State v. Spokane County District Court: Use of the Necessity Defense to Address the Climate Emergency Through Civil Disobedience in Washington State

I. OVERVIEW

Reverend George E. Taylor has dedicated his life to the environmental movement.[1] On a national level, his activism includes voting for candidates focused on environmental issues, sending letters to United States senators and representatives, visiting government offices, and delivering petitions to public officials.[2] His engagement continues on the local level as he testified before his city council on statewide environmental railroad issues.[3] He urged the Spokane City Council to adopt health and safety measures to protect against the risks posed by coal trains and oil tankers and is actively working on a related initiative.[4] However, having had no material effect over the years, he organized a peaceful protest on the Burlington Northern Santa Fe railroad tracks.[5] After refusing to leave the tracks, he was charged with criminal trespass

1. State v. Spokane Cnty. Dist. Ct., 491 P.3d 119, 126 (Wash. 2021).
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.* at 121.

in the second degree and unlawful obstruction of a train.[6] Defendant Taylor testified that he took these actions because he believed them to be "necessary to prevent the imminent harms of climate change and train derailment," and as such raised the necessity defense.[7] In order to present this defense to a jury, he must demonstrate that a question of fact exists as to whether there were "reasonable legal alternatives" to violating the law.[8]

At trial in the district court, defendant Taylor offered the testimony of three expert witnesses who testified to the direct threat that coal and oil pose to the environment, the historic effectiveness of nonviolent civil disobedience, and the specific harms of train derailment.[9] The district court found this evidence, in tandem with Taylor's life experience, sufficient to create a question of fact and granted his motion to present the necessity defense to the jury.[10] Upon review, however, the Court of Appeals of Washington, Division 3, held that "[t]here are always reasonable alternatives to disobeying constitutional laws."[11] As such, there could be no question of fact as to whether there were "reasonable legal alternatives."[12] This was in direct opposition with a previous decision from Division 1 of the Court of Appeals, which held that the defendant in an analogous case had "created a question of fact as to whether there were reasonable legal alternatives by presenting his history of his failed attempts utilizing those alternatives."[13] Given this conflict between appellate courts, when defendant Taylor appealed, the Supreme Court of Washington granted discretionary review.[14] The court *held* that for purposes of the necessity defense, a legal alternative must be effective to be considered reasonable. *State v. Spokane Cnty. Dist. Ct.*, 491 P.3d 119, 122 (Wash. 2021).

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6. *Id.*; *see also* WASH. REV. CODE §§ 9A.52.080 and 81.48.020.
7. *Id.*
8. *Id.*
9. *Id.* at 122.
10. *Id.*
11. *Id.* at 121-22 (citing State *ex rel.* Haskell v. Spokane Cnty. Dist. Ct., 465 P.3d 343, 359 (Wash. Ct. App. 2020)).
12. *Id.* at 122.
13. *Id.* at 125 (citing State v. Ward, 438 P.3d 588 (Wash. Ct. App. 2019) (review denied)).
14. *Id.* at 122. At the appellate level, Washington has three geographic divisions of appellate courts. *Washington Court System*, WASH. CTS. https://www.courts.wa.gov/newsinfo/resources/?fa=newsinfo_jury.display&altMenu=Citi&folderID=jury_guide&fileID=system (last visited Jan. 21, 2021).

II. BACKGROUND

While a defendant has the right to present a defense, this right is not absolute and is subject to established rules of evidence and procedure.[15] The necessity defense specifically is an affirmative defense wherein the defendant establishes that it was necessary for them to have committed the crime.[16] In the state of Washington, the test for the appropriateness of presenting the necessity defense is whether the defendant can show, by a preponderance of the evidence:

> (1) [The defendant] reasonably believed the commission of the crime was necessary to avoid or minimize a harm, (2) the harm sought to be avoided was greater than the harm resulting from a violation of the law, (3) the threatened harm was not brought about by the defendant, and (4) no reasonable legal alternative existed.[17]

Washington is relatively unique in that there is no element of immediacy required for use of the necessity defense.[18] As such, the court did not need to go into a discussion as to whether the climate crisis presents an immediate harm. Thus, the issue addressed by this Note is centered around the fourth element of this test: whether a legal alternative must be effective to be reasonable.

