

NORMATIVE ORDERS

Forschungszentrum der Goethe-Universität Frankfurt am Main

Normative Orders Working Paper

01/2023

Climate Crimes – A Critique

Christoph Burchard and Finn-Lauritz Schmidt

Forschungszentrum „Normative Ordnungen“ der Goethe-Universität Frankfurt am Main
www.normativeorders.net

Goethe-Universität Frankfurt am Main
Max-Horkheimer-Str. 2, 60323 Frankfurt am Main



This work is licensed under the Creative Commons Attribution-Non-Commercial-No Derivative Works 3.0 Germany License. To view a copy of this license, visit http://creativecommons.org/licenses/by-nc-nd/3.0/de/deed.en_GB.

A GERMAN VERSION OF THE PAPER WILL BE PUBLISHED IN THE EDITED VOLUME "KLIMASTRAFRECHT", HELMUT SATZGER/NICOLAI VON MALTITZ (EDS.), EXPECTED 2023. THIS ENGLISH VERSION HAS BEEN REWRITTEN SIGNIFICANTLY TO IMPROVE READABILITY AND TO ACCOUNT FOR ENGLISH TERMINOLOGY.

I. INTRODUCTION

The climatological fact that the last eight years have been the warmest on record¹ is another warning sign that man-made climate change is very real. All skepticism about alarmism notwithstanding, we – as a society, as citizens, as academics – should not shy away from speaking of an impending climate crisis, even an imminent climate catastrophe. This makes it ever more important to protect a habitable climate by all means available, including by criminal law and justice.² Therefore, it may come at a surprise that we aim at critiquing climate crimes in this paper – or to be more precise: we aim at critiquing climate crimes that are conventionally conceived and construed and that aim at the prevention or at least mitigation of potentially catastrophic climate change.

As we will argue in this paper, a critical approach to climate crimes (again: when we speak about “climate crimes”, we mean climate crimes conventionally conceived and construed) may just benefit and effectuate the protection of a habitable climate. Climate crimes that are hastily (mis-)understood as the “sharpest sword” of human societies (as the ultima ratio principle would have it) can indeed have dysfunctional effects. They can stand in the way of the necessary transformation of our societies; they can appease us and induce unwarranted (self-)conciliation; and they can even protect “the powerful” (as in the “major climate sinners” – to use a morally charged term; or as in the “major climate criminals” – to analogize from international criminal justice). Not least against the background of the poor yield of environmental crimes, which once were introduced with comparably high promises, we not only put a question mark behind the hope that the climate crisis can be averted or at least mitigated by means of criminal law and justice. Rather, we dread that (ill-conceived) climate crimes –

¹ Provisional State of the Global Climate 2022, World Meteorological Organization [WMO], https://library.wmo.int/doc_num.php?explnum_id=11359.

² Helmut Satzger, “Alle sprechen vom Klimaschutz – nur nicht die Strafrechtswissenschaft!”, in Bondi et al. (eds.) *Studi in onore di Lucio Monaco* (Urbino: Urbino University Press, 2020), 1001. Also Wolfgang Frisch, “Strafrecht und Klimaschutz. Möglichkeiten und Grenzen eines Beitrags des Strafrechts zum Klimaschutz nach Maßgabe internationaler Klimaübereinkünfte”, *Goldammer’s Archiv für Strafrecht* (2015): 427. Forerunners from the Anglo-American debate, which is more criminological-environmental sociological than criminal jurisprudential, include Mark Byrne, “Can Responsibility for Climate Change Damage be Criminalised?”, *Carbon & Climate Law Review* (2010): 278, p. 283 ff.; Rob White, *Climate Change Criminology* (Bristol: Bristol University Press, 2020) and Ronald C. Kramer, *Carbon Criminals, Climate Crimes* (New Brunswick: Rutgers University Press, 2020).

or an insufficiently far-reaching discussion about them – would deceive us into believing that by doing the normatively right thing (protecting a habitable climate also by means of criminal law) we are taking the factually necessary actions (tackling the problems and risks at hand) (see II.). We therefore suggest thinking of climate protection not from the perspective of climate crimes, but rather from the perspective of planetary climate societies; it is from the latter that we critically reflect upon the former, not vice versa (for a brief outlook, see IV. below).

Our critique of climate crimes, then, is a constructive and a limited one. We will not entertain every angle of critique. We will rather illustrate the (all but self-evident, and indeed highly contentious) pre-conceptions of a climate crimes approach to climate crisis to then concentrate on their inherently delicate parts. Sharing its premises *arguendo*, we will not take a critical look at climate criminal justice *in toto*, but merely at climate crimes that are conventionally conceived and construed and which are intended to avert or at least mitigate climate change and which thereby, by implication, essentially aim at moderately transforming our conception of crime, justice, and society under the conditions of climate change (see II.).

II. CLIMATE CRIMES CONVENTIONALLY CONCEIVED AND CONSTRUED

Let us for first turn to that which we are critical about: climate crimes in the narrower sense as is crimes intended for the protection of a habitable climate, the prevention or likely rather mitigation of likely disastrous climate change. These crimes form but a part of what has been labeled “climate criminal law” (“*Klimastrafrecht*” in German)³. We will first offer some classificatory and then some substantial conceptualizations (see 1. and 2.), before positioning our critique, among other things, in terms of criminal law theory and how our current “age” is being diagnosed (below 3.). In doing so, we will bring to the fore the (in an analytical, not a pejorative sense) ideological backdrop of climate crimes.

1. Conceptualizations

Climate criminal justice in the broadest sense refers to the legislation, administration and adjudication of criminal laws related to the “Anthropocene”, i.e. in an age in which humans have become the decisive factor influencing ecological processes on earth, especially in which we have brought about different ecological crises – like climate change.⁴ Understood

³ Since this is essentially still an imagination, the following should be written in the subjunctive throughout. Not only for stylistic reasons we refrain from doing so.

⁴ The term Anthropocene first appears – as far as is evident – in Paul J. Crutzen, “Geology of mankind”, *Nature* 415 (2002): 23, p. 23.

accordingly, climate criminal justice is a guiding concept⁵: it is directing our attention to the diverse and sometimes contradictory challenges that “the” criminal law must face under conditions of possibly disastrous climate change. In doing so, climate criminal justice casts a (limited and limiting) spotlight on the entire criminal justice system in terms of politics, policies, doctrines, theory, and practice (e.g. as regards the general part and the special part of substantive criminal law, as regards criminal punishment and alternative sanctions, as regards criminal procedure including mutual legal assistance, as regards criminology, etc.).⁶

Climate crimes in a broad sense form part of climate criminal justice. They comprise the sum of all legal norms, which establish or exclude the criminal (in a broad Anglo-American sense⁷ as in *malum in se et prohibitum* or as in bringing together “core” and regulatory offenses⁸) accountability of possible offenders (human beings, but possibly also other actors like corporations⁹) – and which seek to either govern (prevent/mitigate) climate change or address its consequences through behavioral standards (“Do not emit carbon dioxide! Do not destroy carbon sinks!”) and sanctions.

We therefore distinguish between *climate change induced crimes* (“*Klimafolgenstrafrecht*” in German) and *climate change prevention crimes* (“*Klimawandelpräventionsstrafrecht*” as a delightful German neologism¹⁰). This article is about the latter. The former address socially

⁵ Helmut Satzger and Nicolai von Maltitz, “Das Klimastrafrecht - ein Rechtsbegriff der Zukunft”, *Zeitschrift für die Gesamte Strafrechtswissenschaft* 133(1) (2021): 1, p. 1 conceive climate criminal law “as a legal concept of the future”.

