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DOI
10.1057/s41304-025-00540-w

Publication date
2025

Document Version
Final published version

Published in
European Political Science

European Political Science (2025) 24:532–552
https://doi.org/10.1057/s41304-025-00540-w

SPECIAL ISSUE ARTICLE

Dissensus in Europe: climate protesters before court

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Accepted: 4 October 2024 / Published online: 26 June 2025

Abstract

Democracies in Europe fail to take adequate climate mitigation measures. In response, not only legal, but also illegal acts of climate protesters are multiplying in Europe. This paper examines the criminalisation of climate protests in France, Germany, Switzerland, and the UK. Against the overarching concept of dissensus to which this special issue is dedicated, this contribution reflects on the role of judges who deprive the disobedient from the opportunity to communicate about their motives. The paper pays particular attention to the case of David Nixon in the UK, in which the judge prohibited Mr. Nixon from sharing his motivation or mentioning climate change in the court room. This demeans civil disobedience to an ordinary criminal act and deprives democracy of its self-correcting potential.

Keywords Dissensus · Climate litigation · Civil disobedience · Climate protests · Role of judges · Separation of powers

Introduction

We have justified reasons to feel anxiety about the future on a burning planet. Concerns about the mismatch between the overwhelmingly clear science and lack of drastic climate action not only cause anxiety but lead citizens to become climate protesters. The majority of climate protests are legal and peaceful events (Schaafsma 2024). However, some climate protesters break the law as a form of civil disobedience (American Psychological Association 2020; Hickman et al. 2021; Mathiesen 2023). These protesters commit (mostly) nonviolent but illegal acts of objection, aiming to draw attention to the widespread failures of public institutions to take adequate climate action (UNEP 2023; Grant et al. 2022). Nonviolent is here understood as protest that is *not intended to* and does *not foreseeably* harm others. This does not exclude harm to property or harm that occurs as an unintended side effect and differs

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from narrower definitions of nonviolent protest that exclude calculated damage to property (Schaafsma 2024:28, 37–8).

These multiplying forms of *illegal* protests are an illustrative example of the confrontation of 'ideas' or 'ideologies' that some consider the essence of democracy (Mouffe 2016) and others classify as hindering constructive consensual political will-formation (Schmidt 2019). While *environmental* protests have a long history, *climate* protests are in certain terms of a different order (Sovacool and Dunlap 2021). The latter concerns a truly global action problem. The climate crisis is affecting every person on the planet for the foreseeable future, i.e., neither the effects nor the protests are geographically or temporally limited.

Embracing the view that the essence of democracy is the confrontation of ideas (see Brack and Coman in this issue), this paper focusses on confrontations related to climate protests that take partially place within public institutions, namely courts. It reflects on the role of the judiciary in making unlawful climate protests productive for democracy by examining how judges treat these dissenting voices challenging a state's (lack of adequate) climate policy. This limits the scope of examination to the domestic institutional and jurisdictional context.

This paper only engages with the smaller part of *illegal* climate protests, *i.e.*, those that were prosecuted in court. When the protesters are in court, judges institutionally represent the state. Judges are part of the third branch of government, paid by the state, and, in Europe, usually appointed by other state actors. They act within their constitutionally and legally defined mandate and are in the position to impose sanctions on the protesters in the name of the state. At the same time, the independence of judges is in all the examined European jurisdictions, which all (more or less) qualify as liberal democracies, constitutionally protected from direct interference by the other branches. Judges do not receive instructions, nor are they accountable to the electorate for their decisions. They are not required to justify the state's climate policies, nor can they be held accountable for them. By contrast, in civil or administrative proceedings, judges can declare unlawful acts or omissions attributed to the state. This is what makes the court room particularly interesting as a setting where a form of dissensus meets an *institutionally independent* state actor—the judge, who should listen to the grievances of the protesters and ultimately cast unbiased judgment on the situation. Her role as both state actor and as independent decision-maker places the judge in a powerful institutional position where she can either give room to dissensus or make it part of the institutional interaction or suppress it. Judicial suppression also has a different weight because it comes from a state actor that can claim to have the mandate to address conflicts rather than the task to appeal to a constituency by proposing to represent particular ideologies, interests, and conceptions of the world.

Within a system of separated powers, the judiciary has a central role in giving room to dissensus as a constructive engagement with collective will-forming, not only on individual policies, but also on the values underpinning it (for the EU: Eckes et al. 2024). When judges criminalise political actions by shutting down the public's ability to engage with their claim to reasonableness and justification, they deprive democracy of its self-correcting potential that forms part of the basis for law's claim to legitimacy. This, rather than protecting democracy, damages the robustness of the

democratic space in which illegal action can make a valuable and justified contribution to democratic will-formation. Shutting down dissenting voices that challenge the (justness of the) system also—at least potentially—turns constructive dissensus disruptive.

While *constructive* dissensus aims to renegotiate fundamental conceptions of justice, norms, and values, *disruptive* dissensus no longer seeks to exchange and convince but to confront and undermine the norms and values with which it disagrees. Arguably, however, a disruptive function is an intrinsic property of civil disobedience. Hence, even constructive dissensus expressed via civil disobedience accepts or even aims for a degree of disruption.

One widespread (illegal) means of drawing attention to the climate emergency is to temporarily block traffic junctions. Roadblocking constitutes at least potentially an illegal act that is punishable under criminal law. The leading and authoritative public data base of *Global Climate Change Litigation*[1] reports, outside of the US and until 31 December 2023, sixteen cases in *four European countries* where illegal acts of climate protest were prosecuted in practice: France, Germany, Switzerland, and the United Kingdom. Other cases in other jurisdictions may exist but this paper uses *Climate Change Laws of the World* as the source of its empirical data, which exemplifies the argument of the theoretical inquiry into the framing of civil disobedience by specific actors, namely judges. It completes the entries in the data base with other public sources. In four cases, the activists protested and partially blocked airports. In eight cases, the protesters targeted fossil fuel companies. In all of these cases, activists broke the law, and they are facing as a result criminal persecution for charges such as trespassing, damaging property, vandalism, and nuisance. All of these illegal acts protest against political and corporate actors' failure to take appropriate actions to mitigate climate change.

This paper focusses on states and legal orders that can be described as (more or less) liberal democracies because this is the context in which civil disobedience is more difficult to justify and in which the judiciary can be classified at the same time as part of the democratic state and independent institution. It is also in four liberal democracies that the data base reports decided criminal cases against protesters until the cutoff date.

The paper asks the following question: What is the role of judges in navigating constructive and disruptive dissensus in the context of nonviolent but illegal acts of climate protests?

The paper is structured as follows: Sect. "Democracy, dissensus, and civil disobedience" introduces the notion of (constructive and disruptive) dissensus in line with this special issue and relates it to a proposed definition of civil disobedience. Sect. "Judges framing constructive and disruptive dissensus" engages with the judiciary's role in framing (the distinction between) constructive and disruptive dissensus. Sect. "Different national contexts" examines all reported criminal prosecution cases against climate protesters in Europe until the cutoff date. Sect. "The case of David Nixon" focusses on the notable case of David Nixon, which illustrates how

[1] http://climatecasechart.com/non-us-case-category/protesters/ (accessed on 31 December 2023).

judges criminalize protesters' actions and deprive democracies of these protesters' constructive contribution to will-formation. Sect. "Conclusion" concludes.

