, would threaten their public health and welfare, water supply, and cultural resources, including sacred places and burial grounds.² At one point, over 1,000 protesters resided at “Sacred Stone Camp,” which was set up alongside the proposed construction site. The camp has been the scene of multiple face-offs between protesters, the oil company, and law enforcement.³ On his fifth day in office, President Trump reversed former President Obama’s order revoking the company’s permit to build the pipeline.⁴ In June 2017, however, a D.C. district court found that the U.S. Army Corps of Engineers failed to adequately assess the environmental impacts of the pipeline and ordered it to prepare a new impact statement.⁵ In October, a federal judge ruled that the pipeline could continue operating in the interim.⁶

In support of the call for International Days of Prayer and Action for Standing Rock, five activists shut down five different tar sands oil pipelines in Minnesota, Montana, North Dakota, and Washington.⁷ The activists studied how to shut down the pipelines safely for months and, in one coordinated act, disrupted the flow of millions of barrels of crude oil.⁸ One of the activists was fifty-year-old Emily Johnston, who stated, “[f]or years we’ve tried the legal, incremental,

¹ Aaron Sidder, *Understanding the Controversy Behind the Dakota Access Pipeline*, SMITHSONIAN MAG. (Sept. 14, 2016), <http://www.smithsonianmag.com/smart-news/understanding-controversy-behind-dakota-access-pipeline-180960450/>.

² *Id.*

³ *Id.*

⁴ Robinson Meyer, *The Standing Rock Sioux Claim “Victory and Vindication” in Court*, ATLANTIC (June 14, 2017), <https://www.theatlantic.com/science/archive/2017/06/dakota-access-standing-rock-sioux-victory-court/530427/>.

⁵ *Id.*

⁶ *Dakota Access Pipeline to Remain Operational During Environmental Impact Study*, ECOWATCH (Oct. 17, 2017), <https://www.ecowatch.com/dakota-access-pipeline-operating-2495904218.html>.

⁷ *Breaking: Activists Reportedly Shut Down Five Pipelines Carrying Tar Sands Oil into U.S.*, DEMOCRACY NOW! (Oct. 11, 2016), https://www.democracynow.org/2016/10/11/breaking_activists_reportedly_shut_down_five.

⁸ Nia Williams, *Activists Disrupt Key Canada-U.S. Oil Pipelines*, REUTERS (Oct. 12, 2016), <http://www.reuters.com/article/us-usa-canada-pipelines-idUSKCN12B26O>.

reasonable methods, and they haven't been enough; without a radical shift in our relationship to Earth, all that we love will disappear."⁹

In order to even present such a justification to a jury, a defendant like Johnston is usually required to prove to a judge that she took action to deter an imminent harm, that her action and the harm were causally related, and that she had no legal alternatives. These are the requirements of the necessity defense. In deciding whether to permit the necessity defense in a particular case, courts balance the harm of the law that the defendant broke against the harm that the defendant sought to overcome. This Article analyzes how the necessity defense functions in a civil disobedience context and how courts should construe its elements more broadly where climate change activism is concerned.

First, this Article will discuss the Ninth Circuit's approach to the necessity defense, its broader history and origins, and its application in civil disobedience cases. Second, this article will discuss the Tenth Circuit's approach, particularly in *United States v. DeChristopher*, and why the court in that case should have allowed the defendant to present a necessity defense. Finally, this Article will discuss the importance of civil disobedience and potential human rights implications of the necessity defense where climate change activists are concerned. This final section explores how a court's refusal to allow an environmental activist to present a necessity defense may implicate human rights in two ways. First, barring the necessity defense may implicate global human rights to a safe and clean environment by deterring civil disobedience and preventing the change that it has the potential to effect. Second, it may implicate the constitutional right to due process and, in some cases, the right to be free from cruel and unusual punishment.

I

THE NECESSITY DEFENSE IN THE NINTH CIRCUIT

In order to provide a more thorough analysis of the Ninth Circuit's approach to the necessity defense, this section discusses the underlying basis for the necessity defense doctrine and its history in

⁹ Dan Zukowski, *5 Climate Activists Shut Down 5 Tar Sands Pipelines*, ECOWATCH (Oct. 11, 2016), <http://www.ecowatch.com/climate-activists-shut-down-tar-sands-pipelines-2039873407.html>.

English common law. This section then discusses how courts throughout the United States apply the necessity defense in civil disobedience cases. Finally, this section introduces a Washington case where climate change activists presented a necessity defense for the first time in American history.

