
CHAPTER ONE

LOCAL PROSECUTION IN THE ERA OF CLIMATE CHANGE

On May 15, 2013, Ken Ward and Jay O’Hara piloted a lobster boat into the path of a coal freighter, dropped anchor, and for one day delayed the delivery of 40,000 tons of coal to the largest coal-fired power plant (and one of the largest sources of carbon emissions) in New England.¹ After the Coast Guard boarded the boat, the two environmental activists returned to land and were charged with conspiracy, disorderly conduct, and several other counts that threatened them with multiyear prison sentences.² Shortly before the trial was scheduled to begin, Sam Sutter, the District Attorney (DA) for Bristol County, Massachusetts, dropped the charges in exchange for \$2000 in restitution from each.³ From the steps of the county courthouse, Sutter stated:

The decision that [we] reached today . . . certainly took into consideration the cost to the taxpayers . . . but was also made with our concerns for their children, and the children of Bristol County and beyond in mind. Climate change is one of the gravest crises our planet has ever faced. In my humble opinion, the political leadership on this issue has been sorely lacking.⁴

Sutter’s decision received immediate praise, with one commentator describing it as “an unusual and rare example of a prosecutor exercising his conscience and using prosecutorial discretion while still upholding the rule of law.”⁵ But if Sutter was among the first local prosecutors to publicly acknowledge the climate crisis, he would not be the last. During his 2017 campaign for Philadelphia DA, Larry Krasner noted that it was “essential for local prosecutors to vigorously prosecute pollution when the [federal government] refuses to do its duty,” and that “the rule of law must remain paramount” even as “we face the prospect of life-threatening disruptions” due to climate change.⁶ And while running for Los Angeles DA three years later, George Gascón included environmental justice as a focus of his policy platform, promising to “hold oil and

¹ Wen Stephenson, *The New Climate Radicals*, THE NATION (July 17, 2013), <https://www.thenation.com/article/archive/new-climate-radicals> [<https://perma.cc/7UGQ-S7UY>].

² Susan Kieffer, *Two Men and a Lobster Boat*, AUDUBON (Oct. 22, 2014), <https://www.audubon.org/news/two-men-and-lobster-boat-o> [<https://perma.cc/442S-KGB6>].

³ *Id.*; Press Release, Bristol Cnty. Dist. Att’y, Statement on the Disposition of the Brayton Point Protest Case (Sept. 8, 2014), <http://bristolda.com/2014/09/statement-on-the-disposition-of-the-brayton-point-protest-case> [<https://perma.cc/XLE8-WCYW>].

⁴ Press Release, *supra* note 3.

⁵ Kevin Gosztola, *The Prosecution of Environmental Activists: District Attorney Sam Sutter Sets Bold Example for Other Prosecutors*, SHADOWPROOF (Sept. 10, 2014), <https://shadowproof.com/2014/09/10/the-prosecution-of-climate-activists-district-attorney-sam-sutter-sets-bold-example-for-american-prosecutors> [<https://perma.cc/SK7A-A3VF>].

⁶ *Q&A with Philly District Attorney Candidate Larry Krasner*, PHILLY THRIVE (May 15, 2017), <https://www.phillythrive.org/krasner> [<https://perma.cc/K5FS-ZPS7>].

gas accountable for their ongoing actions to fuel climate change” and to crack down on environmental crime.⁷

Despite statements like these, conversations around local prosecution and those around climate change rarely intersect.⁸ The climate justice movement has, for the most part, neglected to turn its attention toward local prosecutors, despite growing demand from voters for local climate action.⁹ By the same token, scholars and advocates for criminal justice reform have largely overlooked the ways that climate change will affect the criminal justice system.¹⁰ Yet independently, both topics have garnered enormous public and academic attention in recent years. Climate activists have increasingly pushed for large-scale action to combat climate change by decarbonizing the economy.¹¹ And with the growth of the Black Lives Matter movement, especially in the wake of the 2020 murders of George Floyd and Breonna Taylor, millions have demanded fundamental transformation of the criminal justice system — including by reassessing the role and power of prosecutors.¹²

These conversations can no longer remain separate. It is a near certainty that the planet will face unprecedented disruptions as a result of climate change, and the criminal justice system will not be immune from them — and not simply because of climate-related disruptions to courts and to prosecutors’ physical offices.¹³ Climate change will necessarily impact the frequency and types of conflicts that arise between people; to the extent the criminal justice system is called upon to address these challenges (as it so often has been in response to other sociopolitical

⁷ Press Release, George Gascón for L.A. Dist. Att’y, George Gascón’s Proposed Initiatives to Enhance Environmental Justice (Nov. 2, 2020), <https://www.georgegascon.org/campaign-news/george-gascons-proposed-initiatives-to-enhance-environmental-justice> [<https://perma.cc/3Q9J-F4QP>].