A. State v. Ward—*Court of Appeals, Division 1*

In *State v. Ward*, Division 1 of the Court of Appeals held that a legal alternative must be effective to be reasonable.[19] In applying that standard to the facts before them, the court found that defendant Ward's evidence regarding his involvement in the environmental movement and extensive expert testimony regarding the climate emergency were sufficient to create a question of fact as to whether reasonable legal alternatives existed.[20] Defendant Ward had been charged with burglary in the second degree, criminal sabotage, and criminal trespass in the second degree when he was arrested after breaking into a pipeline facility and turning off a valve

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15. *Spokane Cnty.*, 491 P.3d at 124-25.

16. *See generally* Joseph Rausch, *The Necessity Defense and Climate Change: A Climate Change Litigant's Guide*, 44 COLUM. J. ENV'T L. 553 (2019); *see also* William P. Quigley, *The Necessity Defense in Civil Disobedience Cases: Bring in the Jury*, 38 NEW ENG. L. REV. 3, 11 (2003) ("The basic theory of the necessity defense is that the defendant properly exercised her or his free will and violated a law in order to achieve a greater good or prevent a greater harm").

17. *Spokane Cnty.*, 491 P.3d at 125 (citing State v. Gallegos, 871 P.2d 621 (1994)).

18. Quigley, *supra* note 16, at 12.

19. 438 P.3d 588, 595 (Wash. Ct. App. 2019).

20. *Id.*

regulating the flow of tar sands into the United States.[21] At trial, he asserted the necessity defense.[22]

At the time of his arrest, he had been involved in various environmental movements for more than forty years and had seen most of his efforts fail.[23] The evidence he offered for his defense included scientific evidence documenting how climate change is primarily a result of how human activity causes greenhouse gas emissions, the contribution of burning tar sands oil to these emissions, and the impacts of climate change.[24] He also offered the curriculum vitae for eight proposed expert witnesses, one of whom testified that the influence of the fossil fuel's industry over political institutions, "renders traditional legal avenues unreasonable as a means of addressing the climate emergency."[25]

In determining whether he had presented sufficient evidence to demonstrate that a question of fact existed as to whether there was a reasonable legal alternative, the court turned to *State v. Parker*.[26] Defendant Parker was found with a gun after a prior conviction for second-degree assault, and as such was convicted of first-degree unlawful possession of a firearm.[27] He attempted to assert the necessity defense, testifying that he carried the gun because he had previously been shot and his assailants were still at large.[28] The court found he was ineligible for presentation of the defense for a variety of reasons, including the fact that he had never contacted the police regarding the original incident.[29] Through their analysis, they established a framework for analyzing whether a reasonable legal alternative existed: "that he actually tried the alternative or had no time to try it, or that a history of futile attempts revealed the illusionary benefits of the alternative."[30] The origin of this rule is *State v. Jeffrey*, which held that reasonableness was to be assessed based

21. *Id.* at 592.
22. *Id.*
23. *Id.* at 594.
24. *Id.* at 592.
25. *Id.* at 595.
26. *Id.*
27. State v. Parker, 110 P.3d 1152, 1153 (Wash. Ct. App. 2005).
28. *Id.*
29. *Id.* at 1154.
30. *Id.* (citing United States v. Harper, 802 F.2d 115, 118 (5th Cir. 1986) (quoting United States v. Gant, 691 F.2d 1159, 1164 (5th Cir. 1982))).

on the facts of the case.[31] Both *Parker* and *Jeffrey* are cited in the necessity defense instruction's comments as the basis for this element of the test.[32]

In applying this test to the fact pattern before them, the court in *Ward* determined that defendant Ward sufficiently demonstrated a question of fact as to the existence of a reasonable legal alternative.[33] His extensive experience with activism demonstrated a long history of engagement with the political process, which is generally considered the primary avenue for inducing legislative action.[34] In contrast with defendant Parker, defendant Ward offered evidence that he attempted relevant alternatives and that they had been ineffective.[35] As such, he successfully established a question of fact to be resolved by a jury and was entitled to present the necessity defense.[36]