A. History and Origins

The necessity defense is a common law doctrine whereby defendants may argue that they had no choice but to violate the law. The necessity defense “traditionally covered the situation where physical forces beyond the actor’s control rendered illegal conduct the lesser of two evils.”¹⁰ The Supreme Court considers it an open question whether federal courts may authorize a necessity defense in the absence of a statute.¹¹ The Court stated, however, that the defense cannot prevail where the legislature has made a determination of values, for example, that marijuana lacks medical benefits justifying an exception to the Controlled Substances Act.¹²

The traditional common law approach requires the defendant to show that “(1) there is no legal alternative to violating the law, (2) the harm to be prevented is imminent, and (3) a direct, causal relationship is reasonably anticipated to exist between defendant’s action and the avoidance of harm.”¹³ The Ninth Circuit also requires defendants to show they were faced with a choice of evils and chose the lesser evil.¹⁴ This is the underlying basis for the necessity defense doctrine, which dates back to English common law.

As early as 1884, an English court considered whether taking another’s life in order to preserve one’s own was self-defense.¹⁵ In *Regina v. Dudley*, the defendants killed a cabin boy and ate him after being shipwrecked for twenty days.¹⁶ The court declined to measure the “comparative value of lives” and stated that men in this context have a moral duty to engage in sacrifice instead of self-preservation.¹⁷

¹⁰ United States v. Bailey, 444 U.S. 394, 410 (1980).

¹¹ United States v. Oakland Cannabis Buyers’ Coop., 532 U.S. 483, 490 (2001).

¹² *Id.* at 491.

¹³ United States v. Meraz-Valeta, 26 F.3d 992, 995 (10th Cir. 1994), *rev’d on other grounds* by United States v. Aguirre-Tello, 353 F.3d 1199, 1207–08 (10th Cir. 2004).

¹⁴ United States v. Schoon, 971 F.2d 193, 195 (9th Cir. 1991).

¹⁵ *Regina v. Dudley* [1884] 14 QBD 273 at 276 (Eng.).

¹⁶ *Id.* at 273.

¹⁷ *Id.* at 287.

It therefore held that the defendants' temptation to act was willful murder, not necessity, and lacked legal justification.¹⁸

B. The Necessity Defense in Civil Disobedience Cases

The Ninth Circuit defines "civil disobedience" as "the wilful [sic] violation of a law, undertaken for the purpose of social or political protest."¹⁹ Activists have successfully employed the necessity defense in cases involving a wide range of acts of civil disobedience. These actions include blocking an entrance to a naval training center in protest against its operations in Central America and its proliferation of nuclear weapons;²⁰ demonstrating during rush hour at the entrance of a roadway to a bridge in opposition to opening a bicycle and pedestrian lane to vehicular traffic;²¹ and refusing to leave a senator's office "until he agreed to hold a public discussion about the government's involvement with the war in Nicaragua."²²

However, courts often set a high bar for defendants to reach in deciding whether to allow defendants to even present a necessity defense to a jury. The Ninth Circuit, for example, does not allow the necessity defense in cases where the defendant engaged in indirect civil disobedience.²³ In *Schoon*, the Ninth Circuit defined indirect civil disobedience as "violating a law or interfering with a government policy that is not, itself, the object of protest."²⁴ In contrast, direct civil disobedience "involves protesting the existence of a law by breaking that law or by preventing the execution of that law in a specific instance in which a particularized harm would otherwise follow."²⁵ The *Schoon* court cited lunch counter sit-ins

¹⁸ *Id.* at 288.

¹⁹ *Schoon*, 971 F.2d at 195–96 (citing WEBSTER'S THIRD NEW INT'L DICTIONARY 413 (Philip Babcock Gove ed., 1976)).

²⁰ Brent D. Wride, *Political Protest and the Illinois Defense of Necessity*, 54 U. CHI. L. REV. 1070, 1070–71 n.4 (1987) (citing *People v. Jarka*, No. 002170 (Lake Cty., Ill., Apr. 1985)).

²¹ *People v. Gray*, 571 N.Y.S.2d 851, 853 (N.Y. Crim. Ct. 1991).

²² VERMONT MODEL CRIMINAL JURY INSTRUCTIONS CR07-301 reporter's note on necessity (VT. B. ASS'N 2012) (citing *State v. Keller*, No. 1372-4-84 (Vt. Dist. Ct. Nov. 17, 1984), http://vtjuryinstructions.org/?page_id=636).

²³ *Schoon*, 971 F.2d at 196.

²⁴ *Id.*

²⁵ *Id.*

during the civil rights era as an example of direct civil disobedience.²⁶ This strict interpretation of the requirement that there be a direct causal relationship between the defendants' actions and the harm they sought to avert makes it difficult for activists to convince courts to allow them to present a necessity defense.