⁶ Compiling unsorted examples: coping with large migration movements in the case of famines caused by climate change; new criminal offences or criminal law that needs to be re-evaluated, for example in the case of so-called “water theft”, “climate change denial campaigns” or “greenwashing”; readjustment of the *actus reus* in terms of conduct, circumstance, causation (on this Helmut Satzger, “Umwelt- und Klimastrafrecht in Europa – die mögliche Rolle des Strafrechts angesichts des „Green Deal“ der Europäischen Union”, in Engelhart et al. (eds.) *Digitalisierung, Globalisierung und Risikoprävention: Festschrift für Ulrich Sieber zum 70. Geburtstag* (Berlin: Duncker & Humblot 2022), p. 1276 f.), consequences (on this Satzger/v. Maltitz, n. 5 above, p. 11) etc. including a shift towards strict liability offences (as a well-known characteristic of so-called “modern criminal law” in the “risk society”, on this Cornelius Prittowitz, *Strafrecht und Risiko* (Frankfurt am Main: Klostermann, 1993) p. 239 ff.); partial independence of criminal liability from administrative permits, specifically a non-accessorial design of climate crimes (see also III.2. below.); implementation of specific “smart sanctions” to compensate for climate-damaging behaviour (e.g. through reforestation; Satzger, n. 2 above, p. 1007); strengthening of international cooperation in criminal matters to deal with transnational climate crimes; establishment of detention conditions that comply with human rights in times of extreme heat waves, cf. Laurie L. Levenson, “Climate Change and the criminal Justice System”, *Environmental Law* 51(2) (2021), 333 and “Local Prosecution in the Era of Climate Change”, *Harvard Law Review* 135(1) (2022), 1544, p. 1548 ff.

⁷ On the perspective of decriminalization in relation to climate protests, see Mathias Bönnte, “Ziviler Ungehorsam im Klimanotstand”, *Onlinezeitschrift für Höchstrichterliche Rechtsprechung zum Strafrecht* (2021): 161, p. 172; Joseph Rausch, “The Necessity Defense and Climate Change: A Climate Change Litigant’s Guide”, *Columbia Journal of Environmental Law* 44(2) (2019): 553, p. 556 ff.

⁸ Satzger/von Maltitz, n. 5 above, p. 1, rightly argue for such a broad concept of climate crimes.

⁹ Fingerprints in Art. 6, 7 of the Proposal for a Directive of the European Parliament and of the Council on the protection of environment through criminal law and replacing Directive 2008/99/EC, COM (2021) 851 final (Dec. 15, 2021).

¹⁰ In the following, we mean precisely these climate change prevention crimes („*Klimawandelpräventionsstrafrecht*“) when we write of climate crimes.

harmful behavior that only occurs or will occur (increasingly) because of climate change¹¹ and/or only experiences its specific social harm as a result of it.¹² In contrast,¹³ climate change prevention crimes are intended to prevent or mitigate man-made climate change¹⁴ by addressing its causes. They criminalize (speaking strictly analytically and about the *lex lata et ferenda*) direct or indirect participation (1) in the illegal emission of greenhouse gases¹⁵ or (2) the illegal destruction of natural sinks (including forests, peatlands, oceans and polar regions).¹⁶ Be it during the actual degradation of a habitable climate (driving an ordinary truck), phases leading up to it (producing an ordinary truck),¹⁷ or phases in their aftermath (buying goods that were transported with said truck)¹⁸.

2. Transformations and the Political

Climate crimes are driven by – to use *Satzger's* words – “climate degradation posing a serious threat to all of humanity, to the plant and animal life surrounding it, and to all cultural achievements.”¹⁹ The prevention or mitigation of man-made climate change will only be achieved through profound transformations of our social, economic, political, etc. *status quo*. According to its proponents, climate crimes are to and will indeed make a decisive contribution to this.²⁰ Among other things, climate crimes are meant both to create a (excuse the

¹¹ Satzger/von Maltitz, n. 5 above, p. 1.

¹² In this context, so-called green criminology refers to the struggle for increasingly scarce habitats and ecological resources. “Climate change-induced displacement” or “water theft” are discussed as possible crimes, cf. Byrne, n. 2 above, p. 283 f.

¹³ On this distinction Satzger/v. Maltitz, n. 5 above, p. 1 f.

¹⁴ Climate change prevention criminal law overlaps with demands for the introduction of an “ecocide” offence under international criminal law: Even though the “ecocide” approach is not only dedicated to protecting the climate or atmosphere, but to the entire planetary and extraplanetary living and non-living nature, in both cases it essentially represents an expansion of the criminal law concept of the environment. Cf. Independent Expert Panel for the Legal Definition of Ecocide, Commentary and Core Text, 11: “Environment means the earth, its biosphere, cryosphere, lithosphere, hydrosphere and atmosphere, as well as outer space.” (<https://www.stopecocide.de/legaldefinition>, status 1/22); Dominik Hotz, “Ecocide as the Missing Fifth Crime under International Criminal Law”, *Zeitschrift für die gesamte Strafrechtswissenschaft* 133(3) (2021): 861, p. 903 f., clearly deviating in concept; on criticism Kai Ambos, “Besser Umweltschutz durch Völkerstrafrecht?”, *Frankfurter Allgemeine Zeitung*, July 2, 2021; Stefanie Bock, “Ökozid - ein neues völkerstrafrechtliches Kernverbrechen?”, *Zeitschrift für Rechtspolitik* (2021): 187.

¹⁵ Demanded by White, n. 2 above, p. 117. The regulatory offence stated in § 32 para. 3 no. 1 of the Greenhouse Gas Emissions Trading Act [TEHG] may serve as a concrete example of how an administrative-accessory climate crime could be designed.

¹⁶ Indirectly, the causes of climate change are those behaviours that directly or indirectly prevent effective environmental protection measures or promote waste and thus increased, greenhouse gas-intensive resource consumption. The spectrum of conceivable conduct could then range from greenwashing and climate fraud to planned obsolescence and climate change denial. The latter demand from William C. Tucker, “Deceitful Tongues: Is Climate Change Denial A Crime?”, *Ecology Law Quarterly* 39(3) (2012): 831, p. 849 ff. based on US-law may be irritating under German law, cf. on the constitutionality of Strafgesetzbuch [StGB] [Penal Code], § 130 paras. 3 and 4 only Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], 1 BvR 2150/08, Nov. 4, 2009, *Neue Juristische Wochenschrift* (2010): 47, p. 51.

¹⁷ This would make the promotion of climate change by certain conduct impossible.

¹⁸ This would be intended to “dry up the market” for conduct that promote climate change.

¹⁹ Satzger in Engelhart, n. 6 above, p. 1275.

²⁰ Thus Satzger/v. Maltitz, n. 5 above, p. 2.

pun) “normative climate” *pro* climate protection and to actually prevent the degradation of a habitable climate (either by prevention by means of classical deterrence, or by compensating for climate degradations by means of innovative “smart sanctions”). In other words, climate crimes are offered as real answers to climate change as a “critical question in human history.”²¹

We share the backdrop of this argumentation. It therefore cannot be argued that climate change as a crisis of global proportions can hardly be stopped on a national or regional, e.g. European level (a criticism that is heard now and then).²² For national or regional action (in introducing climate crimes) can and is meant to turn into the vanguard of international or global efforts – even the reach of national or regional law enforcement is limited under traditional “Westphalian” paradigms.²³ National or regional action can and is meant to shape and drive the international and global debate.²⁴ Countervailing “ideal ideas” (like: In order to effectively counter climate change we need an international harmonization of criminal crimes or even a cosmopolitan centralization of the administration of climate criminal justice!) eventually – as the realist critique of ideal theory would have it – perpetuate the *status quo* and therefore lead to its deterioration.

This is where the *political* (note: not the policies or politics) of climate crimes comes to the fore. Climate crimes are meant to kick-off an initially national or regional, but then international and global transformation of our normative and factual orders. The political, *sub specie* transformative impetus of climate crimes appears in their expression of human agency (We do something about climate change!), i.e. in the contingent decision about conflicting interests (even if some are supposedly irrational, such as a narrow-minded, but widespread

²¹ Satzger/v. Maltitz, n. 5 above, p. 2.

²² Cf. on this Satzger/v. Maltitz, n. 5 above, p. 32 ff.

²³ Climate crimes should be able to claim a global jurisdiction, cf. Satzger, n. 2 above, p. 1017; Satzger/v. Maltitz, n. 5 above, p. 25 ff.

²⁴ This also corresponds to the “leading role in international efforts” in environmental and climate protection envisaged in the European Union’s “Green Deal”, cf. Communication on The European Green Deal, COM (2019) 640 final (Dec. 11. 2019), p. 3. Analytically, parallels also arise with international criminal law, cf. Gerhard Werle, “Völkerstrafrecht und deutsches Völkerstrafgesetzbuch”, *Juristenzeitung* 67(8) (2012): 373, p. 379 f.