Democracy, dissensus, and civil disobedience

The value of dissensus for democracy

Democracy is built on pluralism of ideas, and some argue, even confrontation of ideologies (Dahl 1989; Mouffe 2016). Both opposition and contestation are unavoidable and even form the very essence of democracy (see Brack and Coman in this issue). *Dissensus* is here understood to be different in nature from opposition and contestation in that it is a confrontation of different conceptions of what is 'a good life,' the most basic understanding of matters of justice (Waldron 1999). Following the editors of this special issue, dissensus is broadly defined as '*the expression of social, political and legal conflicts (1) driven by political, social, legal actors, including state and non-state actors in different institutional and noninstitutional arenas (parliamentary, constitutional, public sphere, technocratic and expert arenas…) (2) seeking to maintain, to replace or to restructure liberal democracy (3).*'

Climate protests fall within this definition as they aim to restructure liberal democracy in its current reality. Their direct purpose is to participate in the political debate by forcefully challenging the institutional condoning of unjust politics and communicate with the public (Brownlee 2012b). Their longer-term purpose is triggering a fundamental change in the current understanding that pollution is covered by liberal rights, for example, that actions which cause extraordinarily high emissions are an exercise of individual freedom rights (e.g., flying (in private jets); driving SUVs). Sometimes, they seek more specific policy changes (e.g., ending fossil fuel subsidies). Sometimes, protesters more loosely aim to draw attention to the climate emergency and counter new forms of climate denial, *i.e.,* ignoring the impending catastrophe (Kuper 2023).

The broad definition of dissensus allows for the possibility of seeing (certain forms of) dissensus as a constructive, generative intervention capable of correcting the very flaws of liberal democracy (Rancière 2010). This is a clear break with the 'consensus' culture that has widely been propagated as the basis for political legitimacy (Dryzek and Niemeyer 2006; Dryzek 2000; see also Eckes et al. 2024). Seeing dissensus as having the potential to increase democratic legitimacy takes power relations seriously. It acknowledges that in a democracy marginalised ideologies and groups exist and can contribute to legitimacy. The potential of dissensus is in line with Chantal Mouffe's (1996) warning that 'the real threat to democracy' is 'to negate the ineradicable character of antagonism and aim at a universal rational consensus' (248), as well as, Christoph Möller's (2013: 76) conclusion that:

> '[t]he democratic process depends on a consensus on the procedure, but also on dissident on the merits. The significance of conflicts for a democracy is sometimes underestimated. But, it is obvious that the whole democratic process would be useless under the condition of perpetual consensus.'

Civil disobedience as constructive dissensus and participation

This paper examines challenges to the law, namely illegal acts of climate protest, which if they qualify as acts of civil disobedience, also qualify as an expression of dissensus that, while being illegal, is *legally accepted* to ultimately benefit the legitimacy of the law (Habermas 1985). Politically, civil disobedience is seen as fundamentally communicative (Brownlee 2012a; 2012b) and also as strengthening democracy (Celikates 2016).

In the context of the climate emergency, the discrepancy between talk and action of public bodies is widely documented[2] and also acknowledged by mainstream media outlets (Hodgson and Hancock 2023). In 2018 already, the International Panel on Climate Change (IPCC) concluded that 'civil society is to a great extent the only reliable motor for driving institutions to change at the pace required' (IPCC 2018: 352). With increasing impacts of climate change, insufficient institutional change, and decreasing trust in political institutions (Hosking 2019), civil society increasingly resorts to illegal acts of protest to express dissensus, which could at least potentially qualify as civil disobedience. In turn, this results in a higher number of criminal trials against protesters.

In *A Theory of Justice,* Rawls (1971: 319) developed a theory of civil disobedience 'designed only for the special case of a nearly just society, one that is well-ordered for the most part but in which some serious violations of justice nevertheless do occur'. This connects to this paper's choice to focus on (more or less) liberal democracies. Rawls' definition of civil disobedience requires the disobedient to accept the legitimacy of the state institutions (Rawls 1971) and is fundamentally ameliorative (Schaafsma 2024). This understanding is shared by several contemporaries of Rawls (Bedau 1961; Cohen 1971). Civil disobedience in this sense is defined as 'a public, nonviolent, conscientious yet political act contrary to law usually done with the aim of bringing about a change in the law or policies of the government' (Rawls 1971: 320). Publicness refers to the expressive function of civil disobedience (Brownlee 2012b: 531), which is reflected, not only in the explicit expressive act, but also in the social mobilisation practices around the acts of protest (Scherhaufer et al 2021). Without being able to enter into the complexities of protest organisation, we can observe that these practices usually entail internal and external attempts of communication, including to the wider public with the purpose 'of appealing to the capacity for reason and sense of justice of a majority' of citizens (Habermas 1985:100). This includes mediatisation, staging of symbolic breaches of law, calls for action, and action trainings for prospective protesters (Schwerhaufer et al. 2021).

While lawbreaking usually requires nonviolence to qualify *legally* as civil disobedience and meet the *legal* requirements of justification that allow the disobedient to remain free of punishment, some scholars have—in opposition to Rawls—argued that lawbreaking does not have to be 'civil' to be *morally* justified (notably, Delmas

[2] UN Global Stocktake: https://unfccc.int/topics/global-stocktake; Climate action tracker: Home | Climate Action Tracker.

2019; Mancilla 2012). Civil disobedience is not a legally clearly circumscribed term and its very function is the *political* and *moral* justification of an illegal act of protest. Yet, if disobedience becomes non-civil, violent, and consciously harmful to others, *legal* justification appears impossible. Rawls' definition has further convincingly been criticised to be state-centric and not sufficiently broad and inclusive for the discussion on the justification of civil disobedience in the context of the truly global climate crisis and the waning powers of the state in addressing this crisis (Schaafsma 2024:24; Pineda 2022:12). However, for the purpose of this paper and the discussion of the role of the judge, the link and limitation to the state and *one legal order*, which is a(n inevitable) characteristic of domestic law and the (constitutional) mandate of the judiciary is justified or even logically required.

More could be said, but for pragmatic reasons, I follow Rawls' definition of civil disobedience. For Rawls, civil disobedience requires that the case of grave injustice is well identified; other potentially successful means of influencing public opinion must be exhausted; and the act of protest does not endanger the constitutional order. This connects to Rawls' conception of an 'overlapping consensus' which 'enables us to understand how a constitutional regime characterised by pluralism might, *despite its deep divisions, achieve stability* and social unity because of *the public recognition of a reasonable political conception of justice*' (see Brack and Coman in this issue, *emphasis added*). The disobedient person protests against state policies that she considers to go against her fundamental political conception of justice—either because the state policy is (blatantly) unjust or because the disobedient person has a different conception of justice. In both cases, the intention is to express dissensus and *influence* the stabilising overlapping consensus of the public about what is just, rather than to *reject* the idea of justice entirely. However, several scholars have criticised the idea of an overlapping consensus as stabilising and even argued that consensus is the end of politics and a threat to democracy (Mouffe 2016). In this paper, I understand civil disobedience as challenging established norms and values (of liberal democracy) with the intention to restructure our understanding of them. This challenge is then 'managed through the existing rules of the game and institutions and is solved through a shared understanding or general agreement between actors' (see Brack and Coman in this issue). On the latter two points, constructive dissensus can be contrasted with disruptive dissensus: First, disruptive dissensus is not motivated by the intention to restructure or change norms and values, it rejects the idea of being able to agree on the underlying conceptions of justice, norms, and values, and second, it rejects a state's institutional mechanisms of conflict resolution. Importantly, *legally acceptable* civil disobedience, as here defined, is *constructive* dissensus. This does not exclude that also disruptive dissensus can make a contribution to (a different form of) democracy by rejecting ((part of) what has become) the norms and values of (overly) *liberal* democracy.