⁸ There is, however, a rich literature discussing the application of criminal law principles to the problem of climate change. See generally RONALD C. KRAMER, CARBON CRIMINALS, CLIMATE CRIMES (2020); ROB WHITE, CLIMATE CHANGE CRIMINOLOGY (2018).

⁹ See Patrick Sisson, *The Rise of the Local Climate Candidate*, BLOOMBERG: CITYLAB (Nov. 23, 2021, 3:21 PM), <https://www.bloomberg.com/news/articles/2021-11-23/for-some-candidates-climate-change-is-now-a-local-issue> [<https://perma.cc/RS25-9KJW>]. But see Chesa Boudin (@chesaboudin), TWITTER (Sept. 28, 2019, 5:43 PM), <https://twitter.com/chesaboudin/status/1178062754009120768> [<https://perma.cc/M9EE-25E9>] (announcing endorsement by Sunrise Movement); *Endorsements*, SUNRISE MOVEMENT NYC, <https://www.sunrise-nyc.org/endorsements> [<https://perma.cc/5TK4-CB49>] (endorsing Tiffany Cabán for Queens County DA).

¹⁰ See, e.g., WHITE, *supra* note 8, at 9–10.

¹¹ See David Roberts, *The Green New Deal, Explained*, VOX (Mar. 30, 2019, 8:23 AM), <https://www.vox.com/energy-and-environment/2018/12/21/18144138/green-new-deal-alexandria-ocasio-cortez> [<https://perma.cc/565E-N4D7>].

¹² E.g., Fabiola Cineas, *The Breonna Taylor Case Proves that Prosecutors Have Too Much Power*, VOX (Oct. 14, 2020, 1:30 PM), <https://www.vox.com/21514887/breonna-taylor-daniel-cameron-prosecutor> [<https://perma.cc/TWY5-ZDTE>].

¹³ E.g., Fiscal Year 2021 Budget: Hearing Before Phila. City Council 12 (2020) [hereinafter Phila. Dist. Att’y’s Off.] (statement of Larry Krasner, DA), <http://phlcouncil.com/wp-content/uploads/2020/06/DAO-FY21-BUDGET-HEARING-TESTIMONY-060720.pdf> [<https://perma.cc/LVP9-3SRC>].

crises), local prosecutors will be at the forefront of that response. Purely as a matter of scale, there are over 2300 local prosecutors' offices in the United States that collectively employ tens of thousands of attorneys.¹⁴ By contrast, the ninety-three U.S. Attorneys' offices employ a total of roughly 5500 attorneys.¹⁵ Not only do local prosecutors thus make up the largest contingent of prosecutors in the country, they also prosecute *ninety-five* percent of the nation's criminal cases.¹⁶ Unsurprisingly, then, scholars and activists have deemed local prosecutors "the most powerful officials in the criminal justice system."¹⁷

Assuming, for the sake of argument, that the criminal justice system will continue to exist in more or less the same form it does today (a proposition that is itself deeply contested),¹⁸ how should local prosecutors react to the challenges posed by climate change, and what actions have they already begun to take? Rather than simply responding to climate change's consequences as they unfold, can local prosecutors help to mitigate climate change — and, if so, who should be held accountable? And in all of this, what challenges will local prosecutors face?

This Chapter begins to explore these questions. Section A provides an overview of the ways climate change will impact the criminal justice system and offers a framework for how local prosecutors should exercise their authority in response. Sections B and C then address the various tools local prosecutors have to respond to climate change, some of which

¹⁴ Lijia Gong, PUB. RTS. PROJECT, GROWING AN EQUITABLE ENFORCEMENT PRACTICE: A GUIDE FOR LOCAL PROSECUTORS TO FIGHT CORPORATE ABUSE 5 (2019); see BUREAU OF JUST. STAT., U.S. DEP'T OF JUST., PROSECUTORS IN STATE COURTS, 2007, at 4 (2007), <https://bjs.ojp.gov/content/pub/pdf/psc07st.pdf> [<https://perma.cc/T6GB-5JAC>]. This Chapter uses the term "local prosecutors" to encompass the offices variously labeled "district attorneys," "state's attorneys," "commonwealth attorneys," or "county attorneys" by different municipalities.

¹⁵ U.S. DEP'T OF JUST., U.S. ATTORNEYS (USA) 1 (2017), <https://www.justice.gov/jmd/file/822056/download> [<https://perma.cc/B42T-SMU5>].

¹⁶ Emily Bazelon & Miriam Krinsky, Opinion, *There's a Wave of New Prosecutors. And They Mean Justice.*, N.Y. TIMES (Dec. 11, 2018), <https://www.nytimes.com/2018/12/11/opinion/how-local-prosecutors-can-reform-their-justice-systems.html> [<https://perma.cc/L6TE-X8CL>].

¹⁷ Angela J. Davis, *Reimagining Prosecution: A Growing Progressive Movement*, 3 UCLA CRIM. JUST. L. REV. 1, 4 (2019); see Benjamin Levin, Essay, *Imagining the Progressive Prosecutor*, 105 MINN. L. REV. 1415, 1421–22 (2021).