“business as usual” mentality).²⁵ Climate crimes (like environmental crimes of old) are indeed provided with a “normative surplus.”²⁶ They are not merely meant to catch up on social etc. transformations. They rather seek to initiate and guide such transformations for good and to the better.²⁷ Namely by deterrence and coercion as well as education and internalization (of the underlying normative idea to protect a habitable climate). Depending on one’s concept of law, crime and punishment, climate crimes may just be conceived as an educative “moral institution” that induces the internalization of general climate protective behavioral norms (e.g. the imperative of climate neutrality; prohibition of climate damage) so as to ensure compliance out of inner conviction.

3. Positioning our Critique

Now that we have – however summarily – conceptualized climate crimes and their backdrop, let us position our critique. In doing so, we bring to the fore ideological and normative preconceptions that are inherent to the attempt to fight climate change by means of climate crimes. We will only sketch that these preconceptions are all but uncontentious (and hence need more and due justification), since our critique is but meant as an internal and constructive one (where we *arguendo* share many of said preconceptions).

a) The talk of climate crimes is based on a certain *diagnosis of our current times or age*. This means three things: *First*, we do not deny anthropogenic climate change (something that must unfortunately be emphasized in times of an epidemic loss of the epistemic authority of academia and science).²⁸ *Secondly*, continuing with “business as usual” is out of the question (although it remains to be seen how crass the break with it will have to be; see

²⁵ The second dimension of the political nature of climate crimes lies in the discursive denial of its political character. Specifically, in its scientification, constitutionalisation and moralisation, with which climate protection under criminal law is presented as necessary, natural or without alternative. This is not the place for a corresponding discourse analysis. See therefore only illustratively Matt Wood and Matthew Flinders, “Rethinking depoliticisation: beyond the governmental”, *Policy & Politics* 42(2) (2014): 151, p. 156 ff. Cf. in general and with additional references on the urge of the political into its negation (as an expression of the political of criminal law) Christoph Burchard, “Strafrecht in der Diagnosegesellschaft”, in Silva-Sanchez et al. (eds.) *Strafrecht als Risiko: Festschrift für Cornelius Prittwitz zum 70. Geburtstag*, (Baden-Baden: Nomos, 2023): 77.

²⁶ According to the legislative materials on which the 18th Amendment Act of 28 March 1980 was based, the concentration of environmental crimes in the German Criminal Code was intended to “increase public awareness of the socially harmful nature of such offences”, cf. Regierungsentwurf [Cabinet Draft], *Deutscher Bundestag: Drucksachen [BT] 8/2382, 1, 9 f.* (Ger.).

²⁷ Cf. on the influence of social change on criminal law Frisch, “Gesellschaftlicher Wandel als formende Kraft und Herausforderung des Strafrechts”, in Müller-Dietz et al. (eds.) *Festschrift für Heike Jung zum 65. Geburtstag am 23. April 2007*, passim.

²⁸ On ecological enlightenment in times of climate change denial and scientific scepticism, cf. only Klaus Ferdinand Gärditz, “Umwelt-Aufklärung der Öffentlichkeit als wissenschaftliche Wahrheitspflege?“, *Zeitschrift für Europäisches Umwelt- und Planungsrecht* 15(2) (2017): 112, p. 112 ff.

below). And *thirdly*, it is (hopefully!) not too late to do something, i.e. to take action against climate change and to preserve a habitable climate.

These three points are far less trivial than they might appear at first glance. On the one hand, ideological or otherwise interest-driven strategies of denial or suppression ("*Don't look up!*") are firmly anchored in society. They reach into the highest political circles²⁹ and cannot – as “the” pandemic has painfully demonstrated – simply be eliminated by legislative action. On the other hand, even less radical but no less questionable variants of the “business as usual” approach still cling to potentially unlimited economic growth and rely on technological innovations to cope with the consequences of climate change.³⁰ Finally, such linear predictions of our joint future are contrasted with disruptive and catastrophic, even apocalyptic imaginings of our future³¹ Indeed, dystopias are falling on fertile ground, precisely because current climate science forecasts an increasingly dismal picture. They deny the openness of the future (as a characteristic of modernity) and assume that climate change inevitably will increasingly lead to crass devastations.³²

Protagonists who seek to fight climate change by means of climate crimes need to put more efforts into dispelling all of this.³³ We will not do so, for we aim at an *internal critique of climate crimes*. This, of course, makes our critique political, as we decide upon alternatives and withstand the depoliticizing pull of apocalypticism. We hence share that neither “Don't look up!” nor “Business as usual” is a solution, and that “All hope is lost!” must not be.

b) The “*climate crimes approach to climate change*” carries a weighty baggage of assumptions about the continuity of the administration of criminal justice and indeed the political

²⁹ Cf. on their “success story” Bruno Latour, *Kampf um Gaia* (Berlin: Suhrkamp, 2017) p. 49 ff. and James Hogan and Richard D. Littlemore, *Climate Cover-Up: The Crusade to Deny Global Warming* (Vancouver: Greystone Books, 2009) passim.

³⁰ Umberto Mario Sconfienza, “Techno Business-as-usual”, in Kettemann (ed.) *Navigating Normative Orders*, (Frankfurt am Main: Campus, 2020), 174 with additional references. Under the term “climate and geo-engineering”, possibilities are discussed to build resilience by reshaping habitats or, at best, to remove greenhouse gases from the atmosphere or reflect solar radiation back into space through “negative emissions technologies” and “solar radiation management”, see John Shepherd, *Geoengineering the Climate: Science, Governance and Uncertainty* (Berlin, London: The Royal Society, 2009).

³¹ Analysing these from different perspectives, Sighard Neckel, “Der Zerfall von Ordnungen”, in Forst/Günther (eds.) *Normative Ordnungen* (Berlin: Suhrkamp, 2021): 632, p. 639 (“Planetary Catastrophism”); similarly John Urry, *What is the Future?* (Cambridge: Polity Press, 2016), p. 33 ff. (“Catastrophic Futures”) as well as Pablo Servigne and Raphaël Stevens, *How Everything Can Collapse. A Manual for our Times* (Cambridge: Polity Press, 2020) (“Collapsology”).

³² Neckel, n. 31 above, p. 639 f.

³³ Here, because climate protection is either not necessary at all or could be achieved by less intrusive means. There, because climate protection is no longer possible anyway, so climate crimes would be inappropriate.

ordering of societies (the continuity of which is all but self-evident and needs more consideration). For our critique to stay internal, we hence need to *arguendo* assume three (all but self-evident) points of departure: *Firstly*, criminal law and its administration will by and large continue to exist as we know it today, including their protective dimensions (defense rights etc.) and their so-called fragmentation (criminal law singles out certain socially harmful conduct, not penalizing “everything”).³⁴ *Secondly*, and as regards Germany in particular, and “the” West more generally, the legislation, administration and adjudications of climate crimes will continue under a political order committed to democracy, the rule of law, and the protection of human rights. And *thirdly*, climate crimes are essentially committed to the idea of sustainability and its underlying anthropocentrism, i.e. concepts that we know all too well from traditional environmental crime.³⁵ Once again, these three points are anything but uncontentious.

Some strands in so-called green criminology oppose the continuity of our understanding of criminal law. As a sub-discipline of critical criminology, it strives for a restructuring of criminal justice structures. *Lynch*, as one of its pioneers, based this more than 30 years ago on the pillars of environmentalism, radicalism, and humanism in order to structurally overthrow the socio-environmentally unsustainable practices of the political and economic elites.³⁶ Even beyond such reformist, even revolutionary approaches, it is not far-fetched to hypothesize that more and more havoc caused by climate change can wreak havoc on conventional guarantees of democracy, the rule of law, and human rights. The fight against terrorism and organized crime (including the introduction of “*smart sanctions*” such as special forms of confiscation) offers but a foretaste of this. What is more, our classical thinking on criminal law entrenches the individualization of systemic failures, although the latter have contributed

³⁴ This also means that the “well-known” criticism of so-called “modern criminal law” can be transferred to its manifestation in the form of climate crimes. E.g. the criticism of strict criminal liability, of the expansion and forward attribution of criminal liability as well as of the renunciation of causation and attribution, etc. However, this does not promise new insights, which is why we do not want to reproduce this criticism here. On this debate, see Prittwitz, n. 6 above, p. 242 ff.; on the anti-criticism, see only Bernd Schünemann, “Kritische Anmerkungen zur geistigen Situation der deutschen Strafrechtswissenschaft“, *Goltdammer’s Archiv für Strafrecht* (1995): 201, p. 201 ff.