Some authors have argued that a person might even have a *moral duty* to exercise civil disobedience where she believes that the conflict between justice and the law is too stark to be accepted. Others have convincingly argued that in a liberal-democratic state that has a morally justified claim to political authority, citizens have a *moral right* to carry out suitably constrained civil disobedience (Lefkowitz 2007; against: Raz 1979). Both duty and right are based on the intrinsic, i.e.,

noninstrumental, value of autonomous agency of a person. The reasonable and sincerely held belief, and importantly, the purpose of advocating a change in law or policy are necessary conditions to justify that civil disobedience is a form of participation by an autonomous agent.

Civil disobedience as constructive dissensus is a form of participation, which serves the double purpose of avoiding political domination and alienation. When citizens exercise civil disobedience they often already act upon a sense of alienation. When they act in contestation of the majority opinion and consciously accept the ensuing civil or criminal judicial process against them, they reopen a deliberative process in the public sphere. By recognising civil disobedience as a form of participation, one accepts that the legal means for contesting the outcome of the collective decision-making process may not at all times be sufficient or adequate. While civil disobedience does not deny the general 'political obligations' of citizens to comply with the law and support the legitimacy of their political authority, it allows in limited circumstances to justify noncompliance (Kyllönen 2014). Legal contestation, rather than illegal dissensus, may take too long. Considerable or even irreversible harms may take place. Civil disobedience offers in such cases an intense form of expressing the sincerity of the beliefs of a minority of citizens. By expressing their beliefs through constructive dissensus, they must ultimately aim to contribute to the legitimate political authority of the state.

Understanding civil disobedience as participation also emphasises, in line with participatory democracy theory, the objective of tackling systemic inequalities that do not allow all parts of society to enjoy the same say in policymaking (Elstub 2018). Conceptually, participatory democracy theory challenges the understanding of the state as a neutral structure that can exist separately from civil society and its deeply unequal power relations (Lafont 2020; Pateman 1985). A state reproduces the power structures of society. Participation through constructive dissensus serves in this reading as an alternative channel of influencing the collective decision-making that determines the public course of action. Only acts that do not primarily serve the disobedient person's self-interest can qualify as aiming for communication rather than personal gain.

This participatory process is triggered by the publicity and communicative nature of the act capable of attracting attention. It is usually accompanied by publicly explaining the act, for example, at the protest, on social media, and to the media. The ensuing judicial process is not only the logical consequence of accepting retribution, but also both a sign that the protester does not act for personal gain and an additional opportunity to attract publicity and have the epistemic merits of the justification for the dissenting act publicly evaluated in a public setting that can make a claim to institutional independence, i.e., in the court room.

Judges framing constructive and disruptive dissensus

Separation of powers is aimed to protect the institutional conditions for democracy (Eckes et al. 2024). This includes creating institutional conditions that make disagreement and dissensus productive for the polity's will-formation, rather than

suppressing it. Core features of separation of powers are the independence of the judiciary and the rule of law. This section reflects on the role of the judiciary in construing the distinction between constructive and disruptive dissensus.

Separation of powers as a means to channel conflict

The law and legal practice have an ordering function. They frame and channel confrontations in society. The focus here is on the *institutional* realm, where these confrontations are governed by procedures and are institutional state actors, i.e., the judge, has a powerful role. A central aspect of these procedures is separation of powers. Separation of powers is the ideal that guides the formulation and interpretation of specific procedural rules laying out which institution can do what. While the different conceptions of separation of powers differ and we cannot identify *one* legal or conceptual blueprint of what separation of powers is or should be, it is possible to identify and explain the underlying rationale and purpose of separation of powers. Christoph Möllers (2013) proposed a conceptualisation of separation of powers and its purpose that seems well suited for liberal democracies with a strong commitment to the rights and freedoms of individuals. He identifies individual and collective self-determination as the central elements of the justification of public authority and links the protection of self-determination back to separation of powers (Möllers 2013: 51). This emphasises institutional interaction between the branches that allows for continuous struggle of irreconcilable interests while excluding any lasting domination of one branch over the other (Eckes et al. 2021).

In this reading, the judiciary must embrace simultaneously that it *exercises* public power and that it is *independent* from public power. The latter is essential when citizens bring their grievances about the conflict between justice and law to court, including when they claim that they committed a justified act of civil disobedience in order to draw attention to such a conflict.

Emphasising even more strongly the continuous struggle of irreconcilable interests at the center of democracy, Panu Minkkinen (2020: 38), drawing on the work of Claude Lefort, speaks of 'agonistic separation' that allows democracy to resist or oppose totalitarian tendencies of modern capitalism through rights. The terminology of 'agonistic separation' emphasises the capacity of a system of separation of powers to productively institutionalise conflict and channel ineradicable dimensions of conflict into an institutional exchange.

Separation of powers in this reading creates the 'potentiality' of judicial intervention that creates stability through mutual deterrence (Minkkinen 2020: 41). This reading is shared by Chantal Mouffe (2000), a prominent critic of Habermas, who speaks of 'agonistic pluralism.' Conflicting interests should be able to engage in substantive political competition in an adversarial but institutionally regulated fashion. In other words, a system of separated powers (at least potentially) redirects the antagonistic political struggle for power between different groups in society in rationalising procedures that (have the potential to) turn antagonism into agonism.

Contestation, opposition, and dissensus should not be seen as a threat to separation of powers. They are a necessary ingredient. Separated powers create the

institutional setting to find a temporarily settled position despite incommensurable background conditions. The temporarily settled position is accepted because of the acceptance of the claim that it benefits from legitimacy because of the fact that it was produced under the conditions of separation of powers. In a society characterised by persisting differences, separation of powers gains a central role in mitigating conflict. The independence of the judiciary if taken seriously is the guarantee that judges are not controlled by the government and act within the procedural boundaries of their powers to not become the government themselves. This is why the judiciary has a particularly important role in offering institutional fora and channels to voice dissensus within the structures of liberal democracy. The way judges deal with alleged cases of civil disobedience co-creates the environment in which citizens may or may not feel able to voice their dissenting position that a state acts contrary to fundamental considerations of justice. Criminal law gives judges like no other area of law the power to define what is sufficiently unworthy that justifies criminal punishment. It allows for an exceptionally strong rejection of the state of any competing claims about justice, norms, and values.

Judicial treatment of civil disobedience

Habermas (1985: 106) concludes: 'Civil disobedience draws its dignity from [the] lofty claim to legitimacy of the democratic constitutional state. When state attorneys and judges do not respect this dignity, when they prosecute the disobedient as an ordinary criminal and punish him with the usual sentences, they succumb to an authoritarian legalism.' Civil disobedience is a reminder of the legal system's limitations in achieving justice. It contributes to the system's legitimacy because it is a recognised form of challenging illegitimacy within the system. In a liberal democracy with separated powers, judges have an important role in creating, perpetuating, and containing the area of conflict where law and politics try to dominate each other.

Civil disobedience is breaking the law. Law benefits from a presumption not only of legality, but also of legitimacy. Civil disobedience, on the one hand, challenges this presumption of legitimacy. Those committing civil disobedience are not only sincerely convinced that the law is unjust, but also seek public recognition of these illegitimacies. On the other hand, the institution of civil disobedience contributes to the legitimacy of the legal system because it is a means to eliminate these illegitimacies. The role of judges is to channel these dissenting voices into the institutional exchange and make them productive for the democratic space. The role of judges is to allow participation by the disobedient and facilitate a public exchange about their conviction, while at the same time, upholding the legal order and hence taking action to end the illegal actions. This requires them to act in line with liberal-democratic principles and respect the autonomous agency of those committing civil disobedience, even if they find them guilty of illegal conduct.