For the first time in history, however, a Washington judge allowed climate activists to use the necessity defense in *Washington v. Brockway*, but only upon reconsideration.²⁷ On September 2, 2014, defendants Abby Brockway, Patrick Mazza, Jackie Minchew, Michael Lapointe, and Liz Spoerri arranged themselves on top of and chained to the legs of a twenty-foot tripod for eight hours on a BNSF rail yard.²⁸ The activists sought to draw attention to climate change and the inherent risks that coal and oil trains bring as they travel through the state.²⁹ Judge Howard initially barred the "Delta 5," as they are now known, from using the necessity defense because "such generalized harm—even though it is extreme, cannot be legally cognizable because it is impossible to quantify the societal benefits of defendants' illegal acts as they relate to the harm averted."³⁰

After the defense filed a motion to reconsider, however, Judge Howard reversed his decision to allow the defendants to present a necessity defense.³¹ This enabled the Delta 5's attorneys to present evidence and call expert witnesses to explain "the imminent and severe threat of climate change, the health and safety risks of oil trains, the Northwest's potential to become a major transportation corridor, and the activists' past efforts to seek change through legal means."³² In the end, Judge Howard ruled that the Delta 5 hadn't

²⁶ *Id.*

²⁷ Cally Carswell, *In Washington, Activists and the 'Necessity Defense' on Trial*, HIGH COUNTRY NEWS (Feb. 2, 2016), <http://www.hcn.org/issues/48.2/in-washington-the-necessity-defense-on-trial-alongside-activists>.

²⁸ Hal Bernton, *5 Activists Convicted of Trespass on Everett Tracks in Protest Over Oil, Coal Trains*, SEATTLE TIMES (Jan. 15, 2016), <http://www.seattletimes.com/seattle-news/environment/5-activists-convicted-of-trespass-on-everett-tracks-in-protest-over-oil-coal-trains/>.

²⁹ *Id.*

³⁰ Justin Mikulka, *Delta 5 Trial Set to Make History with "Necessity Defense" for Climate Action*, DESMOG BLOG (Jan. 10, 2016), <http://www.desmogblog.com/2016/01/10/delta-5-trial-set-make-history-necessity-defense-climate-action>.

³¹ *Id.*

³² Carswell, *supra* note 27.

proved that they lacked reasonable legal avenues and instructed the jury not to acquit on necessity.³³

The jury found the Delta 5 guilty of trespass but not guilty of obstructing a train and recommended a sentence of two years' probation.³⁴ One defendant also received a \$53 fine while the other four each received a \$553 fine.³⁵ After the verdict, three jurors approached the defendants and said that they wanted to acquit on both counts.³⁶ One juror even thanked them for teaching him about how companies push dirty energy through Washington.³⁷ Although the necessity defense was not entirely successful in that case, none of the defendants were incarcerated, the fines were minimal, and the Delta 5 gained substantial media attention, allowing them to raise awareness about climate change and the threat oil trains pose to their community.

II

THE NECESSITY DEFENSE IN THE TENTH CIRCUIT

Like the Ninth Circuit, the Tenth Circuit recognizes the necessity defense.³⁸ It observes the traditional common-law requirements of imminence, a direct causal relationship between the defendant's action and the avoidance of harm, and a lack of legal alternatives to violating the law.³⁹ Unlike Judge Howard in *Washington v. Brockway*,⁴⁰ the federal district court in *United States v. DeChristopher* barred the defendant from presenting a necessity defense.⁴¹ DeChristopher appealed his ensuing conviction, but the Tenth Circuit affirmed due to DeChristopher's supposed inability to prove that he lacked viable legal alternatives.⁴² This section discusses

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *United States v. Patton*, 451 F.3d 615, 637 (10th Cir. 2006).

³⁹ *United States v. Baker*, 508 F.3d 1321, 1325–26 (10th Cir. 2007) (citing *United States v. Al-Rekabi*, 454 F.3d 1113, 1121 (10th Cir. 2006)).

⁴⁰ Carswell, *supra* note 27.

⁴¹ *United States v. DeChristopher (DeChristopher I)*, 695 F.3d 1082, 1088 (10th Cir. 2012) (citing *United States v. DeChristopher (DeChristopher II)*, No. 3837208, 2009 WL 3837208 at *5 (D. Utah Nov. 16, 2009)).

⁴² *DeChristopher I*, 695 F.3d at 1097.

DeChristopher's case, his appeal, and the Tenth Circuit's reasoning in affirming his conviction.

A. *United States v. DeChristopher*

The Bureau of Land Management (BLM) manages more than two hundred and forty-five million acres of public land in twelve states and administers seven hundred million acres of sub-surface estate in the United States.⁴³ The BLM's stated mission is "to sustain the health, diversity, and productivity of America's public lands for the use and enjoyment of present and future generations."⁴⁴

In December 2008, the BLM office in Salt Lake City, Utah, auctioned leases on 131 parcels of Utah land for drilling.⁴⁵ Individuals and environmental groups filed administrative challenges over all 131 parcels of land and sought a temporary restraining order in federal court to prevent leases on seventy-seven of them.⁴⁶ The groups claimed that the damage would affect air quality at Arches National Park, Canyonlands National Park, and Dinosaur National Monument.⁴⁷ They also claimed that the sale would threaten Desolation Canyon, one of the largest roadless areas in the continental United States, and Nine Mile Canyon, which the BLM describes as "the longest outdoor art gallery in the world because of its substantial concentration of prehistoric archeological sites and rock art."⁴⁸

When the auction went forward despite these challenges, demonstrators protested outside the BLM office.⁴⁹ One would-be protestor was Tim DeChristopher, who was a student at the University of Utah at the time.⁵⁰ Upon arrival, DeChristopher entered the BLM office and, when an employee asked him whether he was a bidder, observer, or member of the media, he said he was a bidder.⁵¹

⁴³ Press Release, U.S. Dep't of the Interior, BLM Releases Report on Utah Oil and Gas Leases (Oct. 8, 2009) (on file with U.S. Dep't of the Interior website), <https://www.doi.gov/news/pressreleases/BLM-Report-on-Utah-Oil-and-Gas-Leases>.