³⁵ In particular, we do not deny that for climate crimes, as well as for environmental crimes in general, weighty (and theoretically compatible) reasons for criminalization are in dispute, cf. only Günther Stratenwerth, “Zukunftssicherung mit den Mitteln des Strafrechts“, *Zeitschrift für die Gesamte Strafrechtswissenschaft*, 105 (1993): 679, p. 688 and the relevant contributions of Schünemann, references in Bernd Schünemann, “Das ‘Menschenbild des Grundgesetzes’ in der Falle der Postmoderne und seine überfällige Ersetzung durch den ‘homo oecologus’“, in Schünemann et al. (eds.), *Das Menschenbild im weltweiten Wandel der Grundrechte*, (Berlin: Duncker&Humblot, 2002), 3, p. 13 mn. 34.

³⁶ Michael J. Lynch, “The Greening of Criminology: A Perspective for the 1990s“, *Critical Criminology* 2(3) (1990): 3, p. 3.

and will contribute decisively to climate change. Whether this is the correct course of action is very much open for debate; but again, we do not have to continue down this line of critique.

In addition, not only radical movements call for more and more crass breaks with the past and the continuation of "business as usual" (but also: "law as usual"; "politics as usual" etc.). For example, certain post-growth approaches ("degrowth") openly flirt with restructuring our capitalist economic orders and with associated limitations of our ways and standards of living. Climate authoritarian approaches rely on centralized "heavy-handed" enforcement of climate protection, whereby democratic participation and individual spheres of fundamental rights and freedoms are no longer supposed to play a significant role (loosely based on the motto: "*democracy is failing us*").³⁷

Finally, sustainability as the guiding normative principle is increasingly being called into question. The principle of sustainability is familiar to us from the traditional environmental (criminal) law. The German Federal Constitutional Court has only recently given it constitutional dignity by promulgating the "*sustainability of freedom opportunities over time*" ("*Inter-temporale Freiheitssicherung*").³⁸ However, at its core, the principle of sustainability is rooted in the "old environmental order" that seeks to shape a future by reconciling economic and ecological demands: the protection of the environment goes hand in hand with (and many times is promoted through, think about the market for carbon certificates) with further economic growth.³⁹ Whether is still a feasible way ahead, is anything but a foregone conclusion; indeed, one could hold that clear, even crushing priority has to be given to ecological concerns to counter the planetary risks of climate change.

Suffice it to mention these external routes of critique for we, to reiterate the disclaimer, but seek an internal critique of the climate crime approach to climate change.

³⁷ However, such utopian or dystopian ideas, expectations and mental futures are of great importance because, as possibilities for social change, they simultaneously shape the development paths of future environmental protection measures. On this, Sighard Neckel and Frank Adloff, "Vorwort" in Adloff et al. (eds.), *Imaginationen von Nachhaltigkeit, Katastrophe. Krise. Normalisierung*, (Frankfurt am Main/New York: Campus, 2020), 8.

³⁸ Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], 1 BvR 2656/18, 1 BvR 78/20, 1 BvR 96/20, 1 BvR 288/20, Mar. 24, 2021, *Neue Juristische Wochenschrift* (2021): 1723, p. 1729 (esp. fourth guiding principle). On the environmental-ethical connectivity of this so-called climate decision ("*Klimabeschluss*"), see Hans Jonas, "Prinzip Verantwortung – Zur Grundlegung einer Zukunftsethik", in Krebs (ed.), *Naturethik, Grundtexte der gegenwärtigen tier- und ökoethischen Diskussion* (Berlin: Suhrkamp, 2021), 181.

³⁹ Sconfienza, n. 30 above, p. 165.

c) Last but not least, mind that our internal critique will remain mostly negative in its starting point. This means: In this article, we but hint at constructive proposals on how to design a democratically legitimized climate protection regime based on our existing German and European constitutional and economic order, which would counter the causes of man-made climate change in a globally effective manner and guarantee a life-sustaining as well as life-worthy planetary environment. In defense of our negative approach we do not call on critical theory alone.⁴⁰ We rather suggest that a sound climate protection regime (which may very well also draw, in parts, on criminal law) should not be conceptualized starting from climate crimes, but rather from the erection of planetary societies that strive for the proper protection of a habitable climate. Reflections upon them will (have to) be offered elsewhere. Our critique, then, eventually is a constructive one: It plays into the erection of planetary societies seeking the conservation of a habitable climate where the climate criminal justice in general and climate crimes in particular will likely play a (as in one of many) role in addressing the climate crisis (albeit one that is likely rather limited and one that needs thorough rethinking).

III. CLIMATE CRIMES AND THEIR DECEPTIVE CERTAINTIES

So, what is our critique of climate crimes or rather the climate crimes approach to the climate crisis? In a nutshell: "Fighting" climate change with climate crimes *can* lull us into deceptive certainties (to do the "right" thing) and by extension into perilous idleness; and it *will* do so if we think of climate protection essentially in terms of traditional criminal law (see II.3. above). Climate crimes are based on the idea that we can counter climate change with the "sharpest sword" available to a polity (as the German and Continental European *ultima-ratio principle* would have it) and that we can thereby also get hold of "the powerful". But these certainties rest on but normative (and at heart: liberal) doctrines, which are deceptive in having lost touch with the realities of the administration of criminal justice. Normative doctrines obscure that more effective measures are available to mitigate the climate crisis (1. below) and that "the powerful" will likely be shielded with and by climate crimes (2. below). Therefore, the normative basis of the climate crimes approach to the climate crisis may just turn out to be (self-)appeasement. It obfuscates (in a somewhat conciliatory and thereby liberating way) that more drastic measures are likely necessary to avert impending crises. Our (somewhat

⁴⁰ Adorno would be a good source for this: "It is assumed that only those can criticise who have something better to propose instead of what is criticised [...]. By imposing the positive, criticism is tamed from the outset and deprived of its vehemence." Theodor, W. Adorno, "Kritik" in Tiedemann, *Gesammelte Schriften*, vol.10 (2) (Frankfurt am Main: Suhrkamp, 2015), 785, p.792.

distressing, for what we apologize) critique is therefore not "only" directed at the symbolic, but also the dysfunctional and the "dark side" (*Kölbe*⁴¹) of climate crimes.

1. Questionable Effectiveness

It is doubtful that man-made climate change can be decisively stopped or even mitigated with climate crimes that are conceived in somewhat traditional terms and doctrines (see II.3. above); bluntly, climate crimes of the provenance are not a particularly effective means to this end. Such an instrumental (i.e. output orientated) framing of our critique may well be disputed on the basis of a deontic design (e.g. one derived from natural law) of climate crimes⁴²; or by mostly focusing on (esp. democratic) input legitimacy.⁴³ In our opinion, however, climate crimes must *also* be measured by their output. They have to "perform" and need to be able to effectively counter man-made causes of progressing climate change and the resulting planetary dangers.⁴⁴

a) Predicting the likely effectiveness of climate crimes in averting climate crisis rests on their particular design. Let us first look to a design where climate crimes are mostly accessory to an overall climate protection regime, which in turn rests on administrative law and - depending on the regulatory setting - also private law.⁴⁵ Here, this overall climate protection regime is to balance all conflicting (ecological, economic, etc.) interests of current and future generations. Accessorial climate crimes, then, are but that: accessorial and of subordinate nature. Their effectiveness would primarily rest on the primary overall climate protection regime.

This becomes particularly prevalent as regards prior classifications of certain (climate damaging) behavior: If this behavior (like driving a car) is classified as legal (permitted, allowed,

⁴¹ Ralf Kölbel, "Die dunkle Seite des Strafrechts. Eine kriminologische Erwiderung auf die Pönalisierungsbereitschaft in der strafrechtswissenschaftlichen Kriminalpolitik", *Neue Kriminalpolitik* 31(3) (2019): 249, p. 249.

⁴² See, for example, Schünemann's draft on environmental crimes; references in Schünemann, n. 35 above, p. 13 mn. 34.

⁴³ Exemplary to the relationship between Criminal Law and Democracy, Klaus Ferdinand Gärditz, "Strafbegründung und Demokratieprinzip", *Der Staat* 49(3) (2010): 331; critically Bernd Schünemann, "Der Kampf ums Strafrecht, um dessen Wissenschaft und seine jüngste Zuspitzung", *Zeitschrift für internationale Strafrechtsdogmatik* (2020): 479, p. 486 f.