B. State ex rel. Haskell v. Spokane County District Court—*Court of Appeals, Division 3*

While the fact patterns were highly analogous, Division 3 of the Court of Appeals took a very different approach in *State ex rel. Haskell v. Spokane County District Court*.[37] While defendant Taylor relied on the similarity of his case to the earlier decision in *Ward* when arguing his right to present the necessity defense, the appellate court reviewing his case turned to the Montana Supreme Court's decision in *State v. Higgins*.[38] Similar to both defendants Ward and Taylor, Higgins was a climate activist who engaged in the political process by lobbying legislators and organizing rallies.[39] He also engaged in civil disobedience as a tool for public education.[40] The state charged Higgins with criminal trespass and felony criminal mischief when he entered a pipeline facility to shut off the flow of oil, damaging property in the process.[41] While Washington and

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31. *See generally* 889 P.2d 956 (Wash. Ct. App. 1995).

32. 11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 18.02, at 292 (4th ed. 2016).

33. State v. Ward, 438 P.3d 588, 595 (Wash. Ct. App. 2019).

34. *Id.*

35. *Id.*

36. *Id.*

37. 465 P.3d 343, 350 (Wash. Ct. App. 2020).

38. *Id.* at 349.

39. *Id.* (citing State v. Higgins, 458 P.3d 1036, 1038 (Mont. 2020)).

40. *Id.* (citing *Higgins*, 458 P.3d at 1038).

41. *Id.* Both defendants Higgins and Ward were involved in a coordinated movement to turn off the flow of oil through pipelines across the country. *See* Michelle Nijhuis, *'I'm Just More Afraid of Climate Change Than I Am of Prison,'* N.Y. TIMES MAG. (Feb. 13, 2018), https://www.nytimes.com/2018/02/13/magazine/afraid-climate-change-prison-valve-turners-global-warming.html.

Montana both use versions of the common law necessity defense, Montana's rule uses different elements and language:

> (1) They were faced a choice of evils and chose the lesser evil; (2) they acted to prevent imminent harm; (3) they reasonably anticipated a direct causal relationship between his action and the harm averted; and (4) they had no reasonable lawful alternatives to breaking the law.[42]

The court in *Higgins* ultimately held that the defense was unavailable to him because the circumstances surrounding his action lacked the requisite immediacy of harm.[43] However, the court noted that even if this element had been satisfied, the fourth element should be understood consistent with *United States v. Schoon*, which held that the necessity defense is unavailable for cases of civil disobedience in which the illegal action taken was violating a law that was not the object of the protest.[44] The court in *Schoon* was considering the assertion of the necessity defense by defendants who were protesting American involvement in El Salvador by splashing simulated blood throughout an Internal Revenue Service office and interfering with their ability to operate.[45] The defendant protestors were charged with obstructing activities of the IRS and attempted to assert the necessity defense arguing "their acts [. . .] were necessary to avoid further bloodshed in that country."[46] The court held the necessity defense to be unavailable because the laws governing American involvement in El Salvador were not the laws actually being violated by the protestors.[47] Focusing on this inconsistency, the court's opinion drew a bright-line distinction between direct and indirect civil disobedience, arguing that to apply the necessity defense in cases of indirect civil disobedience would subvert the utilitarian theory behind it as "forgiv[ing] a crime taken to avert a lesser harm would fail to maximize social utility."[48]

The court proffered an analysis of three prongs of the common law defense to demonstrate their assertion that the necessity defense is not available in cases of indirect protest against congressional policy.[49] Regarding the balance of harms, the court contends that "the mere existence of a policy or law validly enacted by Congress cannot constitute

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42. *Higgins*, 458 P.3d at 1040.
43. *Id.* at 1041.
44. 971 F.2d 193, 196 (9th Cir. 1991).
45. *Id.* at 195.
46. *Id.*
47. *See id.* at 196.
48. *Id.* at 197.
49. *Id.* at 198.