⁴⁴ *Our Mission*, BUREAU OF LAND MGMT., <https://www.blm.gov/about/our-mission> (last visited Nov. 20, 2016).

⁴⁵ *DeChristopher I*, 695 F.3d at 1087.

⁴⁶ *Id.*; see also *S. Utah Wilderness All. v. Allred*, No. 08-2187-RMU, 2009 WL 765882 (D.D.C. Jan. 17, 2009).

⁴⁷ *Utah Oil and Gas Lease Auction Protested, Legal Deal Struck*, ENV'T NEWS SERV. (Dec. 19, 2008), <http://www.ens-newswire.com/ens/dec2008/2008-12-19-093.html>.

⁴⁸ *Id.*

⁴⁹ *DeChristopher I*, 695 F.3d at 1087.

⁵⁰ *Id.*

⁵¹ *Id.*

DeChristopher signed a bidder registration form,⁵² entered the auction room, and won bids on fourteen parcels totaling \$1,797,852.25.⁵³ DeChristopher could not make the requisite \$81,238 down payment immediately but attempted to raise the money by contacting a fundraiser later that day.⁵⁴ DeChristopher asserted on appeal that when he tried to make the payment, the BLM refused to accept it because it had cancelled the auction.⁵⁵ The Tenth Circuit later stated that this factual dispute was irrelevant.⁵⁶

The district court granted the government's pre-trial motion in limine to bar DeChristopher from presenting a necessity defense.⁵⁷ Therefore, DeChristopher was not permitted to present documentation of the BLM's alleged violations of multiple environmental laws and regulations or evidence of global warming and other environmental issues.⁵⁸ At trial, Special Agent Love testified that DeChristopher told him that he posed as a bidder because he wanted "to create a disruption or a disturbance" and believed it was the only way into the sale.⁵⁹ Love testified that DeChristopher said that upon seeing law enforcement in the room, "he realized that making a disruption or speech would not have the kind of impact he was looking for."⁶⁰ DeChristopher purportedly told Love that he realized after winning the second bid that he could not afford the leases but kept bidding because he wanted to "make a stand."⁶¹ DeChristopher's own admissions at trial supported Love's testimony.⁶²

In July 2011, a jury entered a judgment finding Tim DeChristopher guilty of violating the Federal Onshore Oil & Gas Leasing Reform Act, 10 U.S.C. § 195(a)(1), and making a false statement in violation

⁵² *Id.*

⁵³ *Id.* at 1088.

⁵⁴ *Id.*

⁵⁵ *Id.* at 1088 n.2.

⁵⁶ *Id.*; see also *DeChristopher I*, 695 F.3d at 1096.

⁵⁷ *DeChristopher I*, 695 F.3d at 1088 (citing *DeChristopher II*, No. 3837208, 2009 WL 3837208 at *5 (D. Utah Nov. 16, 2009)).

⁵⁸ *Id.* (citing *DeChristopher II*, No. 3837208, 2009 WL 3837208 at *5).

⁵⁹ *Id.* at 1089.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² See *id.* at 1090.

of 18 U.S.C. § 1001.⁶³ The court sentenced DeChristopher to twenty-four months in prison,⁶⁴ followed by a thirty-six-month term of supervised release,⁶⁵ and ordered him to pay a \$10,000 fine.⁶⁶ On appeal, DeChristopher asserted, among other things, that the district court violated his constitutional rights by limiting his presentation of evidence regarding what he alleged was an illegal auction.⁶⁷ DeChristopher sought to present evidence in defense of Count 1 regarding the BLM's failure to provide adequate notice for the leases, inadequate study of the environmental and archeological impact of the leases, failure to comply with the National Environmental Policy Act (NEPA), the National Historic Preservation Act, the Federal Land Policy and Management Act, and disregard for National Park Service and Environmental Protection Agency concerns.⁶⁸

DeChristopher also argued that the Sixth Amendment's Confrontation Clause gave him the right to cross-examine the BLM's Utah Deputy State Director, Kent Hoffman, regarding the BLM's compliance with federal laws.⁶⁹ The Tenth Circuit agreed with the district court that the evidence was irrelevant because it had "nothing to do with whether Defendant organized a scheme, arrangement, or plan to circumvent or defeat the provision of the Onshore Leasing Reform Act relating to oil and gas auctions."⁷⁰ The court equated the argument to an *in pari delicto*, or unclean hands defense, which it said the statute does not allow.⁷¹

DeChristopher also asserted that the district court abused its discretion by preventing him from presenting a necessity defense.⁷² The Tenth Circuit only reached the first prong of the necessity defense doctrine, which requires that there was no legal alternative to violating the law.⁷³ The court reasoned that DeChristopher could have prevented the harm stemming from the sale and delivery of the leases

⁶³ United States v. DeChristopher, No. 2:09-cr-000183-001, 2011 WL 3269197 at *1 (D. Utah July 28, 2011).