By its illegality, civil disobedience is right on the dividing line between constructive and disruptive dissensus. One could go as far as saying that an illegal act, including hence civil disobedience, is *prima facie* connected with the presumptions of both illegitimacy and disruptive dissensus, i.e., a fundamental rejection of norms

and values. These presumptions can however be rebutted in the (judicial) process of evaluating the illegal act in light of the above-mentioned conditions of civil disobedience, including the intention and potential to make public the alleged conflict between justice and law.

Usually, judges assess a factual situation *ex post*, from the perspective of the law. They have the interpretational powers to determine what is legally relevant and irrelevant. This plays by extension, for example, in the courtroom and through media coverage, a role in shaping what is seen as legitimate and illegitimate by the broader public. However, the framing in the judicial process and the communication to the broader public by protesters may emphasise different aspects or even rely on entirely different arguments (Keller and Bornemann 2021: 129–130).

Furthermore, criminal judges presiding over disobedience cases are in a crucial and privileged causal position as norm-creators that co-determine how conflicts relating to climate are framed. They are agents with special capacities and these capacities come with special second-order responsibilities (Caney 2014). Simon Caney argues that the severity of the climate crisis places on those with powers second-order responsibilities to ensure that those with first-order responsibilities mitigate the climate crisis, for example, decision-makers, actually comply with these responsibilities. Such second-order responsibilities are not absolute but can be limited by 'sufficiently weighty countervailing considerations' (Caney 2014:143), such as the protection of the rule of law.

In the next section, we see how judges received and framed civil disobedience cases in Europe. We then concentrate on one case in which the judge notably suppressed all climate considerations and reflect on this stance in light of the above.

Climate activism in court

In many European states, climate activists have been criminally prosecuted for infringing the law in order to draw attention to the seriousness and urgency of the climate emergency. The *Global Climate Change Litigation* database reports *outside of the US* sixteen entries for European states, including the UK and Switzerland. Four entries outside of Europe are namely in Australia, Canada, and New Zealand. Some of the entries are connected to a series of parallel actions (e.g., in France taking down Macron portraits). This paper examines the cases in Europe. These cases give a very diverse picture of how judges treat illegal acts of climate protest. This picture can be summarised as follows (Table 1):

Many protesters have argued in their defense that they acted in a state of emergency. Some scholars argued in favor of justified climate civil disobedience (Kyllönen 2014; Bamford 2023). Some judges have accepted this defense. The criterion of 'suitability' is repeatedly a stumbling block for accepting the alleged state of emergency justification, i.e., is the negligible reduction of emissions by temporarily hindering air traffic, car traffic, the extraction of lignite, or protecting individual trees or woods from being logged (temporarily or permanently) sufficient to justify that greater harm is prevented.

Table 1 Outcomes and legal reasoning

	UK	FR	CH	DE
Acquittal	Preventing greater harm; jury acquittal; necessity defense	State of necessity	n/a	Suitability/mildest means
Sentenced	Necessity defense rejected; possibility of justification denied; contempt of court	State of necessity rejected; freedom of expression must be considered	Danger not imminent	Civil disobedience rejected because milder means available

Different national contexts

The globally most comprehensive data base on climate litigation, *Climate Laws of the World*, reports until December 31, 2023 sixteen criminal cases against climate protesters in four European countries. This section gives an overview of these cases and considers how judges who were confronted with illegal acts of protest received and framed these acts. The overview demonstrates a very diverse picture in terms of jurisdictional context, action, and outcome. Not all details of the situational circumstances and judicial process are known. We do know that all reported acts of protest formed part of a social mobilisation as described above, and all constituted calculated, i.e., limited, and often symbolic breaches of law.

Furthermore, jurisdictional circumstances (e.g., civil law vs. common law) are determinative for the procedural role of the judge, the presence of a jury, and the procedural opportunities of the accused to explain her moral convictions; they also determine in practice to what extent a trial can serve as means of publicity. However, these differences do not invalidate some general conclusions: First, all judges, except one, seemingly considered arguments supporting justification of these acts as civil disobedience, such as state of emergency justifications. Second, even in cases where protesters were convicted and civil disobedience was not ultimately accepted there is no evidence that the judge as state institution suppressed dissensus in the way discussed as follows (Sect. "The case of David Nixon", The Case of David Nixon).

In the UK, different from the three other jurisdictions discussed as follows, protesters are brought before a jury, which in several cases acquitted them because of their motivation to prevent greater harm. In 2008, a trial court acquitted six Greenpeace protesters shutting down a coal-fired power plant for a day (The Kingsnorth Six Trial 2008; see also Kyllönen 2014). The defendants successfully argued the lawful excuse that they prevented greater damage to even more valuable property. The jury's verdict turned on the argument that damaging property, here the coal-fired power plant, was justified to prevent even greater damage caused by climate change.

In 2021, a jury at Southwark Crown Court acquitted six protesters who were charged with criminal damage caused to Shell's headquarters after spray painting slogans and breaking windows during protests organised by Extinction Rebellion

(Bramwell et al. 2021). The protesters construed their actions consciously in a way that qualified for jury trial (Lambert 2022).The trial judge allowed the defendants to provide evidence of their motivations but informed the jury that even if the protesters' motivations were 'morally justified' they did not qualify as a defense at law. The jury nonetheless acquitted the activists.

Jury trials have several times revealed the tension between what the law deems illegal and what laymen and women serving on juries may nonetheless find justified. One judge has stood out in his restrictive approach to climate protests. Judge Silas Reid repeatedly held that the motivations of climate protesters were 'irrelevant' to the case and prohibited the defendants from speaking about their motivations or mentioning climate change, property insulation, or fuel poverty (Mureithi 2023). This case brings to the fore the tension between law and morality. Jurors are not trained in law and could be expected to form their decision less influenced by the law's claim to express morality. The prohibition to share with the jurors the real motivation behind their civil disobedience deprives the defendants of their claim to moral action and places them in the same position as 'ordinary' criminals that are motivated by self-interest. The case of David Nixon is discussed in more detail in the next Subsection.

One of the objectives of the institution of the jury is to align the criminal justice system with the population's sense of justice (Erastus-Obilo 2006: 197). Moreover, juries, (at least) more so than the legal profession, represent a diversity of the population, in terms of gender, age, education, and ethnicity. Jury trials allow the protesters to demonstrate their intrinsic and authentic motivation, which lead to greater publicity and may—at least potentially—heighten the chances of recognition of the justification of their actions.

In a roadblock case, tried in 2022, seven of approximately thirty health professionals who blocked traffic on Lambeth Bridge, London, displaying a banner protesting the Government's support for fossil fuel, were arrested and subsequently charged with breach of the Public Order Act 1986 (McKelvey and others 2022). The Magistrates Court acquitted all defendants and the presiding judge allegedly remarked on acquittal 'I was impressed by the integrity and rationality of their beliefs' and 'their evidence was highly moving' (McKelvey and others 2022).

In some cases, climate protester could assert a necessity defense to escape liability for vandalism (Trial of Angela Ditchfield 2018). In other, factually similar cases, however, courts decided against the protesters. In 2016, for example, climate protesters were found guilty of aggravated trespass for occupying an airport runway (Basto 2016). Generally, not only in the climate context, civil disobedience as a constitutional practice has come under pressure in the UK (generally: Chow 2022; on environmental defenders: Forst 2024). Interestingly, the UK has seen a major shift in the strategy of its biggest and most well-known organisation of climate activism, Extinction Rebellion, that had previously opted for purposeful breaches of the law by comparatively small numbers of protesters and moved in 2023 to (lawful) mass demonstrations (Extinction Rebellion UK, 31 December 2022).