a cognizable harm."[50] While the opinion notes that general harms may result from a targeted law or policy, a generalized harm of this nature would be too insubstantial to be legally cognizable.[51] Second, the indirect nature of political necessity cases such as these renders it unlikely to actually abate the alleged harm.[52] This common law doctrine developed in circumstances where the nexus between the act taken and the desired result is quite close, as the illegal act taken alone resolves the harm.[53] The third reason is that "legal alternatives will never be deemed exhausted when the harm can be mitigated by congressional action."[54] The court assumes that "lawful political action" is always a reasonable alternative given the potential for Congress to change its mind.[55]

Agreeing with the social policies outlined by the court in *Schoon*, the court in *Higgins* adopted their line of reasoning.[56] Because Higgins protested climate policy, and not the specific laws regarding trespass and criminal mischief that he was charged with, he was not permitted to assert the necessity defense.[57] The Court of Appeals, Division 3, in *State ex rel. Haskell* similarly found the arguments of *Schoon* to be persuasive and applied the rule in the same way.[58] Because defendant Taylor protested broader policies regarding climate change and the danger of coal and oil trains, and not the laws regarding criminal trespass and unlawful obstruction of a train with which he was charged, the court found that this was a circumstance of indirect civil disobedience.[59] Following the approach taken in *Schoon* and adopted in *Higgins*, the Washington court found the necessity defense to be unavailable and held that the district court had erred in granting defendant Taylor's motion to present.[60] In their reasoning, they explicitly rejected the approach taken by *Ward*, arguing that courts cannot permit the necessity defense when individuals intentionally place themselves in conflict with constitutional laws "merely because their law-abiding efforts are unlikely to effect a change in policy

50. *Id.*
51. *Id.*
52. *Id.*
53. *Id.*
54. *Id.*
55. *Id.* at 199.
56. State v. Higgins, 458 P.3d 1036, 1038 (Mont. 2020).
57. *Id.* at 1038-39.
58. State *ex rel.* Haskell v. Spokane Cnty. Dist. Ct., 465 P.3d 343, 349-50 (Wash. Ct. App. 2020).
59. *See id.*
60. *Id.* at 346.

as soon as they would like."[61] The court took the position that the very fact that defendant Taylor testified to the alternatives he pursued demonstrates that reasonable legal alternatives exist.[62]

III. COURT DECISION

In the noted case, the Supreme Court of Washington granted defendant Taylor's motion for discretionary review to resolve the conflict between Appellate Divisions 1 and 3 as to what constitutes a "reasonable legal alternative" for proper assertion of the necessity defense.[63] In considering whether a court has denied a defendant's constitutional right to present a defense, the issue is reviewed *de novo*.[64] Here, the court relied on the clear language of the jury instructions along with previous decisions interpreting this prong of the necessity defense requirements from across the appellate divisions to hold that legal alternatives must be effective to be reasonable.[65] In applying this principle to the facts before them, the court found that defendant Taylor had successfully presented a question of fact as to whether a reasonable alternative existed, and granted his motion to present the necessity defense.[66]

A. Reasonable Legal Alternatives Must Be Effective

While the court offered very little discussion of the policy implications underlying this issue, they began by firmly rejecting the Division 3 Appellate Court's broad assertion that "there are always reasonable legal alternatives to disobeying constitutional laws."[67] To demonstrate the flaw, the court gave the classic example of a hiker caught in a snowstorm who breaks into a cabin to survive.[68] The trespass law is constitutional, yet as the court said, they would not be denied presentation of the defense. To find so, holding the appellate court's statement as true would undermine the purpose of the necessity defense in its entirety.[69]

In reaching their ultimate holding, the court turned first to the language itself, as when that language is clear, it is not the role of the courts