¹⁸ As noted above, a growing academic and popular movement has called for the wholesale reimagining of the criminal justice system and its instruments — including by calling for the abolition of prisons, police, and prosecutors themselves. See, e.g., Dorothy E. Roberts, *The Supreme Court, 2018 Term — Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1 (2019); see also Mariame Kaba, Opinion, *Yes, We Mean Literally Abolish the Police*, N.Y. TIMES (June 12, 2020), <https://www.nytimes.com/2020/06/12/opinion/sunday/floyd-abolish-defund-police.html> [<https://perma.cc/HN5Z-MPBF>]; Taylor Blackston & Sojourner Rivers, Op-ed, *To Confront Sexual Violence, We Don't Need Better Prosecutors — We Need to Abolish Them*, TRUTHOUT (June 17, 2021), <https://truthout.org/articles/to-address-gender-based-violence-first-defund-the-prosecutors> [<https://perma.cc/R5JK-CJWD>]. While such critiques are deeply important, this Chapter focuses on what actions local prosecutors can and should take (or have already taken) in response to climate change within the criminal justice system as it exists today.

certain prosecutors have already begun to utilize (even if they rarely frame their actions explicitly in terms of climate change). Section B examines the steps prosecutors can take to hold accountable those who contribute to climate change or exacerbate its consequences — namely, corporations, corporate executives, and policymakers. Section C then discusses how local prosecutors should exercise their day-to-day authority, including by pursuing decarceration, exercising leniency toward climate protesters, and advocating for climate action.

A. Climate Change as a Criminal Justice Priority

Given the scientific consensus around the threat posed by climate change, political leaders and politicians of all kinds and at all levels of government must plan for how to respond to the many challenges the climate crisis will bring. Local prosecutors are no exception.¹⁹ This section begins by highlighting some of the many changes the criminal justice system can anticipate due to climate change; indeed, some have already begun to materialize. In response to these changes, local prosecutors should adopt a public health approach to projected increases in crime by looking toward restorative justice models, rather than incarceration, while still seeking to hold accountable those who contribute to climate change or who exacerbate its consequences.

1. *How Climate Change Impacts the Criminal Justice System.* — First, climate change is expected to alter the frequency and types of crimes that the criminal justice system will be forced to confront, especially in the absence of stronger social safety nets. According to a 2012 working paper from the Harvard Kennedy School, between 2010 and 2099, the United States will experience an additional 3.8 million cases of larceny, 3.1 million burglaries, 2.4 million simple assaults, 1.4 million vehicle thefts, 409,000 robberies, 216,000 cases of rape, and 35,000 murders compared to the baseline as a result of climate change.²⁰ A 2020 study reached similar conclusions with respect to violent crime generally.²¹ Both studies discuss several hypotheses for these increases: first, longer periods of temperate weather (namely during winter months) will increase *opportunities* for crime; second (and relatedly), changing weather patterns may increase the *probability* that crimes are committed successfully; and third, increased temperatures will cause higher rates of physiological heat stress, leading to more frequent conflicts.²²

¹⁹ See Laurie L. Levenson, *Climate Change and the Criminal Justice System*, 51 ENV'T L. 333, 380–81 (2021).

²⁰ Matthew Ranson, *Crime, Weather, and Climate Change 2* (Harvard Kennedy Sch., M-RCBG Associate Working Paper Series No. 8, 2012).

²¹ Ryan D. Harp & Kristopher B. Karnauskas, *Global Warming to Increase Violent Crime in the United States*, 15 ENV'T RSCH. LETTERS, Mar. 3 2020, at 1.

²² *Id.*; Ranson, *supra* note 20, at 3.

Beyond its impact on more traditional crimes, climate change will also likely increase the frequency of less common crimes and create new forms of crime altogether. Professor Laurie Levenson notes that the anticipated surge of climate refugees seeking entry to the United States may produce scores of immigration-related offenses like illegal entry.²³ Professor Rob White further notes that climate-related events will increase the prevalence of crimes including “looting and blackmarketeering in relation to food products, illegal fishing and killing of birds and land animals, and trafficking in humans and valued commodities such as water and food.”²⁴ Levenson also anticipates the continued proliferation of fraud and property crimes in the aftermath of climate-fueled disasters, and more novel crimes such as criminal negligence in cases where “defendants ignore the dangers from climate change and their actions contribute to deaths.”²⁵ And those who refuse or are unable to obey evacuation orders may, at least in theory, be criminally prosecuted.²⁶

In addition, climate change is contributing to increasingly dangerous conditions within carceral facilities. Extreme heat poses a risk to both prisoners and correctional officers: according to a recent analysis by *The Intercept*, over half of prisons, jails, and detention centers will experience more than ten days a year exceeding 105 degrees by century’s end; nearly 700 facilities will experience more than *fifty* days annually at these levels.²⁷ Already, prisoners in California’s Central Valley have consistently reported lack of access to fans and air-conditioning, and have described their conditions of confinement during heat waves as “a living hell.”²⁸ Climate-fueled wildfires pose an additional threat to prisoners not only in the American West, but also in less obvious areas like Oklahoma and Florida.²⁹ And as hurricanes, sea level rise, and extreme rainfall intensify, flooding will increasingly expose prisoners to

²³ Levenson, *supra* note 19, at 340–42. More aggressive efforts to criminalize immigration would lead to “a tsunami of new cases.” *Id.* at 342.