⁴⁴ In the debate about climate crimes, it is often assumed without further ado that this is true. For example, White, n. 2 above, p. 117, states: "[T]he issue is what can be done to reduce the contributing causes of climate change. The obvious and science-based answer is to diminish greenhouse gas emissions (GHG). This could and arguably should involve the criminalisation of carbon emissions (...)."

⁴⁵ Correspondingly, but on environmental crimes and not including the control function of private law, Frank Saliger, "Grundfragen des heutigen Umweltstrafrechts" in Kloepfer/Heger (eds.), *Das Umweltstrafrecht nach dem 45. Strafrechtsänderungsgesetz* (Berlin: Duncker&Humblot, 2015), 16. There also correspondingly to the following in the continuous text.

approval-free, approved, or even simply approvable) by primary legislation, climate crimes can by definition not even serve as a blunt sword.⁴⁶ For it does not apply to the legal damaging of our climate, in Germany due to the notorious notion of unity of our legal order, or simply because accessory criminal law cannot upheave prior classifications as legal by primary legislation.⁴⁷ This also and especially applies when (far) too much is and remains (classified as) legal.⁴⁸

This is where we have to take into consideration that climate change results to a large extent from ordinary, hitherto socially adequate (allowed, normal) activities. A debate about countermeasures therefore has to focus on challenging on countermeasures and also the illegality of these activities. This is where we need to discuss, inter alia, measures of rendering certain behavior impossible, prohibitions under administrative law, or allowing for tort claims under civil law. Such discussions must not be hastily glossed over by debating climate crimes.

For in an accessory design, climate crimes can "only" target at *illegal* behavior that damages our climate. But even here, as regards the fight against illegal behavior, doubts remain whether climate crimes will prove particularly effective. In any case, existing environmental crimes, which share a comparable accessory design, have in no way fulfilled their comparably high expectations in practice.⁴⁹ This is likely due to the fact that the boundaries between the legal and the illegal as well as between crimes proper and mere administrative offences is rarely clear-cut.

⁴⁶ This is the diagnosis widely shared by proponents and critics, here representative of the former Bernd Schünemann, "Vom Unterschichts- zum Oberschichtsstrafrecht. Ein Paradigmawechsel im moralischen Anspruch?" in Kühne/Miyazawa (eds.), *Alte Strafrechtsstrukturen und neue gesellschaftliche Herausforderungen in Japan und Deutschland* (Berlin: Duncker&Humblot, 2000), p. 33, and the latter Olaf Hohmann, *Das Rechtsgut der Umweltdelikte* (Frankfurt am Main: Peter Lang, 1991), p. 205.

⁴⁷ Aptly Frisch, n. 2 above, p. 432.

⁴⁸ However, this does not detract from the punishability and need for punishment of what is illegal, in this respect, Wolfgang Frisch, "Grundlinien und Kernprobleme des deutschen Umweltstrafrechts", in Leipold (ed.), *Umweltschutz und Recht in Deutschland und Japan* (Heidelberg: C.F.Müller, 2000), p. 386; Klaus Rogall, "Umweltschutz durch Strafrecht - eine Bilanz" in Klaus-Peter Dolde (ed.), *Umweltrecht im Wandel* (Berlin: Schmidt, 2001), 795, p. 806 f.

⁴⁹ This is the diagnosis of Thomas Fischer, *Strafgesetzbuch*. [German Criminal Code], (München: C.H. Beck, 69th, edn. 2022), Vor §§ 324 ff. Rn 5 with additional references. More optimistic Hero Schall, "Das Umweltstrafrecht heute: ein bloßes Alibi-Instrument?" in Hefendehl et al. (eds.), *Streitbare Strafrechtswissenschaft, Festschrift für Bernd Schünemann zum 70. Geburtstag* (Berlin, München, Boston: De Gruyter, 2014), 815, p. 825 with additional references ("partial success") and Frisch, n. 2 above, p. 432 ("existing, albeit quite limited, preventive power of environmental crimes").

As an “*appendix to administrative mazes*”⁵⁰, accessorial climate crimes would not even be able to satisfy an expressive and communicative function: “moral messages” cannot be sent if normative commands are vague at best – and self-contradictory at worst. Consider the existing climate protection regime: If the emission of (if numerable, but) unthinkable CO₂ is legal in the permitted operation of a power plant, sending the message that the unpermitted operation of a heating system in a single-family house amounts to a climate crime (worthy of punishment) is hardly conceivable. For the message “Make sure to get a power plant!” does not seem to work.

b) As commentators have already noted, them merely being accessorial to prior permissions and legalizations is the coffin nail to climate crimes so designed.⁵¹ *Satzger* therefore suggests breaking with this design, e.g. by loosening the accessorial nature of climate crimes. He mentions that illegally obtained permit must not stand in the way of criminal prosecutions; or that national permissions must not override EU prohibitions of behavior harming our climate.⁵² *White* goes several steps further by designing climate crimes as primary norms which supersede permissions etc under administrative or private law.⁵³ He seeks to prosecute those “responsible” for climate change, whom he calls – by drawing a memorable socio-pedagogical generalization – “*carbon criminals*”. He indeed is envisaging the creation of an “*Eco-Police*” and an “*International Environmental Court*”, and seeks to empower civil society actors to target the aforementioned carbon criminals.

Not least because of the poor yield of accessorial environmental crimes, such breaks with a merely accessorial design of climate crimes must not be taken lightly. For better or for worse, such breaks would borrow from “*law and order*” thinking, which in turn may well come into high public demand to prevent the hazards of climate change in the future. “Law and order” thinking is a prime example of reactive formal social control, and as such particularly ostentatious a governance tool. It reduces complexity by effectuating or pretending to effectuate control with, and on the occasion of deviant behavior.

⁵⁰ Thomas Fischer, “15 Jahre Sechstes Strafrechtsreformgesetz – Blick zurück nach vorn” in Freund et al. (eds.), *Grundlagen und Dogmatik des gesamten Strafrechtssystems*, Festschrift für Wolfgang Frisch zum 70 Geburtstag (Berlin: Duncker&Humblot, 2013) p. 41 mn. 42.

⁵¹ *Satzger* in Engelhart, n. 6 above, p. 1278.

⁵² *Satzger* in Engelhart, n. 6 above, p. 1278.

⁵³ *White*, n. 2 above, p. 137. See also *Kramer*, n. 2 above, p. 193 ff.

However we construe climate crimes (as being subsidiary or primary to non-criminal laws and norms), our *déformation professionnelle* can tempt us into subconsciously transferring traditional assumptions about criminal law (effectiveness, legitimacy, etc.) onto a climate crime approach to climate change. The often but implied assumption that climate crimes will effectively serve climate protection is, or so it is safe to assume, closely connected to an idealization of criminal law's exceptionalism, sub specie burden and efficacy exceptionalism. This resonates in the *ultima ratio* principle, which holds much sway in Continental European jurisdictions. It holds that criminal law must only be employed as the last resort, since it is the sharpest sword of polity. This carries the danger of confusing high burdens (of criminal sanctions) with extraordinarily controlling effects.⁵⁴ This complicates paying sufficient attention to the *real* effects of climate crimes and the possible alternatives to them.⁵⁵

But this, or so we suggest, we have to do: Predicting the real effects of climate crimes and their likely alternatives. As far as averting harms from climate change goes, climate crimes (be they designed as subsidiary or primary to non-criminal laws and norms) are – just like ordinary crimes – by no means the "sharpest sword" of a polity.⁵⁶ For criminal law is "but" normative. It prohibits socially harmful behavior, but thereby makes the latter possible. It effectively enables (mind: not allows) individuals to break its commands – albeit under warning of punishment.⁵⁷ Climate crimes share this "fate" of the "but normative". In addition, just like criminal law, climate crimes (in a traditional design, s. II.1. above) remain selective and allow for slack, i.e. they cannot and do not want to ensure all-encompassing compliance (for better or worse). This is where the *ultima ratio* evidences a blind-spot. As *Husak* has rightly noted: "[W]e could come to utilize modes of social control that would make the criminal law seem benign by comparison. [...] Any inclination to include [the *ultima ratio*] principle in our

⁵⁴ With regard to this confusion, reference is only made to the criminological findings on the reality of deterrence and prevention, overview inter alia in Karl-Ludwig Kunz and Tobias Singelstein, *Kriminologie* (Stuttgart: utb, 2021), p. 342-375.