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61. *Id.* at 350 (citing United States v. Ayala, 289 F.3d 16, 26-27 (1st Cir. 2002) (quoting United States v. Maxwell, 254 F.3d 21, 29 (1st Cir. 2001))).
62. *Id.* at 351.
63. State v. Spokane Cnty. Dist. Ct., 491 P.3d 119, 121-22 (Wash. 2021).
64. *Id.* at 124.
65. *Id.* at 125.
66. *Id.* at 126.
67. *Id.* at 121-22.
68. *Id.* at 125.
69. *Id.*

to construct a different interpretation.[70] The language of the jury instructions is "reasonable legal alternative," and the court found that the deliberate inclusion of the word "reasonable" creates a distinct additional requirement.[71] As such, an alternative cannot simply be available in the abstract; to give the term "reasonable" meaning, the alternatives considered must also be effective.[72] In addition to solely proffering their own understanding of "reasonable legal alternative," the court also referred to the comments of the instructions. The court noted that the instruction's comments clarify that reasonable is, in and of itself, a requirement.[73] Furthermore, opinions from across all three divisions of the Court of Appeals demonstrate that this interpretation has been held consistently across the state.[74]

The court described how in *Ward*, Division I held that a history of failed attempts to utilize alternatives was sufficient to demonstrate a question of fact as to whether there were reasonable legal alternatives.[75] Division 1 noted that defendant Ward's more than forty years of involvement in the environmental movement and the corresponding evidence of these actions' failure to create significant progress are sufficient to demonstrate a question of fact as to the reasonableness of these alternatives.[76] The court found this holding in *Ward* to be consistent with Division 2's holding in *Parker*, which held that the standard for demonstrating a reasonable legal alternative exists is whether the defendant actually tried the alternative, had no time to, or had a history of futile attempts.[77] The court approved the consistent application of this rule across a variety of fact patterns, because the determination of what constitutes an alternative is made on a case-by-case basis.[78] Not to be left out, the court included a brief case from Division 3 that also analyzed the notion of reasonableness as a distinct requirement to be determined by the specific facts of the case, which is consistent with the other two divisions.[79]

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70. *Id.*
71. *Id.* (citing 11 WASH. PRAC.: PATTERN JURY INSTR.: CRIM. 18.02 (5th ed. 2021)).
72. *Id.*
73. *Id.*
74. *Id.* at 125.
75. *Id.*
76. *Id.* (citing State v. Ward, 438 P.3d 588, 588 (Wash. Ct. App. 2019)).
77. *Id.* at 125-26 (citing State v. Parker, 110 P.3d 1152, 1144 (Wash. Ct. App. 2005) (quoting United States v. Harper, 802 F.2d 115, 118 (5th Cir. 1986) (quoting United States v. Gant, 691 F.2d 1159, 1164 (5th Cir. 1982)))).
78. *Id.* at 126.
79. *Id.*

B. Taylor Successfully Demonstrated that a Question of Fact Exists as to Whether Reasonable Alternatives Existed

As extensively noted in the court's discussion of the correct legal principle, the determination of whether an alternative is effective is a fact dependent inquiry.[80] In making its determination, the court asked whether "he had actually tried the alternative or had no time to try it, or that a history of futile attempts revealed the illusory benefits of the alternative."[81] The court found the evidence proffered by defendant Taylor regarding his engagement in the democratic process throughout the years, with little to show for it, had successfully demonstrated a question of fact as to whether there were reasonable legal alternatives.[82]

Consistent with its analysis, the court began its application of the rule to defendant Taylor by examining the specific facts of his case.[83] Defendant Taylor spent much of his life working to call attention to the harms of climate change, and a great deal of his work has been done through his engagement with the political process, including voting consistently for candidates with an environmental platform, communicating with his representatives on both a local and national level, and getting involved with the development of local legislation by testifying on issues and working on state initiatives.[84] He also presented an expert witness who testified to the effectiveness of nonviolent resistance and that defendant Taylor had "taken reasonable legal alternatives to civil disobedience prior to the date of his arrest, without success."[85] In reviewing these facts through a holistic lens, the court held that he offered sufficient evidence to create a question of fact for the jury as to whether he had legal alternatives and granted his motion to present the necessity defense.[86]

IV. ANALYSIS

The specific language of the necessity defense in Washington puts the Washington Supreme Court in a unique position to permit its use in