²⁴ WHITE, *supra* note 8, at 44.

²⁵ Levenson, *supra* note 19, at 363; *see id.* at 346–49, 354–56; *infra* ch. I, section B.1.a, pp. 1554–58.

²⁶ *E.g.*, William S. Gribble, *It’s a Trap!: Responsible Enforcement of Texas Disaster Evacuation Orders*, 52 TEX. TECH L. REV. 725, 732–34 (2020).

²⁷ Alleen Brown, *Boiling Behind Bars*, THE INTERCEPT (Feb. 12, 2022, 9:00 AM), <https://theintercept.com/2022/02/12/prisons-texas-heat-air-conditioning-climate-crisis> [<https://perma.cc/8DHK-R5N3>]; *see also* DANIEL W.E. HOLT, SABIN CTR. FOR CLIMATE CHANGE L., HEAT IN US PRISONS AND JAILS i–iii (2015).

²⁸ Cyrus Dunham, “*A Living Hell*”: *Dispatches from a California Prison Amid the Climate and Coronavirus Crises*, THE INTERCEPT (Nov. 22, 2020, 8:00 AM), <https://theintercept.com/2020/11/22/california-women-prison-heat-climate-covid> [<https://perma.cc/YL4N-G4H4>]; *see also* Brown, *supra* note 27 (describing similar conditions in Texas prisons).

²⁹ Alleen Brown, *Dark, Smoky Cells*, THE INTERCEPT (Feb. 12, 2022, 9:12 AM), <https://theintercept.com/2022/02/12/wildfires-prisons-climate-california> [<https://perma.cc/3FBR-APXZ>].

“horrifying, inhumane conditions,” including power outages and sewage backups inside cells.³⁰ In many cases, these climate risks overlap.³¹

Finally, to the extent that political inaction continues to stall progress on climate action, and as the effects of climate change become more readily apparent, it is reasonable to expect more frequent acts of civil disobedience in response. Activists across the country have in recent years staged increasingly large-scale protests, including interfering with pipelines and interrupting sessions of state legislatures.³² Especially considering the widespread support for climate justice among younger generations, these types of actions seem likely to continue or intensify.³³

2. *Building Community Resilience.* — If history is any guide, the societal disruptions caused by climate change will likely invite a response by the criminal justice system.³⁴ As this occurs, local prosecutors will play a substantial role in shaping such a response, given that they are “responsible for the vast bulk of criminal law enforcement” within the states and have typically been vested with tremendous power to manage these problems.³⁵ This allocation of power is partly the product of the “law and order” or “tough on crime” ethos common in American

³⁰ John Washington, *After Harvey, Texas Inmates Were Left in Flooded Prisons Without Adequate Water or Food*, THE NATION (Oct. 13, 2017), <https://www.thenation.com/article/archive/after-harvey-texas-inmates-were-left-in-flooded-prisons-without-adequate-water-or-food> [<https://perma.cc/6TZG-K7HL>]; see Alleen Brown, *Trapped in the Floods*, THE INTERCEPT (Feb. 12, 2022, 9:18 AM), <https://theintercept.com/2022/02/12/prison-climate-crisis-flood> [<https://perma.cc/Q7BH-QPV5>].

³¹ Florida’s Cross City Correctional Institution, for instance, is projected to face “extreme” heat risk, “moderate” wildfire risk, and “severe” flood risk as a result of climate change. See *Climate and Punishment*, THE INTERCEPT, <https://projects.theintercept.com/climate-and-punishment/index.html> [<https://perma.cc/PT3E-WGXM>].

³² See, e.g., Sibó Chen, “Blockadia” Helped Cancel the Keystone XL Pipeline — And Could Change Mainstream Environmentalism, THE CONVERSATION (Mar. 10, 2021, 12:32 PM), <https://theconversation.com/blockadia-helped-cancel-the-keystone-xl-pipeline-and-could-change-mainstream-environmentalism-155276> [<https://perma.cc/6DRS-F94C>]; Jesse Paul, *Denver DA Won’t Prosecute 33 Climate Protesters Arrested Before Gov. Polis’ State of the State Speech*, COLO. SUN (Jan. 23, 2020, 3:35 PM), <https://coloradosun.com/2020/01/23/colorado-protesters-jared-polis-state-of-the-state-charges> [<https://perma.cc/2WF7-263J>].