In different cities in *France*, climate protesters were accused in more than 30 cases of theft and refusal to provide DNA, after stealing or attempting to steal portraits of the French President, Emmanuel Macron (Take Down Macron Protester

Cases 2019). The protesters justified their actions by reference to the necessity of drawing attention to France's failure to meet its climate targets. The cases developed quite differently, some ending in acquittals, others in conviction. The French Supreme Court (*Cour de Cassation*) held that taking down portraits could fall within the realm protected by the *freedom of expression*. Importantly, while the Court rejected the defense of the 'state of necessity' it explained that *if invoked* the judges cannot refuse to examine whether their *freedom of expression* had been infringed (Pourvoi 20.85-434). In line with this, the Court upheld the convictions in cases in which the protesters had not raised the defense of freedom of expression (Pourvois 20-80.489 et 20-80.895). Reliance on the freedom of expression chimes well with the public element of civil disobedience and the objective to effectuate change.

In several cases of airport protests in France, the activists requested acquittals based on a 'state of necessity' defense, which justifies an offense when proportionate, just and necessary to warn of a future danger (Bordeaux-Mérignac Airport v Climate Activists 2020). In some cases, courts followed these requests and considered the measures justified by the prevention of even more serious harm (ADP Group (Paris Airports) v Climate Activists 2020).

In Switzerland, protesters occupied a Credit Suisse branch to protest the bank's fossil fuel investments (Credit Suisse Protesters Trial 2020). The district court accepted the protesters' defense of necessity and the imminence of the danger (Cour d'appel penale 2020). However, the Court of Appeal annulled the judgment of the lower instance court (Cour d'appel penale 2020: Sect. 6.3). The prosecution argued successfully that the danger was not (sufficiently) imminent (Cour d'appel penale 2020: Sect. "Climate activism in court").

In Germany, the discrepancy in the criminal law assessment of different courts is the starkest. Criminal charges for climate protests started only in 2022. On several occasions, district courts have imposed serious prison sentences on those blocking roads (Amtsgericht Heilbronn 2023), based on charges, such as coercion ('Nötigung') (Amtsgericht München 2022; Bayerisches Oberstes Landesgericht 2023; Amstgericht Tiergarten 2022). In Munich, courts held in two instances that an act of road blocking was *not* justified by (1) the right of resistance regulated in the Basic Law (Article 20(4) GG) because the right to resist presupposes that the constitutional order can no longer be adequately protected by the state; (2) the state of emergency defense (Sect. 34 of the German Criminal Code) because the accused had milder means at his disposal to achieve his goal of influencing public opinion; or (3) 'civil disobedience' (Amtsgericht München 2022; Bayerisches Oberstes Landesgericht 2023).

By contrast, a District Court in Flensburg accepted that tree occupation to prevent logging of a forest could be justified by the state of emergency defense (Amtsgericht Flensburg 2022). It recognised that the defendant acted to avert a present danger from a legal interest capable of being in a state of emergency, using appropriate and suitable means, which were the mildest available in the specific case. 'Appropriateness' presupposes that the act eliminates the dangerous situation with a high degree of probability. 'Suitability' requires an effect connection between means and objective. The court in this case identified the action of the accused to be 'not just civil disobedience' but an action in a state of emergency. Interestingly, even if the court

could not establish a direct causal connection between the act of protest and the prevention of global warming, it accepted as justified to protect legal interests through political protest, whose sole aim is to raise public attention for the urgency and challenges of the climate crisis.

The judge made a reference to how the German Federal Constitutional Court (GFCC) dealt with the 'drop in the ocean' argument in the *Neubauer* case (2021), arguing that a duty to protect cannot be denied by reference to the comparably limited contribution (a few trees) to protect the interest capable of being protected (stable climate). While it is not necessary that the threat is averted, the means cannot be entirely useless. *Neubauer* confirmed the constitutional value of the legal interest of climate protection. The Court also referred to the state objective of environmental protection (Article 20a of the German Constitution) as not have binding force on third parties but requiring courts to interpret open-textured norms, including the state of emergency justification in its light. This argument reflects a constitutionalisation of the issue.

However, the climate emergency has not become a *carte blanche* for climate activists to breach the law. Other requirements, such as the requirement to use *relatively mildest means* are a legal tool to exclude many actions from the realm of what can be legally justified. In addition, climate science and the identification of likely specific impacts are relevant in the proportionality assessment. When the court weighs the conflicting interests, namely the legal interests concerned and the degree of danger threatening them, it must be shown that the protected interest substantially outweighs the impaired interest. However, as we also saw, a small contribution to protecting the protected interest may be sufficient.

In August 2022, the district court of Berlin Tiergarten accepted that blocking a major road by lying on the asphalt and gluing one's hand to the ground is coercion and reprehensible because of the duration of 20–30 min (Amtsgericht Tiergarten 2022a). In October 2022, the same court took a different position, arguing that public demonstrations are always a nuisance for traffic, the actions had been announced, no ambulances were hindered, and climate change is a fundamentally important cause (Amtsgericht Tiergarten 2022b). The appeal by the prosecutor to Landgericht Berlin is pending. In both cases, also other considerations of civility and nonviolence were brought up, for example, that no police officers were obstructed in carrying out their duty because the activists cooperated and did not resist their own detention.

The concise review of all criminal cases against climate protesters in Europe that are reported in the data base until December 31, 2023 demonstrates that these cases were treated very differently by domestic courts. Some protesters were acquitted based on an argument of necessity. Others were charged and even incarcerated. In any event, in most cases, the judge or jury considered the climate emergency in some way as the motivation of the perpetrator, for example, they accepted a stable climate as the endangered good. The institutional mechanism of conflict resolution (judicial proceedings) has in all these cases taken note of the grievances of the disobedient. They, themselves or via their legal representatives, could publicly explain the grievances that motivated their actions, and by doing so, attempt to recruit others to share their views. Their dissensus remained constructive in the sense that they

remained committed to renegotiate rather than reject the existence of (some) shared values and procedures. One case stands out as the exception: the case of David Nixon (Gayle 2023). It is illustrative of judicial power that can restrict political participation and suppress the underlying legitimising reasons for civil disobedience in a way that (at least potentially) turns constructive dissensus disruptive, namely into a complete rejection of the system as unjust and unable to respond to dissenting voices.

The case of David Nixon

David Nixon, a 36-year-old caretaker, was prosecuted for forming a human roadblock on a major traffic junction in London on October 25, 2021 to protest insufficient public climate action. He argued that he had already used all other legal means to persuade people of the urgency of the climate emergency (Gayle 2023). Nixon apparently said: 'I see myself as a good member of society, a good person, who doesn't know what to do' (Gayle 2023).

His action formed part of the Insulate Britain's campaign. About 30 others participated. David Nixon was brought to jury trial at Inner London Crown Court. He was found guilty of causing a public nuisance and was jailed; however, he publicly announced that he will continue his protests upon his release (Timlin 2023).

As we have seen above, juries had in several previous cases chosen to find illegal acts of climate protest justified on other than legal grounds. In other words, evaluating—as juries do—the motivation of the protesters without legal training, considering their conscience, they reasoned outside of the legal framing of what could constitute an illegal but legitimate act of civil disobedience.

The presiding judge, Judge Silas Reid, prohibited David Nixon in his trial to mention the climate emergency or fuel poverty as his motivation for the traffic obstruction, classifying his motivation as legally irrelevant and hence denying him to justify his actions. This deprived Mr. Nixon of the chance that the jury might be convinced of the legitimacy of his actions in light of his motivation and decide not to punish him. Mr. Nixon apparently said that '[t]he rule of law would not survive the consequences of climate breakdown and by not taking that into account, judges were failing in their function to keep people safe' (Gayle 2023).