80. *Id.*
81. *Id.* at 126 (citing State v. Parker, 110 P.3d 1152, 1144 (Wash. Ct. App. 2005) (quoting United States v. Harper, 802 F.2d 115, 118 (5th Cir. 1986) (quoting United States v. Gant, 691 F.2d 1159, 1164 (5th Cir. 1982)))).
82. *Id.* at 126, 127.
83. *Id.* at 126.
84. *Id.*
85. *Id.*
86. *Id.* at 127.

cases of indirect civil disobedience. Unlike many jurisdictions around the country, the jury instructions contain no language imposing requirements on the immediacy of the harm to be avoided, nor the effectiveness of the action taken.[87] As such, the court is not required to undertake an extensive analysis of the proximity of defendant Taylor's protest to the harms of climate change and train derailment. This is particularly meaningful in the context of environmental activism, as courts have typically been slow to accept scientifically established causal relationships when looking at issues regarding immediacies of harm to ecosystems and the human communities within them.[88] However, rather than go into the more highly politicized conversation around policy as was laid out in the Division 3 opinion, the court focused on the specific language of the pattern jury instructions.[89]

By relying on the specific language of the instructions and previous interpretations from the other divisions, the court limited partisan criticism. Almost entirely devoid of any policy discussion, the court's decision to write in this manner is particularly striking given that the Division 3 Appellate Court, which they reviewed and overturned, had denied defendant Taylor's motion to present the necessity defense strictly on the policy basis of the facts' characterization as indirect civil disobedience.[90] While seemingly unique, it is not entirely surprising given the potentially contentious separation of powers issues it calls into question.

A. Separation of Powers Concerns

Separation of powers conflicts arise when one of the three branches of government oversteps its authority, interfering with the other branches' freedom and ability to carry out their own functions. While the Constitution includes no explicit separation of powers article, it is the principle underlying the theory of checks and balances and is critical in protecting against an undemocratic consolidation of power.[91] While often

87. *The Climate Necessity Defense: A Legal Tool for Climate Activists*, CLIMATE DISOBEDIENCE CTR. (last visited Dec. 3, 2021), https://www.climatedisobedience.org/necessity defense.

88. Maria L. Banda, *Climate Science in the Courts*, ENV'T L. INST. at 11 (Apr. 2020), https://legacy-assets.eenews.net/open_files/assets/2020/04/24/document_cw_01.pdf.

89. *Spokane Cnty.*, 491 P.3d at 128.

90. State *ex rel.* Haskell v. Spokane Cnty. Dist. Ct., 465 P.3d 343, 349-50 (Wash. Ct. App. 2020).

91. Jon D. Michaels, *An Enduring, Evolving Separation of Powers*, 115 COLUM. L. REV. 515, 525-26 (2015).

discussed in the context of legislative overreach, this particular split in court opinion turns on whether the permitting of the necessity defense in cases of indirect civil disobedience is an overstep of judicial discretion.[92]

The court's holding in the noted case puts a critical question before the jury: whether the lawful democratic process alone provides a reasonable alternative to civil disobedience in the context of the climate crisis. By holding the necessity defense available to those protesting legislative inaction, the court essentially gave a jury the freedom to bring into question the efficacy of our country's legislative process. This was a particular concern emphasized in *State ex rel. Haskell* by Division 3, which noted that these policy considerations were the primary drivers behind their adoption of the approach taken in *Schoon* and *Higgins*.[93] The opinion referred to the historical development of the common law defense to argue that "the necessity defense was never intended to permit judges or juries to allow people to ignore constitutional laws."[94] The court argued that because the crime committed was motivated by the defendant's conscious and voluntary decision to violate a constitutional law, the necessity defense should not be available.[95] To allow it in cases of political protest "would be tantamount to giving an individual carte blanche to interpose a necessity defense whenever he becomes disaffected by the workings of the political process."[96]

While these concerns have a reasonable basis, they are an overly broad interpretation of this holding. This ruling does not permit every defendant charged while in the course of indirect civil disobedience to successfully evade prosecution.[97] Rather, it allows a jury to evaluate the reasonableness of the action taken, including consideration of whether the traditional political process is effective in actualizing the change desired. The critical distinction is that it is not the court making that decision, but rather a jury of the public. Those who compose a jury also represent the general public of which the legislature is designed to serve. The jury has complete discretion to find that the legislative process is an adequately effective reasonable alternative.