³³ E.g., Emma Marris, *Why Young Climate Activists Have Captured the World’s Attention*, NATURE (Sept. 18, 2019), <https://www.nature.com/articles/d41586-019-02696-0> [<https://perma.cc/U9M4-MMR7>].

³⁴ The United States has historically relied on criminalization to manage a multitude of real or perceived social problems. See generally, e.g., MICHELLE ALEXANDER, *THE NEW JIM CROW* (2012); Joel A. Dvoskin et al., *A Brief History of the Criminalization of Mental Illness*, 25 CNS SPECTRUMS 638 (2020); NAT’L IMMIGRANT JUST. CTR., *A LEGACY OF INJUSTICE: THE U.S. CRIMINALIZATION OF MIGRATION* (2020); Anna North, *The Movement to Decriminalize Sex Work, Explained*, VOX (Aug. 2, 2019, 7:30 AM), <https://www.vox.com/2019/8/2/20692327/sex-work-decriminalization-prostitution-new-york-dc> [<https://perma.cc/7SFR-8ZRN>].

³⁵ Rachel E. Barkow, *Federalism and Criminal Law: What the Feds Can Learn from the States*, 109 MICH. L. REV. 519, 545 (2011); see also sources cited *supra* note 17.

politics and among many local prosecutors.³⁶ A similar knee-jerk impulse will likely accompany the disruptions caused by climate change.³⁷

But this “law and order” approach has largely failed to meaningfully prevent other social ills, exemplified most notably by the failure of the U.S. war on drugs. As a 2021 report concluded, the United States’ reliance on prosecution and policing “has failed to achieve many of its purported goals of reducing the supply, demand, and markets for illicit drugs on a meaningful scale.”³⁸ In the context of the opioid epidemic, similar failures have prompted some prosecutors to recognize that we “cannot prosecute our way out of” the crisis and to focus instead on providing public health-oriented solutions.³⁹ Other advocates have arrived at the same conclusion with respect to homelessness, noting that criminalization of unhoused people is not only ineffective and costly but also “serve[s] as a barrier to income and housing stability.”⁴⁰

By the same measure, we cannot prosecute our way out of the disruptions caused by the climate crisis. While harsh criminal enforcement may mollify some constituents in the short term, local prosecutors should instead view the risks posed by climate change as presenting “an opportunity to rethink what it means for communities to be cared for and ‘safe.’”⁴¹ And in a world of climate change, public safety would be best served not by coercion and incarceration, but instead by fostering resilient communities that protect their most vulnerable members.⁴² As White argues, building such resilience is “[a] vital component of any criminological project concerned with global warming.”⁴³ This aim could be realized by adopting a more restorative approach to

³⁶ See Levin, *supra* note 17, at 1423–25 & n.46.

³⁷ See WHITE, *supra* note 8, at 124; cf. KRAMER, *supra* note 8, at 220–21.

³⁸ DAVID CLOUD, ALISSA MARQUE HEYDARI & RENA PAUL, INST. FOR INNOVATION IN PROSECUTION, A NEW APPROACH: A PROSECUTOR’S GUIDE TO ADVANCING A PUBLIC HEALTH RESPONSE TO DRUG USE 2 (2021); see also sources cited *supra* note 34.

³⁹ Press Release, Suffolk Cnty. Dist. Att’y, DA Rollins Announces Funding for Community-Based Drug Diversion Partnership (May 13, 2020), <https://www.suffolkdistrictattorney.com/press-releases/items/2020/5/13/da-rollins-announces-funding-for-community-based-drug-diversion-partnership> [<https://perma.cc/8ANB-8VD5>].

⁴⁰ *Housing and Homelessness as a Public Health Issue*, AM. PUB. HEALTH ASS’N (Nov. 7, 2017), <https://apha.org/policies-and-advocacy/public-health-policy-statements/policy-database/2018/01/18/housing-and-homelessness-as-a-public-health-issue> [<https://perma.cc/7DFR-W4DM>].

⁴¹ Brett Story & Seth J. Prins, *A Green New Deal for Decarceration*, JACOBIN (Aug. 28, 2019), <https://jacobinmag.com/2019/08/green-new-deal-decarceration-environment-prison-incarceration> [<https://perma.cc/56TP-6545>].

⁴² See THE SECURE AND THE DISPOSSESSED 104 (Nick Buxton & Ben Hayes eds., 2016); cf. Mark E. Keim, *Building Human Resilience: The Role of Public Health Preparedness and Response as an Adaptation to Climate Change*, 35 AM. J. PREVENTIVE MED. 508, 508 (2008).