More importantly, however, he was deprived of the opportunity to allow the jury, representing the public, to see his act through his eyes—to make his deeply held conviction public for which he was willing to break the law and endure punishment. He was also denied drawing public attention to the cause of his actions during the trial. This shutting down of the publicity of the disobedient's motivation prevents engagement with the views that the disobedient act communicates. It limits the exchange to the issue of illegality rather than legitimacy.

Denying David Nixon the opportunity to share his motivation also leads to punishment rather than penalty. Nixon himself told Judge Reid that he found the inability to tell the jury why he had taken part in the protest 'soul-destroying' (Gayle 2023). Based on the distinction offered by David Lefkowitz (2007: 218), punishment is a way of expressing 'attitudes of resentment and indignation' and 'judgments of

disapproval and reprobation', while penalty lacks symbolic significance of this sort. Those committing civil disobedience willingly accept the costs that come with the illegality of their act. This cost ensures their sincerity and rules out illegal acts that are not based on a deep conviction of the need for change. Hence, the state is in its right to impose a penalty, but it cannot justifiably connect this with the expressive element of reprobation (punishment) (Lefkowitz 2007: 223).

Protesting the delegitimization of his actions, David Nixon disobeyed the judge's instruction not to mention the climate crisis as his motivation. He was sentenced to eight weeks of detention for contempt of court as the punishment for protesting the judicially imposed delegitimization of his actions (Mureithi 2023). The judge attempted to make Mr. Nixon's illegal acts illegitimate by judicial power.

David Nixon's case demonstrates the judge's powers to suppress the law's ability to reflect on where (and why) legality and legitimacy are not aligned. *Prima facie,* if Judge Reid's position was followed more widely it would deprive the law of its reflective potential. This reflective potential is a crucial element to justifying the general assumption that illegality is an indication of illegitimacy, and importantly that legality benefits from a presumption of legitimacy. Mr. Nixon mentioned the protection of the rule of law against the climate emergency as the motivation for his actions. He aimed for change through participation with the intention to protect the common good.

However, Judge Reid, as he had done in earlier cases, went further than preventing David Nixon of the opportunity to exercise civil disobedience and criminalising his actions by isolating them from their motives (see The Guardian 2023). He silenced the publicity of Mr. Nixon's protest in court. Judge Reid's orders, that jurors must not consider the defendant's beliefs because they are not relevant to the question of guilt or innocence, are under appeal.

In the meantime, Judge Reid took further action against those protesting against his silencing orders. Court protesters had raised signs outside of the courthouse, saying: 'Jurors: You have an absolute right to acquit a defendant according to your conscience' (see The Guardian 2023). Judge Reid ordered one of the court protesters to appear in court for contempt of court by attempting to influence the jury. When those voicing concern about the procedure and holding signs multiplied, apparently Judge Reid did not take further actions against them (Plan B, 2023). The democratic space appears to have been resilient enough to prevail against judicial power exercised to curtail the robustness of that democratic space by silencing constructive dissensus.

Conclusion

> 'Far from being enemies of the people, judges are just about the only friends we have.' (Rozenberg 2020).

Against the overarching concept of dissensus, we reflected on *the role of judges in receiving dissenting voices of climate protesters and making them productive for (the legitimacy of) the democratic process.* Habermas (1985: 101) speaks in the

context of protests against the stationing of NATO rockets of a 'the law is the law' mentality. This equally applies to the mentality with which illegal acts of climate protests are received in 2023. Public opinion, the media, and politicians have taken a very critical stance (see Deutschlandfunk 2023; Brändlin 2022; Gayle 2021a, 2021b). They express their disapproval and reprobation. Civil society organisations, as discussed above for Extinction Rebellion, appear to retract from disruptive interventions. The wave of illegal protests across Europe has gone down again. This appears to be—at least also—motivated by the negative reception of the disruptive actions, which stands in tension with Rawls' observation that disobedience becomes effective and incisive only if it is able to encourage an *openly shared sense of justice* (1971). In addition to the rather negative reception, we have, after the period of research for this article has ended, seen unprecedented prison sentences imposed on climate protesters in the UK (Braithwaite and Tenno 2024).

Criminalising environmental and climate protesters, detaining them, and making them subject to the social branding of criminals is not new (Schaafsma 2024) but it is reaching a new level of intensity, and arguably, hostility (Forst 2024; Ketcham 2024; Chow 2022). Criminalisation may discourage some from relying on illegal forms of protest. However, it does not acknowledge or respond to the growing and reasonable grievances of the protesters, who demand better protection of the climate. It aims to silence their grievances rather than engage with them. This is unlikely to work in light of the growing and widespread climate impacts and concerns with this global problem. When judges go even further and delegitimise the protesters and their motives, it is likely to turn constructive dissensus into disruptive dissensus and lead to (even greater) alienation and complete rejection of the existence of (some) shared values and procedures, while also disruption may make a contribution to reconsidering the foundations of democracy, such conflict cannot be channeled into the state's institutional structures.

Judges in the four countries discussed above approached illegal acts of climate protests very differently. Some found the acts justified as actions in a state of emergency; others did not. However, nearly all of the judges and juries engaged with the motives of the defendants. The case of David Nixon is a notable exception. It highlights the role of judges and the law in framing the dissensus expressed through acts of civil disobedience by climate protesters. A judge who deprives the disobedient from the opportunity to communicate—within the procedural constraints of the trial—about their motives demeans them to ordinary criminals who act out of self-interest rather than civil duty.

Judges, who demean civil disobedience to ordinary criminal acts, deprive democracy of its self-correcting potential. This potential is the very foundation of the law's claim to legitimacy. It deprives the democratic institutions of the valuable, justified, and constructive contribution that illegal actions can—under the above explained circumstances—make to democratic will-formation. The public can no longer consider reasonableness and justification of the dissenting voices of the disobedient protesters.

Judges are required to consider the climate emergency in very different judicial proceedings. The criminal prosecution of climate protesters is a particularly confrontational setting where individuals voluntarily put their human rights on the line.

Judges in all of these proceedings are in a particularly powerful role to frame the conflict. They also struggle to find the appropriate legal standards and reasonings faced with a looming existential crisis. By deciding what the law means for the individual case of climate protest, they also shape the perception of the wider public beyond that specific case. Ultimately, their position on what is lawful, necessary, and justifiable feeds into the media and political reception back into the broader public debates on how to make sense of the climate emergency. As Antoine Vauchez (2015:7) wrote for the European context: 'There are no areas of […] politics, economics, bureaucracy or civil society that have not been produced or coproduced to some extent by lawyers.' While the context and also the implications are different, the process of coproduction of the sense that we make of the climate emergency is ongoing, including through climate litigation and illegal protests and judges should consider democracy and the legitimacy of law as guiding values when they create or shut down opportunities for constructive dissensus. In addition, through the lens of the power/responsibility principle (Caney 2014), they have, because of their powerful role, second-order responsibilities to allow dissenting voices on the climate emergency to feed into the democratic process.

References

ADP Group (Paris Airports) v. Climate Activists. 2020. Court of First Instance of Bobigny, Tribunal Correctionnel (Fra.), available at https://climatecasechart.com/non-us-case/climate-activists-v-paris-airports/, accessed 7 Dec 2023.

American Psychological Association. 2020. Survey of 2020: 2/3 of all Americans experience climate anxiety, available at https://www.apa.org/news/press/releases/2020/02/climate-change, accessed 7 Dec 2023.

Amtsgericht Flensburg. 2022. [District Court Flensburg] Nov. 7, 2022–440 Cs 107 Js 7252/22. (Ger.).