⁶⁴ *Id.* at 2.

⁶⁵ *Id.* at 3.

⁶⁶ *Id.* at 5.

⁶⁷ *DeChristopher I*, 695 F.3d at 1095.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.* at 1096.

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

by filing or joining a lawsuit to enjoin their issuance.⁷⁴ The court noted that one such lawsuit prevented the BLM from issuing the leases by granting a temporary restraining order.⁷⁵ The court concluded that DeChristopher had other legal and more effective means of preventing issuance of the leases and was therefore not entitled to present a necessity defense to the jury.⁷⁶

B. DeChristopher's Legal Alternatives, or Lack Thereof

As previously stated, the Tenth Circuit only reached the legal alternatives prong of the necessity doctrine in *United States v. DeChristopher*.⁷⁷ According to the Tenth Circuit, “[t]he purpose of requiring the defendant to show that he had no legal alternative to violating the law ‘is to force an actor to evaluate the various options presented and choose the best one’ because ‘[i]n most cases, there will be a clear legal alternative.’”⁷⁸ The Tenth Circuit stated that DeChristopher could have filed or joined a lawsuit and pointed out that one such lawsuit resulted in a temporary restraining order.⁷⁹ That lawsuit was filed by the Southern Utah Wilderness Alliance, Natural Resources Defense Council, The Wilderness Society, National Parks Conservation Association, Grand Canyon Trust, Sierra Club, and the National Trust for Historic Preservation⁸⁰ on December 17, 2008, two days before the auction.⁸¹ The lawsuit challenged the issuance of eighty parcels of land.⁸²

The complaint explained that the plaintiff organizations had already filed numerous lease sale protests with the BLM’s Utah State

⁷⁴ *Id.*

⁷⁵ *Id.* at 1096–97 (citing *S. Utah Wilderness All. v. Allred*, No. 08-2187-RMU, 2009 WL 765882 (D.D.C. Jan. 17, 2009)).

⁷⁶ *Id.* at 1097.

⁷⁷ *Id.* at 1096.

⁷⁸ *United States v. Baker*, 508 F.3d 1321, 1325–26 (10th Cir. 2007) (citing *United States v. Al-Rekabi*, 454 F.3d 1113, 1123 (10th Cir. 2006)).

⁷⁹ *DeChristopher I*, 695 F.3d at 1096.

⁸⁰ Complaint at ¶¶ 9–15, *S. Utah Wilderness All. v. Allred*, No. 08-2187-RMU, 2009 WL 765882 (Dec. 17, 2008), https://www.nrdc.org/sites/default/files/lan_08121701a.pdf.

⁸¹ See Bibi Van der Zee, *Tim DeChristopher on Trial for Sabotaging Oil and Gas Land Auction*, THE GUARDIAN (Feb. 28, 2011), <https://www.theguardian.com/environment/2011/feb/28/tim-dechristopher-trial-oil-gas>.

⁸² Complaint, *supra* note 80, ¶ 98.

Director,⁸³ but the defendant and BLM Deputy State Director Kent Hoffman issued a final Decision to Lease 131 parcels on December 12, 2008 regardless.⁸⁴ The plaintiffs alleged:

BLM rushed to complete the challenged lease sale before a new administration—one that publicly criticized the lease sale—takes office in January 2009. In its haste, the agency failed to complete the analysis required by federal law for the protection of natural and cultural resources. BLM ignored requests by the U.S. Environmental Protection Agency (EPA), National Park Service, the Hopi Tribe, and numerous environmental and historic preservation organizations to analyze, among other issues, air pollution at national parks, destruction of cultural resources, and climate change.⁸⁵

In a December 18, 2008, filing, the BLM agreed that if any of the eighty parcels were bid on at the December 19 auction, it would not execute the leases until each pending administrative protest was addressed.⁸⁶ This eleventh-hour stipulation demonstrates that the outcome of the proceeding was still very uncertain at the time of the auction, which took place just one week after the BLM issued its Decision to Lease and only two days after the plaintiffs filed their complaint.