⁴³ WHITE, *supra* note 8, at 44. It should be acknowledged that governments and corporations have elsewhere deployed the language of “building resilience” to justify militarized responses to emergencies and disasters. See THE SECURE AND THE DISPOSSESSED, *supra* note 42, at 103–04.

prosecution — one that “respond[s] to individual harm ‘without relying on alienation, punishment, or State or systemic violence.’”⁴⁴

Supporting climate resilience is a task that local prosecutors are uniquely situated to take on relative to their state and federal analogues. Communities across the country will experience climate change in different ways and to different degrees, and its impacts will be magnified by existing social vulnerabilities. Communities of color, for instance, will disproportionately bear the brunt of climate change’s burden and already experience significant health consequences as a result of mass incarceration.⁴⁵ With this information in mind, local prosecutors are well positioned to understand the needs and circumstances of their constituents and to shape their local criminal justice policies accordingly — including by rejecting incarceration and other harshly punitive policies in favor of policies that bolster community cohesion and resilience. And these decisions could, for the most part, be made independently of state or federal political leadership.⁴⁶ Thus, even with a state attorney general inclined to punish harshly, or a U.S. Attorney General indifferent to climate change, a local prosecutor could fashion, and their constituents could demand, a criminal justice policy that promotes resilience, rather than retribution.

Such an approach could prove to be politically beneficial for local prosecutors, the vast majority of whom are elected.⁴⁷ For one thing, a large majority of Americans, across the political spectrum, agree that climate change is an urgent issue that the federal government is not doing enough to remedy, and that climate change is affecting their local communities.⁴⁸ Stepping into this leadership vacuum could therefore provide local prosecutors with a political boost, especially at a time when voter demand for local climate solutions is on the rise.⁴⁹ But even where climate change is a politically sensitive topic, local prosecutors

⁴⁴ Note, *Prosecuting in the Police-less City: Police Abolition’s Impact on Local Prosecutors*, 134 HARV. L. REV. 1859, 1871 (2021) (quoting GENERATION FIVE, TOWARD TRANSFORMATIVE JUSTICE 5 (2007), http://www.generationfive.org/wp-content/uploads/2013/07/G5_Toward_Transformative_Justice-Document.pdf [<https://perma.cc/D42Y-3HVR>]).

⁴⁵ U.S. ENV’T PROT. AGENCY, CLIMATE CHANGE AND SOCIAL VULNERABILITY IN THE UNITED STATES 4 (2021); see Elizabeth J. Gifford, Commentary, *How Incarceration Affects the Health of Communities and Families*, 80 N.C. MED. J. 372, 372–74 (2019); Seth J. Prins & Brett Story, Editorial, *Connecting the Dots Between Mass Incarceration, Health Inequity, and Climate Change*, 110 AM. J. PUB. HEALTH S35, S35 (Supp. 2020).

⁴⁶ See Barkow, *supra* note 35, at 556.

⁴⁷ PROSECUTORS & POL. PROJECT, UNIV. OF N.C. SCH. OF L., NATIONAL STUDY OF PROSECUTOR ELECTIONS 4 (2020) (“Forty-five states elect prosecutors on the local level.”).

⁴⁸ See ALEC TYSON & BRIAN KENNEDY, PEW RSCH. CTR., TWO-THIRDS OF AMERICANS THINK GOVERNMENT SHOULD DO MORE ON CLIMATE 4 (2020), https://www.pewresearch.org/science/wp-content/uploads/sites/16/2020/06/PS_2020.06.23_government-climate_REPORT.pdf [<https://perma.cc/5LB4-YQBW>].

⁴⁹ See Sisson, *supra* note 9.

could instead benefit from promoting their commitment to building resilience. Eli Lehrer, the president of the libertarian think tank R Street Institute, has suggested that resilience is “a mom-and-apple-pie issue. How could anybody say, ‘It’s a bad idea to make people safer against extreme weather?’”⁵⁰ And while some progressive districts across the country have begun embracing restorative justice models, these models are gaining support among members of the political right as well.⁵¹

3. *Addressing Climate Change Through Prosecution.* — Fostering community resilience and pursuing less carceral approaches to prosecution does not necessarily require eschewing criminal enforcement altogether. Rather, local prosecutors could shift their focus more toward “eliminat[ing] the environmental, economic, and sociopolitical forces that are the root causes of many discrete, interpersonal injuries.”⁵² While this might not compose their bread-and-butter work, local prosecutors are well positioned to combat offenses like wage theft, predatory lending, pollution, and unsafe rental housing conditions.⁵³ Local prosecutors have already been identified as critical to combatting environmental crimes, like hazardous waste dumping and water contamination, since they may react more quickly than other agencies and “may be more attuned to the particular problems and needs of local communities.”⁵⁴ This enforcement is important given that access to clean air and water is “an essential part of community health and well-being.”⁵⁵

From this perspective, local prosecutors would be justified in using their resources to directly address climate change — itself a “root cause” of many criminal acts and a primary source of community harm. While climate change is a global problem with many discrete contributors and structural causes, this should not obscure the fact that there are specific individuals and corporations who “can and should be deemed responsible in the eyes of the law.”⁵⁶ Under existing law, this would most obviously include targeting illegal greenhouse gas emissions, but it might also encompass knowing or negligent failures to act in anticipation of climate change. And while it might be true that ordinary people are “implicated in activities that contribute to global warming,” targeting them for prosecution in the same way would be counterproductive given

⁵⁰ Bill Kakenmaster, *What Is Climate Resilience?*, IMPAKTER (Mar. 2, 2018), <https://impakter.com/what-is-climate-resilience> [<https://perma.cc/VKW5-UQ45>].