Amtsgericht Heilbronn.2023. [District Court Heilbronn] Mar. 6, 2023–26 Ds 16 Js 4813/23. (Ger.).

Amtsgericht München. 2022. [District Court Munich] Sept. 16, 2022—1034 Ds 113 Js 124163/22 jug (Ger.).

Amtsgericht Tiergarten. 2022a. [District Court Tiergarten] Aug. 30, 2022a—422 Cs 231 Js 1831/22 (11/22) (Ger.).

Amtsgericht Tiergarten. 2022b. [District Court Tiergarten] Oct. 5, 2022b—(303 Cs) 237 Js 2450/22 (202/22). (Ger.).

Bamford, D. 2023. Can Climate Civil Disobedience be justified? *Think* 22 (64): 65–70.

Bayerisches Oberstes Landesgericht. 2023. [BayObLG] [Bavarian Higher Regional Court] Apr. 21, 2023, 205 StrafRechtsReport [StRR] 63 (2023) (Ger.).

Bedau, H. 1961. On civil disobedience. *Journal of Philosophy* 58: 653–665.

Bordeaux-Mérignac Airport v. Climate Activists. 2020. Criminal Court of Bordeaux (Fra.), available at https://climatecasechart.com/non-us-case/bordeaux-merignac-airport-v-climate-activists/, accessed 7 Dec 2023.

Brändlin A.-S. 2022. 'Museum climate protests spark debate on activism tactics', Deutsche Welle, 28 October, available at https://www.dw.com/en/museum-climate-protests-spark-debate-on-activism-tactics/a-63590402, accessed 7 Dec2023.

Brack, N. and R. Coman. 2024. 'Dissensus over Liberal Democracy: Concept-Building and Typology in this issue'.

Braithwaite, S. and S. Tenno. 2024. 'Environmental activists sentenced to years in prison over UK highway protest' CNN, 18 July 2024, Just Stop Oil: UK court sentences climate activists to prison for 4–5 years over highway protest | CNN, accessed 2 Sep 2024.

Brownlee, K. 2012a. *Conscience and Conviction: The case For Civil Disobedience*. Oxford: Oxford University Press.

Brownlee, K. 2012b 'Conscientious Objection, Civil Disobedience' in Andrei Marmor (ed), The Routledge Companion to Philosophy of Law, New York, NY: Routledge, 527–529.
Bundesverfassungsgericht. 2021. [German Federal Constitutional Court] Order of the First Senate of 24 March 2021 - 1 BvR 2656/18, 1 BvR 78/20, 1 BvR 96/20, 1 BvR 288/20 (*Neubauer*)
Caney, S. 2014. Two Kinds of Climate Justice: Avoiding Harm and Sharing Burdens. *The Journal of Political Philosophy* 22 (2): 125–149.
Celikates, R. 2016. Rethinking Civil Disobedience As A Practice of Contestation—Beyond the Liberal Paradigm. *Constellations* 23 (1): 37–45.
Chow, P.Y. 2022. The Change in Judicial Practice in Cases Concerning Civil Disobedience Protests and its Constitutional Significance. *Modern Law Review* 86: 927–950.
Climate Action Tracker (no date), available at https://climateactiontracker.org/, accessed 7 Dec 2023.
Cohen, C. 1971. *Civil Disobedience: Conscience, Tactics, and the Law*. New York: Columbia University Press.
Cour d'appel penale. 2020. [Criminal Appeals Court] Hearing, Sept. 22, PE19.000742/PCL (Switz.), available at https://www.findinfo-tc.vd.ch/justice/findinfo-pub/html/CAPE/Jug/20200909110410802_e.html, accessed 7 Dec 2023.
Credit Suisse Protesters Trial. 2020. Lausanne District Court, Court of Appeals in Geneva, Court of Appeals in Renens (Switz.), available at http://climatecasechart.com/non-us-case/credit-suisse-protesters-trial/, accessed 7 Dec 2023.
Dahl, R.A. 1989. *Democracy and its Critics*. New Haven and London: Yale University Press.
Delmas, C. 2019. *A Duty to Resist: When Disobedience Should be Uncivil*. London: Oxford University Press.
Deutschlandfunk. 2023. 'Die Proteste der „Letzten Generation"', 13 November, available at https://www.deutschlandfunk.de/letzte-generation-klima-proteste-aktivisten-100.html, accessed 7 Dec 2023.
Dryzek, J.S. 2000. *Deliberative Democracy and Beyond: Liberals, Critics, Contestations*. Oxford: Oxford University Press.
Dryzek, J.S., and S. Niemeyer. 2006. Reconciling pluralism and consensus as political ideals. *American Journal of Political Science* 50 (3): 634–649.
Eckes, C., P. Leino-Sandberg, and A. Ghavanini. 2024. The Dynamics of Powers in the European Union, Hart Publishing.
Eckes, C., P. Leino-Sandberg, and A. Wallerman Ghavanini. 2021. 'Conceptual framework for the project "Separation of Powers for 21st Century Europe (SepaRope)"', Amsterdam Law School Research Paper No. 2021-06, Amsterdam Centre for European Law and Governance Research Paper No. 2021-01, https://doi.org/10.2139/ssrn.3777334.
Elstub, S. 2018. Deliberative and Participatory Democracy. In *The Oxford Handbook of Deliberative Democracy*, ed. A. Bächtiger. Oxford: Oxford University Press.
Erastus-Obilo, B.G.A. 2006. The Place of the Explained Verdict in the English Criminal Justice System, Universal Publishers.
Extinction Rebellion UK, We Quit, post of 31 Dec 2022, available at: https://extinctionrebellion.uk/2022/12/31/we-quit/.
Forst, M. 2024. 'State repression of environmental protest and civil disobedience: a major threat to human rights and democracy', available at: https://unece.org/climate-change/press/un-special-rapporteur-environmental-defenders-under-aarhus-convention-releases, accessed on 2 September 2024
Gayle, D. 2021a. 'Drivers threaten Insulate Britain activists in Essex protests', The Guardian, 13 October, available at https://www.theguardian.com/environment/2021/oct/13/drivers-threaten-insulate-britain-activists-in-essex-protests, accessed 7 Dec 2023.
Gayle, D. 2021b 'Climate activists crossed the line with roadblocks, says minister', The Guardian, 5 October 2021, available at https://www.theguardian.com/environment/2021/oct/05/climate-activists-insulate-britain-roadblocks-kit-malthouse, accessed 7 Dec 2023.
Gayle, D. 2023. 'Insulate Britain activist jailed for eight weeks for contempt of court', The Guardian, 7 February, available at https://www.theguardian.com/environment/2023/feb/07/insulate-britain-activist-david-nixon-jailed-for-eight-weeks-for-contempt-of-court, accessed 7 Dec 2023.
Grant, N. et al. 2022. 'Climate Analytics, 1.5°C Pathways for the EU27: accelerating climate action to deliver the Paris Agreement', available at https://climateanalytics.org/media/1-5pathwaysforeu27-2022.pdf, accessed 7 Dec 2023.
Habermas, J. 1985. Civil Disobedience: Lidmus Test for the Democratic Constitutional State. *Berkeley Journal of Sociology* 30: 95–116.