The jury here is merely applying the standard of a reasonable actor in the circumstances of the defendant.[98] This approach is well-established

92. State *ex rel.* Haskell, 465 P.3d at 350.
93. *Id.*
94. *Id.* at 351.
95. *Id.* at 350.
96. *Id.*
97. *See* State v. Spokane Cnty. Dist. Ct., 491 P.3d 119, 128 (Wash. 2021).
98. *Id.* at 127-28.

across almost every body of law and, as such, presents no genuine issue of judicial overstep.[99]

B. Implications for Environmental Activism

With a public that is increasingly in favor of legislative action against climate change,[100] this holding presents a significant opportunity for environmentalists in Washington to utilize civil disobedience as a tool of activism. However, the rule as articulated in *Parker* has unique complications when applied to different activist demographics. The rule requires the defendant to demonstrate that "he had actually tried the alternative or had no time to try it, or that a history of futile attempts revealed the illusionary benefits of the alternative."[101] Both *State v. Ward* and *Spokane Cnty.* present cases where the defendant has spent decades of their lives committed to engagement with the environmental movement.[102] As such, they were both able to demonstrate that they had considerable experience actually engaging with alternative options, to no avail.[103] As younger activists will not have the same opportunity to demonstrate analogous facts, their ability to create a question of fact as to this issue may be limited to the two other elements. However, given the lack of litigation addressing this issue, it is unclear how this body of case law will be applied.

One point of uncertainty is that the instruction is not clear as to whether "a history of futile attempts" must be taken by the defendant, or if they can reference the activities of the whole environmental movement over time.[104] The evidence proffered in *Ward* and *Spokane Cnty.* was limited to the individual actions taken by the respective defendants.[105] As such, it is undetermined whether a defendant would be allowed to submit evidence of actions taken by others. An additional issue is whether a court would find that there is "no time to try it."[106] Addressing this element would require the court to engage in a scientific discussion about the

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99. *See* David Zaring, *Rule by Reasonableness*, 63 ADMIN. L. REV. 525, 535-49 (2011).

100. Alec Tyson & Brian Kennedy, *Two-Thirds of Americans Think Government Should Do More on Climate,* PEW RSCH. CTR. (June 23, 2020), https://www.pewresearch.org/science/2020/06/23/two-thirds-of-americans-think-government-should-do-more-on-climate/.

101. State v. Parker, 110 P.3d 1152, 1154 (Wash. Ct. App. 2005) (citing United States v. Harper, 802 F.2d 115, 118 (5th Cir. 1986) (quoting United States v. Gant*,* 691 F.2d 1159, 1164 (5th Cir. 1982))).

102. 438 P.3d 588, 595 (Wash. Ct. App. 2019); 491 P.3d at 126.

103. *Ward*, 438 P.3d at 595; *Spokane Cnty.*, 491 P.3d at 127.

104. *Parker*, 110 P.3d at 1154.

105. *See Ward*, 438 P.3d 588; *see also Spokane Cnty.*, 491 P.3d at 119.

106. *Parker*, 110 P.3d at 1154.

timeline of climate change, which a court would likely find to be beyond its mandate.

V. CONCLUSION

Environmental activism cannot be defined in terms of one specific action; rather, it is an incredibly diverse set of movements with a common goal. This results in both intentional and unintentional conflicts with the judiciary, as the legislative and executive branches fail to take the action necessary to avert the climate crisis. This instance is one where the existing legal framework can be utilized to protect these frontline activists. This case demonstrates how advocates have the creativity and skill to reinterpret existing laws for the purpose of protecting environmental activists. Where defendant Taylor was arrested for protesting a lack of legislative response, his successful argumentation of the necessity defense demonstrates how frameworks that have been in place for centuries can be adapted to allow those within the legal system to advocate for environmental reform.

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