⁵¹ Amy J. Cohen, *Moral Restorative Justice: A Political Genealogy of Activism and Neoliberalism in the United States*, 104 MINN. L. REV. 889, 892 (2019).

⁵² Note, *supra* note 44, at 1871; see also Avanindar Singh & Sajid A. Khan, *A Public Defender Definition of Progressive Prosecution*, 16 STAN. J. C.R. & C.L. 475, 476 (2021).

⁵³ Gong, *supra* note 14, at 7.

⁵⁴ THEODORE M. HAMMETT & JOEL EPSTEIN, NAT’L INST. OF JUST., U.S. DEP’T OF JUST., LOCAL PROSECUTION OF ENVIRONMENTAL CRIME xi (1993); see also *id.* at iii.

⁵⁵ Gong, *supra* note 14, at 16.

⁵⁶ WHITE, *supra* note 8, at 112.

that their contributions by and large originate “in structures over which the participants have little or no direct control.”⁵⁷

This approach would require turning an eye toward the actions of corporations and corporate executives. Although federal prosecutors have historically taken the lead in controlling corporate crime, local prosecutors do pursue such investigations, which have several advantages over more common civil and regulatory enforcement actions.⁵⁸ First, criminal prosecutions do not face the same “structural barriers” that suits by private attorneys general face, such as forced arbitration clauses or limitations on class actions.⁵⁹ Second, and relatedly, criminal prosecutions are not subject to the same remedial limits that exist in civil enforcement actions, and prosecutors’ “discretion, resources, and power in the criminal system permit far more expansive remedies than are available in civil cases brought by private attorneys general.”⁶⁰ This is relevant since many corporate criminal prosecutions are resolved through settlements, rather than trials; these settlements can require corporations to make public apologies, conduct community service, or establish compliance and oversight programs.⁶¹ And third, many consider criminal liability to carry a more negative stigma than civil liability — that is, corporations “do not want to be labeled corporate criminals and therefore may have more incentives to avoid criminal sanctions than otherwise comparable civil or administrative sanctions.”⁶²

Beyond the strong interest in preventing these harms in the first place, corporate prosecutions raise fewer carceral concerns than prosecutions of individuals, since “corporations can neither be jailed nor have their individual liberties restricted when they commit crimes.”⁶³ Just as local prosecutors can adopt policies that differ from their state and federal counterparts, they can also “close the corporate enforcement gap” caused by weak enforcement at the federal or state levels.⁶⁴ Finally, just

⁵⁷ *Id.* at 114; cf. Catherine Coleman Flowers, Opinion, *A County Where the Sewer Is Your Lawn*, N.Y. TIMES (May 22, 2018), <https://www.nytimes.com/2018/05/22/opinion/alabama-poverty-sewers.html> [<https://perma.cc/W5HB-39YE>].

⁵⁸ Michael L. Benson, *Investigating Corporate Crime: Local Responses to Fraud and Environmental Offenses*, 28 W. ST. U. L. REV. 87, 87–89 (2000–2001); see KRAMER, *supra* note 8, at 206.

⁵⁹ Gong, *supra* note 14, at 7.

⁶⁰ Brandon L. Garrett, *Structural Reform Prosecution*, 93 VA. L. REV. 853, 874 (2007). *But see* Benson, *supra* note 58, at 105 (“[M]any [environmental] violations that could be handled in a criminal forum instead receive treatment via administrative or civil proceedings.”).

⁶¹ Gabriel Markoff, *Arthur Andersen and the Myth of the Corporate Death Penalty: Corporate Criminal Convictions in the Twenty-First Century*, 15 U. PA. J. BUS. L. 797, 800, 827 (2013).

⁶² David M. Uhlmann, *The Pendulum Swings: Reconsidering Corporate Criminal Prosecution*, 49 U.C. DAVIS L. REV. 1235, 1242 (2016).

⁶³ *Id.* at 1243. This is obviously not true for prosecutions of corporate executives.

⁶⁴ Gong, *supra* note 14, at 7; see Mihailis E. Diamantis & William S. Laufer, *Prosecution and Punishment of Corporate Criminality*, 15 ANN. REV. L. & SOC. SCI. 453, 458 (2019) (noting decline in federal corporate prosecutions in the last decade).

as building resilience may be politically popular, corporate enforcement priorities may enjoy similar support among local prosecutors' constituents of many different political affiliations.⁶⁵ None of this is meant to suggest that corporate prosecutions would be easy for local prosecutors to undertake; and, as suggested by the next section, the efficacy of such prosecutions in preventing corporate misconduct may be questionable. But considering the magnitude of climate change, local prosecutors should be open to reallocating their resources in this way.