⁵⁵ In general, according to Alice Ristroph, "The Wages of Criminal Law Exceptionalism", *Criminal Law and Philosophy* (2021): "the siloed thinking of criminal law exceptionalism makes it difficult or impossible to contemplate a world without criminal law. Thus criminal law exceptionalism does its ideological work: it produces and reinforces the belief that criminal law is indispensable, a belief that in turn motivates policy choices and informs legal practices."

⁵⁶ This is based on the concept of the law's effectiveness, which is not only linked to the mere observance of the norm (as Hans Kelsen, *What is Justice? justice, law, and politics in the mirror of science* (Berkeley: University of California Press, 1960), p. 268), but to the fact that the compliance with laws produces effects that are actually conducive to the achievement of the objective - in this case, climate protection. Instructive Hubert Rottleuthner and Margret Rottleuthner-Lutter, in: Wagner (ed.) *Kraft Gesetz. Beiträge zur rechtssoziologischen Effektivitätsforschung*, (Wiesbaden: vs 2010), p. 13 ff.

⁵⁷ And thereby also promotes or maintains individual freedom (fundamentally Bernhard Haffke, "Die Legitimation des staatlichen Strafrechts zwischen Effizienz, Freiheitsverbürgerung und Symbolik" in Schünemann et al. (eds) *Festschrift für Claus Roxin zum 70. Geburtstag* (Berlin, Boston: De Gruyter 2001), p. 955 ff.

criminal law derives from our assurance that such options are not serious candidates for implementation.”⁵⁸ We should nothastily turn a blind eye to such alternatives. Not because we recommend entering the escalating spiral of ever greater hazards of climate change, but because only by focusing on such alternatives can we balance their impending “evils” (to draw on Bentham) with those of climate crimes.

Measures of active social control are readily available alternatives to restricting any freedoms (as in the possibilities) to damage our climate. Think about the technical (or *ad maiore ad minus legal*) prevention or even preemption of harmful behavior, “ideally” speaking garnished with a full-enforcement regime that gets rid of any remaining pockets of slack, ineffectiveness and selectivity. For example, instead of turning “driving a of fossil-fueled car without compensation” into a crime (see 2. below) (with the consequence that citizens can and will continue to do so and that not all “climate sinners” can be held accountable), such cars could be banned completely, e.g. by no longer granting permits to such vehicles or by – to go extremely drastic: militarily – sealing off oil fields in the first place.⁵⁹

c) Here we return to the beginning of our argument: Before we seek to use supposedly regulatory climate crimes, we need to assess which measures are best (in terms of averting possibly fatal climate change, but also in terms of upholding our current political order, including the protection of human freedoms and liberties) to prevent or mitigate the consequences of climate change. As scholars of criminal law and justice, we are of course invited to participate in this assessment.⁶⁰ However, we caution against overburdening criminal law with tasks that it will likely cannot accomplish without a foundational restructuring of our societies at large.⁶¹ What is more, the notion that climate crimes are fighting climate change

⁵⁸ Douglas Husak, „The Criminal Law as Last Resort“, *Oxford Journal of Legal Studies*, 24(2) (2004): 207, p. 215.

⁵⁹ Christian J. Jäggi, *Perspektiven zum Umbau der fossilen Wirtschaft. Hürden und Chancen für nachhaltige Konsum in Gegenwart und Zukunft*, (Wiesbaden: Springer Gabler, 2022), p. 57 ff.

⁶⁰ Wolfgang Mitsch, “Maßstäbe für wissenschaftliche Strafgesetzbekungskritik”, *Kriminalpolitische Zeitschrift* (2019): 29, p. 34 (“Certainly, accessory criminal law is not at the forefront in this area but must wait until politics and pre-criminal law legislation have set the course. But in my opinion, criminal law scholarship does have a watchdog role in the sense that it provides impetus for the relevant social circles and state authorities.”).

⁶¹ International criminal law provides a blueprint for the consequences of such a functional overload of solitary criminal law control logics. Confidence in its preventive effects seems downright naïve in view of the current world political situation (or as an act of self-conciliation?). And its *de facto* failure to prevent core crimes has triggered a veritable crisis of confidence in many regions of the world, even if not in Germany (concerning international criminal law *in toto* or the ICC in any case). Cf. the sobering evaluation by Dov Jacobs and Joseph Powderly, “On the impact of online commentary in international criminal law: A vain pursuit of a Socratic ideal?”, *Leiden Journal of International Law*, 32 (2019): 1, p. 1: “[...] international criminal justice ceased to be a flourishing liberal cosmopolitan, progressive project. [To] advocate for it on such terms seems incomprehensibly naïve; a totem of an age of idealistic innocence, a relic of the world of yesterday.”.

with a particularly sharp, even the sharpest sword available to a polity, is somewhat quixotic. If designed as accessory to non-criminal laws and norms, climate crimes are severely blunted. And even if designed as primary, they tempt us into losing sight of more effective (mind: not necessarily less intrusive) alternatives, be they scalpels or maces. Finally, upon climate crime's losing the illusion of effectiveness (to avert or mitigate climate change), this may well erode social trust (indeed the rule of recognition) into the criminal justice per se, and by extension it may well erode the authority of the state and encourage the very apocalypticism that one actually wanted to avoid (above II.3.).⁶²

Mind that our critique is not "only" – in a *Frankfurt'ian manner* – directed at so called symbolic criminal law. To be sure, we caution against exaggerating the effectiveness of climate crimes.⁶³ The point is, however, that a lack of effectiveness not "only" perpetuates the *status quo*, but also deteriorates it, in that it contributes to further deterioration of our climate. In this sense, the solutions offered by the climate crimes approach to climate change are not "merely" symbolic ("No such luck!"), but part of the very problem.

2. Shielding the Powerful

Our second challenge to classically conceived climate crimes is: They are likely to spare and indeed shield "the rich and the powerful".⁶⁴ This may sound strange at first, since climate crimes bring a contrary image to our mind: Lady Justice wielding her armaments blindfolded, immune to power, wealth, class, or status. Are climate crimes therefore not – and this where

⁶² Thus, regarding internationally scaled climate crimes, also Geoff Gilbert, "International Criminal Law Is not a Panacea - Why Proposed Climate Change 'Crimes' Are Just Another Passenger on an Overcrowded Bandwagon", *International Criminal Law Review* 14(3) (2014): 551, p. 560 f.: "Rather, it is to ensure that international criminal law is not extended beyond its proper reach and then fail to provide any effective additional protection against climate change, thereby also casting doubt on its authority in other spheres."

⁶³ On this key objection against symbolic criminal law Kristina Peters, "Symbolisches Strafrecht", *Juristische Rundschau* (2020): 414, p. 416; Frank Saliger, "Über das kommunikative Moment in neueren, insbesondere expressiven Straftheorien - Einige kritische Anmerkungen" in Saliger (ed.), *Rechtsstaatliches Strafrecht, Festschrift für Ulfrid Neumann zum 70. Geburtstag* (Heidelberg: C.F. Müller, 2017), p. 698.

⁶⁴ One could also speak of the "biggest climate sinners" in moral terms or of the "major climate criminals" ("*Hauptklimaverbrecher*") in criminal terms. The latter formulation is an intentional analogy to international criminal law and the "major war criminals" ("*Hauptkriegsverbrechern*") of the Nuremberg Trials. These polemical exaggerations regarding individual responsibility are based on the empirically sound knowledge that the richest one percent of the world's population caused more than twice as many climate-damaging CO₂ emissions between 1990 and 2015 as the poorer half of the world's population combined (see instead of many Stockholm Environment Institute/Oxfam (eds.), *The Carbon Inequality Era. An Assessment of the global distribution of consumption emissions among individuals from 1990 to 2015 and beyond 2020*, passim). Layer models based on other classifications and reference values could also be used; at the collective level, for example, the primary responsibility of energy-intensive companies and industrialised countries, see Berstelsmann Stiftung (ed.), *Geteilte Verantwortung beim globalen Klimaschutz 2021* (<https://www.bertelsmannstiftung.de/de/publikationen/publikation/did/geteilte-verantwortung-beim-klimaschutz>, status 1/22).

climate and international criminal justice share common grounds - particularly suited to addressing macro-criminality, corporate crimes, and the “carbon crimes of the powerful”?⁶⁵ This is what *White* suggests when he emphatically asks “Who is responsible for climate change?” to then name “carbon criminals” and the “crimes of the powerful”.⁶⁶ One could go even further. Analogizing from *Schünemann* (who was speaking about environmental and white collar crimes), one could posit that climate crimes are the means to reverse the traditional targeting of the “lower class” by targeting the “upper class”, since criminal law is the “only [sic!] suitable means to address effectively the specific menaces of a postmodern industrial society”.⁶⁷ But again, we are not convinced that this holds water vis-à-vis climate crimes.

a) First, climate crimes conventionally conceived (unsurprisingly so) follow in the footsteps of the “negative” concepts of harm, freedom, and proscription of conventional criminal laws. After all, climate crimes target anthropogenic causes of climate change (as in emitting greenhouse gases or destroying natural sinks, above II.1.). This shields “the powerful”, for it is not asked whether they are or have been committed to *positive climate improvements* according to their (financial, political, etc.) possibilities.