To compound this uncertainty, it is important to note that the judiciary often gives great deference to agency decisions. This makes it difficult to obtain remedies for many environmental issues in court. As University of Oregon School of Law Professor Mary Wood explains,

To make matters worse, the judiciary has largely relinquished its role as an institutional check on environmental agencies, regularly invoking the administrative deference doctrine to give weight to agency decisions. The deference principle assumes that expert agencies act as unbiased decision makers, ever faithful to statutory goals. This approach insulates agency decisions from rigorous judicial examination of inappropriate political motivations that regularly influence the agencies. Through the deference doctrine, courts unwittingly create a judicial prop for an administrative

⁸³ *Id.* ¶¶ 93–96.

⁸⁴ *Id.* ¶ 97.

⁸⁵ *Id.* ¶ 2.

⁸⁶ Parties' Stipulation and Motion at 1, *S. Utah Wilderness All. v. Allred*, No. 08-2187-RMU, 2009 WL 765882, at *1 (D.D.C. Dec. 18, 2008), https://www.nrdc.org/sites/default/files/lan_08_121901a.pdf.

façade that conceals political influence and, at times, outright corruption.⁸⁷

At the helm of these administrative offices is the executive branch, which Wood likens to an administrative tyranny that rules over the public's natural resources with few checks or balances from Congress or the courts, and minimal restraint from its citizens.⁸⁸ This concentration of power means that there are extensive administrative decisions and executive control where crucial environmental policies are concerned. In turn, this often leaves environmental advocates like DeChristopher with little choice but to engage in other means of securing just outcomes.

Proponents of the administrative state will argue that mechanisms such as the Administrative Procedure Act's requirement that federal agencies publicize their proposed rules, and NEPA's allowance for public comment on federal actions are legal avenues for public participation.⁸⁹ However, the window of time for comment opens far before any imminent environmental harm, and it requires an enormous amount of time and public resources to make use of those public processes or lobby the legislature.⁹⁰ Given this harsh reality, it is hard to imagine what kind of action, aside from joining in already pending yet uncertain litigation, DeChristopher could have taken in the seven days between the BLM's Decision to Lease and the auction itself.

Considering the narrow time frame, the political backdrop, and the degree of uncertainty at the time of the auction, it was not only rational but justifiable for DeChristopher to engage in civil disobedience while other "legal alternatives" had already been—or were in the process of being—exhausted. The fact that the lawsuit was successful should only serve to prove, not disprove, that DeChristopher's actions were justifiable at the time. However, the jury never had the chance to hear evidence of the illegality of the sale or the harm it could cause because the Tenth Circuit denied DeChristopher's proposed unclean hands and necessity defenses.

⁸⁷ MARY CHRISTINA WOOD, *NATURE'S TRUST: ENVIRONMENTAL LAW FOR A NEW ECOLOGICAL AGE* 10 (2014).

⁸⁸ *Id.* at 119–20.

⁸⁹ *See id.* at 113.

⁹⁰ *See id.*

C. DeChristopher's Actions Were Causally Connected to an Imminent Harm

Had the Tenth Circuit reached the other elements of the necessity defense, the court would have likely denied the government's motion in limine to bar the defense. First, DeChristopher sought to prevent imminent harm. In addition to the immediate environmental harm that the BLM sale posed to public lands, DeChristopher sought to prevent the imminent harm of climate change. As Wood explains,

[The c]limate crisis presents nearly unfathomable urgency because of what scientists call "tipping points"—climate tripwires, so to speak. These thresholds, caused by human carbon pollution, trigger dangerous feedbacks capable of unraveling the planet's climate system. Once triggered, these vicious cycles continue despite any subsequent carbon reductions achieved by humanity. Such tipping points loom near. Some may be underway. Some may be intensifying.⁹¹

This urgent threat can easily cause a sense of helplessness and doom where few opportunities to thwart it are available. While on trial, DeChristopher said of winning his first parcel, "[it] felt like the first time my actions had really been in line with my sentiment. Up to that point I knew that climate change was a really huge issue, and yet in response to that I was riding my bike and writing letters to Congress."⁹²

Second, DeChristopher's actions were causally connected to the harm he sought to prevent. DeChristopher posed as a bidder and obstructed the auction in order to prevent the BLM from issuing leases to oil and gas companies. Even by the *Schoon* standard, DeChristopher's act of civil disobedience was much more like a lunch counter sit-in⁹³ than a protest in an IRS office with twenty-nine other protesters throwing fake blood around the building and obstructing the office's operation.⁹⁴ As Patrick Shea, a former BLM director under the Clinton administration, said, "[w]hat Tim did was in the best tradition of civil disobedience, he did this without causing any

⁹¹ *Id.* at 11.

⁹² Van der Zee, *supra* note 81.

⁹³ See *United States v. Schoon*, 971 F.2d 193, 196 (9th Cir. 1991) (describing lunch counter sit-ins as an example of direct action).

⁹⁴ See *id.* at 195 (describing defendants' conduct underlying their convictions).

physical or material harm. His purpose was to draw attention to the illegitimacy and immorality of the process.”⁹⁵

III

ENVIRONMENTAL CIVIL DISOBEDIENCE AND HUMAN RIGHTS

The application of the necessity defense in environmental civil disobedience cases implicates human rights in two different ways. First, freedom from the environmental havoc that climate change will wreak is now characterized as a human right in the international community. Second, incarcerating activists for seeking to advance a human right without allowing them to present a necessity defense can violate their constitutional rights.