Hickman, C., et al. 2021. Climate Anxiety in Children and Young People and Their Beliefs About Government Responses to Climate Change: A Global Survey. *The Lancet—Planetary Health* 5 (12): E863–E873.
Hodgson, C. and A. Hancock. 2023. 'EU must speed up emissions cuts to meet net zero climate target, says report', Financial Times, 25 June, available at https://www.ft.com/content/da82c1d0-3494-4f02-a435-c38c9dcf649c?desktop=true&segmentId=7c8f09b9-9b61-4fbb-9430-9208a9e233c8#myft:notification:daily-email:content, accessed 7 Dec 2023.
Hosking, G. 2019. 'The decline of trust in government', in Sasaki, M. (ed.), Trust in Contemporary Society. Leiden, The Netherlands: Brill, pp. 77–103.
IPCC. 2018. 'Special Report. Global Warming of 1.5 C'.
Keller, S., and B. Bornemann. 2021. New Climate Activism between Politics and Law: Analyzing the Strategy of the KlimaSeniorinnen Schweiz. *Politics and Governance* 9 (2): 124–134.
Ketcham, C. 2024. 'Europe's Crackdown on Environmental Defense is Silencing a Message the World Needs to Hear', New York Times, 18 August 2024, available at: Opinion | Europe's Crackdown on Environmental Defense Is Silencing a Message the World Needs to Hear - The New York Times (nytimes.com), accessed on 2 Sep 2024.
Kuper, S. 2023. 'How to tackle your inner climate denier', Financial Times, 23 November, available at https://www.ft.com/content/108727c5-abd0-4194-b961-2676257a34b9?desktop=true&segmentId=7c8f09b9-9b61-4fbb-9430-9208a9e233c8#myft:notification:daily-email:content, accessed 7 Dec 2023.
Kyllönen, S. 2014. Civil Disobedience, Climate Protests and a Rawlsian Argument for 'Atmospheric' Fairness. *Environmental Values* 23 (5): 593–613.
Lafont, C. 2020. *Democracy Without Shortcuts – A Participatory Conception of Deliberative Democracy*. Oxford: Oxford University Press.
Lambert D. 2022. 'Juries keep letting Extinction Rebellion off the hook—here's why', The Standard, 8 April, available at https://www.standard.co.uk/comment/juries-judges-extinction-rebellion-innocent-just-stop-oil-protests-climate-activists-b992610.html, accessed 7 Dec 2023.
Lefkowitz, D. 2007. On a Moral Right to Civil Disobedience. *Ethics* 117 (2): 202–233.
Mancilla, A. 2012. Noncivil disobedience and the right of necessity. *Krisis* 3: 3–15.
Mathiesen, K. 2023. 'Climate Activists have a new traget: Civilians', Politico, 2 May, available at https://www.politico.eu/article/climate-change-global-warming-earth-activists-have-a-new-target-civilians/, accessed 7 Dec 2023.
Minkkinen, P. 2020. Enemies of the People'? The Judiciary and Claude Lefort's 'SavageDemocracy. In *Constituent Power–Law Popular Rule and Politics*, ed. M. Arvidsson, L. Brännström, and P. Minkkinen, 27–42. Edinburgh: Edinburgh University Press.
Möllers, C. 2013. *The Three Branches: A Comparative Model of Separation of Powers*. Oxford: Oxford University Press.
Mouffe, C. 1996. Democracy, Power and the "Political." In *Democracy and Difference*, ed. S. Benhabib. Princeton: Princeton University Press.
Mouffe, C. 2000. The Democratic Paradox, Verso Books, pp. 80–108.
Mouffe, C. 2016. 'Democratic politics and the dynamics of passions', in K. Palonen, T. Pulkkinen and J. M. Rosales (eds.) The Ashgate research companion to the politics of democratization in Europe: Concepts and histories, Routledge, pp. 89–100.
Mureithi, A. 2023. 'For history to judge, not the jury': judge rules climate crisis 'irrelevant'', openDemocracy, 22 February, available at https://www.opendemocracy.net/en/insulate-britain-trials-climate-crisis-silas-reid-judge-court-protests/, accessed 7 Dec 2023.
Pateman, C. 1985. *The Problem of Political Obligation: A Critique of Liberal Theory*. Cambridge: Cambridge University Press.
Pineda, E. 2022. Beyond (and before) the Transnational Turn. *Democratic Theory* 9 (2): 11–36.
Plan B. 2023 'Judge Silas "Silencing" Reid defeated by show of solidarity for retired social worker arrested for holding up a sign', 17 May, available at https://planb.earth/wp-content/uploads/2023/05/PR-Judge-Reid-defeated.pdf, accessed 7 Dec 2023.
Basto, R.v. 2016. West London Magistrate's Court (UK), available at https://climatecasechart.com/non-us-case/r-v-basto/, accessed 7 Dec 2023.
Bramwell, R.v., et al. 2021. Southwark Criminal Court (UK), available at https://climatecasechart.com/non-us-case/r-v-bramwell-et-al-the-shell-six-case/, accessed 7 Dec 2023.

McKelvey, R v., and others. 2022. West London Magistrate's Court (UK), available at https://climatecasechart.com/non-us-case/r-v-mckelvey-and-others-doctors-for-xr-protest-on-lambeth-bridge/, accessed 7 Dec 2023.
Rancière, J. 2010. Dissensus, On Politics and Aesthetics, New York (Continuum)
Rawls, J. (1971) A Theory of Justice. Reprint, Harvard: Harvard University Press,
Raz, J. 1979. *Authority of Law*. Oxford: Clarendon.
Rozenberg, J. 2020. *Enemies of the People? How Judges Shape Society*. Bristol: Bristol University Press.
Schaafsma, G. 2024. Contestation in the Anthropocene - Climate Change and Civil Disobedience, PhD thesis, University of Amsterdam, available at: Contestation in the Anthropocene (uva.nl).
Scherhaufer, P., P. Klittich, and A. Buzogány. 2021. Between Illegal Protests and Legitimate Resistance. Civil Disobedience Against Energy Infrastructures. *Utilities Policy* 72: 101249.
Schmidt, M.G. 2019. Demokratietheorien. Eine Einführung, Wiesbaden: Springer Fachmedien.
Sovacool, B.K., and A. Dunlap. 2021. Anarchy, War, or Revolt? Radical Perspectives for Climate Protection, Insurgency and Civil Disobedience in a Low-Carbon Era. *Energy Research & Social Science* 86: 102416.
Take Down Macron Protester Cases. 2019. (Fra.), available at https://climatecasechart.com/non-us-case/state-v-delahalle-goinvic/, accessed 7 Dec 2023.
The Guardian. 2023. 'Climate activist who allegedly held sign directed at jurors may be charged', 4 April, available at https://www.theguardian.com/uk-news/2023/apr/04/climate-activist-trudi-warner-held-sign-telling-jurors-act-conscience-charged, accessed 7 Dec 2023.
The Kingsnorth Six Trial. 2008. Maidstone Crown Court (UK), available at http://climatecasechart.com/non-us-case/the-kingsnorth-six-trial/, accessed 7 Dec 2023.
Timlin, J. 2023. 'Climate change campaigner is jailed', Barnsley Chronicle, 21 April, available at https://www.barnsleychronicle.com/article/25139/climate-change-campaigner-isjailed#:~:text=David%20Nixon%2C%2036%2C%20was%20found,Britain%27s%20campaign%20of%20civil%20resistance, accessed 7 Dec 2023.
Trial of Angela Ditchfield. 2018. Cambridge Magistrates' Court (UK), available at https://climatecasechart.com/non-us-case/trial-of-angela-ditchfield/, accessed 7 Dec 2023.
UNEP. 2023. 'Emissions Gap Report 2023: Broken Record—Temperatures hit new highs, yet world fails to cut emissions (again)'.
Vauchez, A. 2015. *Brokering Europe: Euro-Lawyers and the Making of a Transnational Polity*. Cambridge: Cambridge University Press.
Waldron, J. 1999. *Law and Disagreement*. Oxford: Oxford University Press.

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