It could be argued that such positive obligations should be negotiated and realized elsewhere. At the national level, for example, in the form of climate taxes that serve redistribution for the purpose of climate protection. Or at the international level in treaties under public international law that serve the protection of natural sinks (such as the Amazon region), and that go hand in hand with adequate international redistributions and offer incentives to developing countries in participating in the interest of all of mankind. – Yet bringing in tax or public international law, or other fora, when it comes to obligations to actively improve our climate sends a perilous political message⁶⁸: that only active, and possibly only direct deteriorations of our climate warrants redress by criminal law. This is message must not dominate.⁶⁹ Those responsible for climate change are not only those who actively cause harm, but also those who fail to thwart harm, even though they are able to do so due to their financial, political, social etc. power. This, conventional criminal law and by extension climate

⁶⁵ Relating state and corporate crimes as manifestations of macro criminality to climate change *White*, n. 2 above, p. 23 ff. (“The state-corporate nexus”).

⁶⁶ *White*, n. 2 above, p. 97.

⁶⁷ *Schünemann*, n. 46 above, p. 35.

⁶⁸ It shapes, among other things, the dogmatic demarcation of action and omission, critically on this Christoph Burchard in: *Nomos Kommentar Wirtschafts- und Steuerstrafrecht*, 2nd ed. 2022, § 13 StGB [Criminal Code] recital 6 (Ger.).

⁶⁹ *White*, n. 2 above, p. 119.

crimes conventionally conceived cannot address. All the more so, as conventional criminal law rarely “thinks” about future generations, and is rather conceived in terms of balancing the freedoms and liberties of present generations only. This ignores that climate protection, and indeed planetary climate protection societies, must also take into due consideration the freedoms and liberties of generations to come, and balance the rights and interests of those present with those who will (hopefully) follow.

b) A doctrinal outflow of this anti-egalitarian bias is what one could call “the balance sheet principle” or the compensation doctrine. According to *Satzger/von Maltitz*, the actus reus of climate crimes lies in the causation of climate harms, the finding of which requires drawing up a balance sheet of positive and negative emissions.⁷⁰ Therefore, adequate compensation (e.g. reforestation programs that compensate for climate-damaging behaviour) are to, or so they suggest, exclude criminal liability.⁷¹ *Satzger/von Maltitz* are consciously and conspicuously silent about “in what form and by whom the compensation is ultimately assumed. Thus, with the introduction of a comprehensive climate criminal law, the state is likely to assume (at least partial) collective compensation.”⁷²

But here comes the crux of the matter: Climate crimes conventionally construed with the “balance sheet principle” in mind perpetuate an upper class of powerful actors and communities, who are willing and able to compensate for climate harms for themselves or their members. Take reforestation programs as an example, for which “one” needs money, space, seeds, and time. Powerful actors (individual and/or collective) enjoy access to all this because they have the necessary financial, spatial, natural and time resources for compensation measures.⁷³

On the one hand, this would turn (or perpetuate) climate crimes as crimes for the poor and periphery and do not challenge existing inequalities. This is harmful to (national, European, international) social cohesion, which in turn is necessary for a common fight against climate change. Climate crimes as crimes for the poor and the periphery target those who cannot

⁷⁰ *Satzger/v. Maltitz*, n. 5 above, p. 16; there also on the following.

⁷¹ We leave open here how this is dogmatically implemented, e.g. in the determination of the success of the offence or by means of new grounds for justification or other grounds for exclusion of punishment or annulment of punishment, such as a reference to active remorse (instructive Morten Blöcker, *Die tätige Reue*, Baden-Baden: Nomos, 2000). We doubt whether such dogmatic constructions can make a decisive difference to climate change.

⁷² *Satzger/v. Maltitz*, n. 5 above, p. 16; there also on the following.

⁷³ This aspect also applies if compensation measures are initiated by the state and not privately, because a financial contribution is then due, which can be linked to the quantity of greenhouse gases emitted or to the financial possibilities of the emitter. It is obvious that the compensation to be paid - even if it is progressive - becomes less relevant the more financial resources are available. If cynicism is allowed, it means nothing less than that the CO₂ intensive freedom of the poor is worth less than that of the rich.

offer adequate compensation⁷⁴, and who therefore present a negative balance sheet, and who nevertheless required to abstain for that which the powerful can afford to compensate. This anti-egalitarian bias takes shape on stages large and small (think about international relations, and individual compensation for air travel).

On the other hand, and here we come back to our starting point, the compensation doctrine obfuscates that upper classes may well to invest affirmatively into climate protection, that is beyond efforts of mere compensation. Or why are “omissions to properly improve our climate” (based, for example, on the possibilities, and hence the duty, to ensure a habitable climate for future generations) not on equal footing with “inflicting uncompensated harms to our current climate”? Of course, we could ask this question in a non-rhetorical manner. But then we would arrive at climate crimes that are no longer conventionally conceived, and that suddenly no longer target the usual suspects, i.e. “others” (the poor, the periphery), but indeed ourselves.

c) Finally, we caution that both the protective procedures and doctrines as well as the fragmentary nature of climate justice conventionally conceived privileges precisely those that contribute disproportionately to climate change: the rich and powerful.⁷⁵ This does not in principle cast doubt on liberal positions, like that criminal law be no ordinary instrument of social governance or that criminal procedure establish high safeguards against abuse of state power. Quite to the contrary, our critique serves as a reminder that these liberal positions have already been undermined by the realities of the administration of criminal justice. Climate crimes (especially those that but accessorial to non-criminal laws) that pay lip-services to said liberal positions, or that do not account for their real subversion, eventually encourage powerful actors to only show “creative & symbolic compliance”, but no committed compliance with the goals of protecting a habitable climate. Again, this is no solution, but part of the problem.⁷⁶

In conclusion, climate crimes conventionally conceived make us believe that Lady Justice can and will those most responsible for climate change. But because she is blindfolded, she

⁷⁴ The upper class is affected when it is able but unwilling to compensate.

⁷⁵ Whether this privilege can be broken through the introduction of an independent (climate and environmental) criminal liability of companies and associations ["*Verbandsstrafrecht*"] remains to be seen at this point (This is precisely what is called for by Cramer, *Carbon Criminals. Climate Crimes 2020*, p. 193 f. and is already provided for in Art. 6, 7 of the EU Commission's proposal for a directive, COM (2021), 851 final of December 15, 2021.).

⁷⁶ See Rob White, "Carbon criminals, ecocide and climate justice" in Holley/Shearing (eds.), *Criminology and the Anthropocene* (London: Routledge, 2018), 50, p. 63 and Fiona Haines and Christine Parker, "Moving towards ecological regulation" in Holley/Shearing (eds.), *Criminology and the Anthropocene* (London: Routledge, 2018), 81, p. 83.

cannot see that her particular focus on (directly or indirectly) harmful conduct, on causation and on harms (to name just a few) indeed spares the powerful and shields them from responsibility. Only against this backdrop does it become clear why *White* draws conclusions for his fight against the "crimes of the powerful" that may sound radical to conventional criminal law theorists. After all, he advocates for a political understanding of class power and a rejection of formally legal criteria in assessing criminality and harm.⁷⁷ Figuratively speaking, *White* calls for a *seeing* Lady Justice. But are we ready for such a break with the *status quo*?