A. International Human Rights

The concept that humans have a right to be free from the suffering that environmental degradation can bring is not a new one. According to University of Oregon Law Professors John Bonine and Svitlana Kravchenko, “today it is widely accepted that human rights, including the right to continued and satisfactory life itself, cannot be fully enjoyed and realized in a polluted and degraded environment.”⁹⁶ In conjunction with its Conference on the Human Environment, the United Nations proclaimed in the Stockholm Declaration of June 16, 1972 that, “[m]an has the fundamental right to freedom, equality, and adequate conditions of life, in an environment of a quality which permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations.”⁹⁷

Then, in 1994, Special Rapporteur on Human Rights and the Environment Fatma Zohra Ksentini wrote in her final report to the Sub-Commission on Prevention of Discrimination and Protection of Minorities, “[h]uman rights, an ecologically sound environment, sustainable development and peace are interdependent and

⁹⁵ Stephen Speckman & Clayton Norlen, *BLM Auction Plans in Jeopardy*, DESERET NEWS (Dec. 23, 2008, 12:23 AM), <http://www.deseretnews.com/article/705272366/BLM-auction-plans-in-jeopardy.html?pg=all>.

⁹⁶ JOHN E. BONINE & SVITLANA KRAVCHENKO, *HUMAN RIGHTS AND THE ENVIRONMENT: CASES, LAW, AND POLICY* 20 (2008).

⁹⁷ U.N. Conference on the Human Environment, *Stockholm Declaration*, Principle 1, U.N. Doc. A/CONF.48/14/Rev.1 (June 16, 1972).

indivisible.”⁹⁸ Furthermore, Ksentini stated that, “[a]ll persons have the right to an environment adequate to meet equitably the needs of present generations and that does not impair the rights of future generations to meet equitably their needs.”⁹⁹ These provisions are not binding on the United States, but they do support the assertion that laws and policies that exacerbate climate change pose a threat to human rights.

There is also a link between the public trust doctrine, which is primarily concerned with climate change, and human rights. As Wood writes, “[l]ong predating any statutory law, the reasoning of the public trust puts it on par with the highest liberties of citizens living in a free society. This public property right ranks so fundamental to citizens that some scholars describe it as a natural right or human right.”¹⁰⁰

Despite the correlations between climate change and human rights, the Ninth Circuit’s approach poses an extra barrier to presenting the necessity defense by categorizing government policies as harmless by default. In *Schoon*, the court stated that:

The mere existence of a policy or law validly enacted by Congress cannot constitute a cognizable harm. If there is no cognizable harm to prevent, the harm resulting from criminal action taken for the purpose of securing the repeal of the law or policy necessarily outweighs any benefit of the action.¹⁰¹

The court therefore held that the defendants’ protests against the U.S. government’s policy toward El Salvador were indirect because the most immediate harm was the policy itself, which, alone, was not a legally cognizable harm.¹⁰² Where climate change is concerned, however, there are several distinguishing factors.

First, the policies that activists like DeChristopher take action to counter are rarely validly enacted by Congress. As previously discussed, administrative agencies have enormous power in the environmental realm, and their decisions can have enormous impacts with little public participation or opportunity for comment.¹⁰³ As Wood explains:

⁹⁸ Fatma Zohra Ksentini (Special Rapporteur on Human Rights and the Environment), *Draft Principles on Human Rights and the Environment*, ¶ 1, U.N. Doc. E/CN.4/Sub.2/1994/9, annex I (July 6, 1994).

⁹⁹ *Id.* ¶ 4.

¹⁰⁰ WOOD, *supra* note 87, at 14.

¹⁰¹ *United States v. Schoon*, 971 F.2d 193, 197–98 (9th Cir. 1991).

¹⁰² *Id.* at 196–97.

¹⁰³ *See* WOOD, *supra* note 87, at 10.

The fact remains that, despite all of these existing public comment processes, nothing forces agencies to heed public opinion. When government agencies become beholden to industry, citizens find it not worth the price of postage to ask the agency for resource protection. The NEPA rules affirmatively require agencies to respond to public comments, but captured agencies treat this as a meaningless chore. NEPA officers sort through public comments, cubbyhole them into categories, then develop a set of generic responses to each category.¹⁰⁴

Therefore, courts should take a different approach where the policy or law at issue is advanced by an administrative agency that is comprised of unelected officials with little accountability to the public.