3. (Self-)Conciliation

So far, we argued that climate crimes conventionally conceived are rather part of the problem (that our climate will further deteriorate) than part of a solution. Contrary evaluations may well fall prey to (self-)conciliation. In believing that one is doing the normatively right thing (punishing those that bring harm to the climate), one can easily lose sight (or have others lose sight) of the fact one is not tackling that which is factually necessary, namely opening a debate on the necessary transformation of our societies so that they can square the circle by ensuring a habitable climate in a democratic political order that guarantees the human rights of generations present and future. By being wary of the (self-)conciliatory nature of climate crimes, we bring to the fore that they can impede necessary societal transformations by betting on one-sided attributions of responsibility, which reduce complexity in the wrong manner.⁷⁸ Once again, we do not criticize that climate crimes are "merely" symbolic. We rather caution that, if improperly conceptualized, they further that which they allegedly target: the deterioration of our climate.

One might object by pointing out the transformative and educational powers of criminal law, especially its expressive⁷⁹ and generative normative⁸⁰ dimensions, the (moral) censure it communicates and the just deserts it reinforces. Doesn't the mere fact that climate crimes

⁷⁷ White, n. 2 above, p. 115.

⁷⁸ On the reflexive use of criminal law to manage social conflicts, cf. Tobias Singelstein, "Sieben Thesen zu Entwicklung und Gestalt des Strafrechts", *Zeitschrift für Rechtssoziologie* (2014): 321, p. 325.

⁷⁹ Cf. Klaus Günther, "Demokratische Transformationen des Strafrechts der Moderne?", *Rechtsgeschichte [Legal History]* 28 (2020): 120, p. 123 with reference to the particularly succinctly formulating Klaus F. Gärditz, *Staat und Rechtspflege. Braucht die Verfassungstheorie einen Begriff von Strafe?* (Paderborn: Brill Schöningh, 2015), p. 23: "Criminal law has thus remained a remaining heat source of socially integrating symbolism in a society that has coolly rationalised its institutions, which reaches beyond a simple setting of legal consequences."

⁸⁰ Winfried Hassemer, "Symbolisches Strafrecht und Rechtsgüterschutz", *Neue Zeitschrift für Strafrecht* (1989): 553, p. 556 distinguishes between the criminal law-critical category of symbolic criminal law and symbolic normative functions. - With a conceptual apparatus in the broadest sense of criminal law and a reformatory claim, Green Criminology also wants to "address the major questions arising from the current social, political, economic and ecological processes of change" (Holger Schmidt, "Ein grüner Zweig der Kriminologie?", *Kriminologisches Journal* 45(4) (2013): 260, p. 265). Admittedly, the demands of Green Criminology seldom move along the lines of classical criminal law thinking assumed here (II.3. above).

have become subject of academic and policy debates implies a significant awareness for the topic? And (especially in pluralized and secularized societies, in which other systems of norms - such as moral or religious ones - can no longer claim general validity)⁸¹ is it not possible, even necessary to draw on the criminal law to demonstrate in a prominent, expressive and socially integrative way that and how conflicting interests across generations and national borders are balanced so as to counter climate change and so as to break with the status quo? In that sense: Isn't criminal law the place to negotiate the future of our planet and of generations to come?

We think not! The symbolic and expressive functions of criminal law can only be as valuable as that what they seek to symbolize and what they do express. Yet climate crimes, in their very conventional conception and construction, express and symbolize their dysfunctionality, their being inattentive to the rights of future generations, and their shielding the "rich and powerful" (including ourselves, as we come from privileged circles from a privileged part of the planet). For these reasons, climate crimes conventionally conceived must dominate neither the politics nor the policies of polities that strive for the protection of a habitable climate. 1. and 2. above). The political and transformative momentum of climate crimes conventionally conceived indeed leads us away from debating the critical issues of climate protection. Criminal liability presents too much of a reduction of complexity to properly discuss the political, economic, social, scientific etc. implications of proper climate protection.⁸²

The problem is not that climate crimes are a big "bluff" with which other agendas are concealed or hidden.⁸³ Rather, the problem is that the *illusio* of the criminal law field⁸⁴ makes us believe or want to believe in the effectiveness, lack of alternatives, and neutrality of climate crimes. This belief in criminal law and its meaningfulness to fight climate change has (self-)conciliatory effects. One (too) easily loses sight of the actual power dynamics, which

⁸¹ Critical of this vanishing point of criminal law affirmation is Christoph Burchard, "Criminal Law Exceptionalism as an Affirmative Ideology, and its Expansionist Discontents", *Criminal Law and Philosophy* (2021).

⁸² Also see Felix Herzog, *Gesellschaftliche Unsicherheit und strafrechtliche Daseinsvorsorge: Studien zur Vorverlegung des Strafrechtsschutzes in den Gefährdungsbereich* (Heidelberg: v. Decker's Verlag Schenck, 1991), p. 147 (on environmental protection and environmental crimes).

⁸³ The (almost unmissable) literature on symbolic criminal law complains that the latter feigns legal effectiveness, primarily serves to calm and appease the norm addressees, satisfies the current "need for action" or demonstrates a strong state. Fundamental Hassemer, n. 80 above, p. 556 (admittedly with the clarification that this deception or this "bluff" is not based on intentions, but describes a characteristic of the norm); overview in Niklas Funcke-Auffermann, *Symbolische Gesetzgebung im Lichte der positiven Generalprävention* (Berlin: Duncker&Humblot, 2007), p. 46 ff.

⁸⁴ On the concept, cf. for example Pierre Bourdieu, *Praktische Vernunft. Zur Theorie des Handelns*, Hella Beister (trans.) (Berlin: Suhrkamp, 1998), p. 143 and Pierre Bourdieu and Loïc J. D. Wacquant, *Reflexive Anthropologie*, Hella Beister (trans.) (Berlin: Suhrkamp, 1996). Heinrich Popitz, *Die Präventivwirkung des Nichtwissens* (Tübingen: Mohr (Siebeck), 1968), applies this idea to criminal law by assuming that criminal law probably only works because most people assume that it would.

in turn reproduces the *status quo*, possibly contrary to one's intentions. The "escape into climate crimes conventionally conceived" seeks a "way out of the pressure to prevent."⁸⁵ This is likely part of self-imposed or structurally internalized (self)conciliation and appeasement, in which – to promulgate some layman's psychology – worry, even fear and also hope are likely become motivating factors.⁸⁶

IV. OUTLOOK: PLANETARY CLIMATE SOCIETIES

Make no mistake: With our critique of climate crimes conventionally conceived we do *not* deny climate change or the need to do something about it. Yet we sought to disclose that climate crimes, in their very conventional conception, need to disclose and pay proper attention to their political, social, economic, etc. preconceptions. We claim that climate crimes conventionally conceived, or the discussions about them, do not bring to the fore that we – as humans wishing to uphold a habitable climate for generations present and future – need to make calls on how moderate or radical the break with the *status quo* should and must be. In that respect, we are not arguing in favor of more rigid active social control (e.g. by means of technical or legal prevention or preemption). And we caution against supposedly benevolent climate authoritarian imaginings ("Eco dictatorship") that seek to force (criminal) law into the service of climate protection (no longer "rule of law", but "rule by law"). The point of reference can no longer remain the national or regional level. As difficult as this may be, it would seem that we (now as criminal law academics) need to turn the tables and not to think of climate protection from the perspective of climate crimes. For "[w]e cannot prosecute our way out of the disruptions caused by the climate crisis."⁸⁷ Rather, climate crimes must be designed from the perspective of planetary climate societies, which must first and foremost become aware of their relationship to nature (or better: understand themselves as part of nature) and the just distribution of freedom across generations present and future. It is high time that we address this, and not climate crimes, especially those conventionally conceived.

⁸⁵ Arndt Schmehl, "Symbolische Gesetzgebung", *Zeitschrift für Rechtspolitik* (1991): 251, p. 253.

⁸⁶ See also Funcke-Auffermann, n. 83 above, p. 46 ff. with citations. Klaus Tiedemann and Urs Kindhäuser, "Umweltstrafrecht - Bewährung oder Reform?", *Neue Zeitschrift für Strafrecht* (1988): 337, p. 340 make a virtue of this necessity and declare that "the securing of fear-free certainty of existence" must be "a component of the protection of legal interests [*Rechtsgüterschutz*]" in environmental criminal law".

⁸⁷ Criminal Justice System, n.6 above, p.1550.