Second, the U.S. government's policies regarding climate change may be deemed harmful soon. Although a policy validly approved by Congress may not be harmful per se, atmospheric trust litigation is challenging Congress' promotion of fossil fuels and inaction with regard to climate change. In the United States District Court for the District of Oregon, "youth plaintiffs," an association of young environmental activists called "Earth Guardians," and stand-in guardian for future generations, Dr. James Hansen, filed a constitutional climate lawsuit against the government under the public trust doctrine.¹⁰⁵ The plaintiffs seek "(1) a declaration their constitutional and public trust rights have been violated and (2) an order enjoining defendants from violating those rights and directing defendants to develop a plan to reduce CO2 emissions."¹⁰⁶ Judge Aiken adopted Magistrate Judge Coffin's Findings and Recommendation denying the government's motion to dismiss.¹⁰⁷ Therefore, Congress' and various governmental agencies' policies could be deemed harmful if the pending litigation is successful.

Judicial determinations aside, Wood's assertions support the theory that government policies implicate the human right to a healthy environment: "[h]umanity cannot hope for a livable planet if government agencies continue to license industries to pollute and

¹⁰⁴ *Id.* at 114.

¹⁰⁵ See *Juliana v. United States*, 217 F. Supp.3d 1224, No. 6:15-cv-01517-TC, (D. Or. Nov. 10, 2016). See also *Landmark U.S. Federal Climate Lawsuit*, OUR CHILDREN'S TRUST, <https://www.ourchildrenstrust.org/us/federal-lawsuit/> (last visited Nov. 21, 2016).

¹⁰⁶ *Juliana*, 217 F. Supp.3d at 1233.

¹⁰⁷ *Id.* at 1234.

destroy the remaining natural resources. Environmental law becomes profoundly relevant to the daily life and future well-being of every citizen alive today.”¹⁰⁸

When the government prosecutes and incarcerates individuals who take action to challenge these policies, the constitutional bounds of criminal law become profoundly important to the daily life and future well-being of citizens as well.

B. U.S. Constitutional Rights

Imprisoning climate change activists who challenge government policies without allowing them to present a necessity defense also poses a threat to constitutional rights. As Bonine and Kravchenko point out, “[e]nvironmental and other human rights defenders- the citizen or lawyer advocates who try to defend the human rights of others to a healthy environment- are often at risk of having their own rights infringed because of their work. The risk can be starkly physical.”¹⁰⁹

Most notably, denying a defendant the opportunity to present a necessity defense implicates the constitutional right to due process. The Fifth Amendment states that no person shall “be deprived of life, liberty, or property, without due process of law.”¹¹⁰ The Supreme Court of Minnesota held that criminal defendants have a fundamental due process right to explain their conduct to a jury and that a broad exclusionary order raises serious constitutional questions concerning a defendant’s right to testify.¹¹¹ This right is clearly at risk where courts routinely deny defendants the opportunity to present evidence to support the affirmative defense of necessity for their actions.

Furthermore, a court’s refusal to allow a defendant to offer evidence of necessity as a mitigating circumstance also implicates the Eighth Amendment, which provides that “excessive bail shall not be required, no excessive fines imposed, nor cruel and unusual punishments inflicted.”¹¹² For example, four of the activists who shut down the aforementioned Washington, Minnesota, and Montana pipelines could each face prison sentences ranging from ten to thirty

¹⁰⁸ WOOD, *supra* note 87, at 336.

¹⁰⁹ BONINE & KRAVCHENKO, *supra* note 96, at 483.

¹¹⁰ U.S. CONST. amend. V.

¹¹¹ *State v. Brechon*, 352 N.W.2d 745, 751 (Minn. 1984).

¹¹² U.S. CONST. amend. VIII.

years in addition to fines ranging from \$41,000 to \$50,000.¹¹³ The fifth activist, who shut down the pipeline in North Dakota, could face up to *eighty-one* years in prison and \$94,500 in fines.¹¹⁴ These defendants face such harsh sentences despite the fact that their actions did not result in any injury or death.¹¹⁵ Because they took direct action to protest the fossil fuel industry and prevent the imminent threat that climate change poses, the courts that try these defendants should permit them to present the necessity defense in order to avoid infringing on the Fifth and Eighth Amendments.

CONCLUSION

Mahatma Gandhi said, “an unjust law is itself a species of violence. Arrest for its breach is more so.”¹¹⁶ In circumstances where the law is inadequate to help environmental activists obtain just outcomes, the least it can do is refrain from hurting them. Therefore, courts should be more liberal in applying and admitting the necessity defense when defendants who lack meaningful legal alternatives engage in civil disobedience to protect the environment, especially from climate change.

¹¹³ Sabrina King, *Crossing the Fossil Fuel Industry Could Now Get You Locked Up – For Decades*, AMERICAN CIVIL LIBERTIES UNION (Oct. 24, 2016, 11:45 AM), <https://www.aclu.org/blog/speak-freely/crossing-fossil-fuel-industry-could-now-get-you-locked-decades>.

¹¹⁴ *Id.*

¹¹⁵ *See id.*

¹¹⁶ MAHATMA GANDHI, NON-VIOLENCE IN PEACE & WAR 144 (Mahadev H. Desai ed., Navajivan Publ'g House 1962).