B. Prosecuting Climate Criminals

With this framework in mind, this section and the next begin to assess some of the concrete actions local prosecutors can take to respond to climate change and its consequences. In several cases, these actions have already begun, even if they have not been explicitly identified as relating to climate change. Recognizing the systemic harm that climate change creates, local prosecutors should view their public safety mandate as requiring them to combat climate change, or at least minimize its consequences. This section explores several tools local prosecutors can use to do so, though they are imperfect tools at best. The most obvious options likely include prosecutions for illegal emissions, under existing environmental criminal law, and for corporate failures to prepare adequately for climate change. While local prosecutors can bring such charges, their deterrent effect may be limited. Less obvious tools include prosecutions of government officials for failures to prepare for climate change, and fraud and nuisance prosecutions of corporations.

1. *Prosecuting Emissions and Failures to Adapt.* — In recent years, local prosecutors have demonstrated their capacity to bring charges against corporations (and sometimes corporate executives) for illegal emissions as well as failures to adapt to or prepare for climate change. The first section below surveys some of these actions, while the second section addresses their relative merits.

(a) *Examples of Local Prosecution.* — For local prosecutors interested in addressing the “root causes” of climate change, there is an obvious place to start: stemming carbon emissions. Though carbon emissions are not usually criminalized (so long as they fall within regulatory limits),⁶⁶ there are some instances where prosecutions can take place under state or local health and safety codes or environmental laws.

⁶⁵ Cf., e.g., Brian Mann, *State Attorneys General Reach a \$26 Billion National Opioid Settlement*, NPR (July 21, 2021, 3:55 PM), <https://www.npr.org/2021/07/21/1018881195/state-attorneys-general-26-billion-opioid-settlement> [<https://perma.cc/Z92X-F9GR>] (discussing coalition of state attorneys general from both red and blue states that successfully sued opioid manufacturers).

⁶⁶ See Michael G. Faure, Ingeborg M. Koopmans & Johannes C. Oudijk, *Imposing Criminal Liability on Government Officials Under Environmental Law: A Legal and Economic Analysis*, 18 LOY. L.A. INT'L & COMPAR. L.J. 529, 558 (1996).

In 2015, for instance, a fuel storage facility operated by the Southern California Gas Company (SoCalGas) began leaking natural gas in the Porter Ranch area of Los Angeles.⁶⁷ Scientists soon thereafter identified it as “the largest methane leak in U.S. history.”⁶⁸ While the health effects of the leak were felt by residents immediately,⁶⁹ the leak also had implications for climate change: for the first twenty years after it is released, methane is roughly eighty times more powerful than carbon dioxide in trapping heat in the atmosphere.⁷⁰ SoCalGas quickly became the target of not only dozens of civil lawsuits and regulatory actions but also criminal charges brought by the Los Angeles DA under the state’s environmental and health codes.⁷¹ The DA ultimately allowed SoCalGas to plead no contest to one misdemeanor count for failing to notify the state of the leak immediately, dropping three other misdemeanor charges in exchange for a \$4 million settlement.⁷²

Beyond mitigating climate change, local prosecutors can also pursue charges against corporations whose actions facilitate disasters exacerbated by climate change. Notably, district attorneys in California have brought criminal charges against Pacific Gas & Electric (PG&E) in response to devastating wildfires caused, at least in part, by the company’s negligent maintenance of its power lines. Scientists have demonstrated that climate change has “inexorably stacked the deck in favor of bigger and more intense fires across the American West over the past few decades,” due to increased temperatures, lower precipitation, and other factors.⁷³ The 2018 Camp Fire, which infamously razed the town of Paradise, became the most destructive fire in California history when it burned over 18,000 buildings and killed at least eighty-four people.⁷⁴

⁶⁷ See Amina Khan, *Porter Ranch Leak Declared Largest Methane Leak in U.S. History*, L.A. TIMES (Feb. 25, 2016, 4:45 PM), <https://www.latimes.com/science/sciencenow/la-sci-sn-porter-ranch-methane-20160225-story.html> [<https://perma.cc/F3DN-MVNX>].

⁶⁸ *Id.*

⁶⁹ *Id.* (noting that residents “report[ed] symptoms such as headaches and nausea”).

⁷⁰ Editorial, *Control Methane to Slow Global Warming — Fast*, NATURE (Aug. 25, 2021), <https://www.nature.com/articles/d41586-021-02287-y> [<https://perma.cc/EQ8L-PZ2J>].

⁷¹ Misdemeanor Complaint, State v. S. Cal. Gas Co., No. 6SC00433 (Cal. Super. Ct. Feb. 2, 2016); see Alice Walton, *Southern California Gas to Pay \$4-Million Settlement over Massive Porter Ranch Gas Leak*, L.A. TIMES (Sept. 13, 2016, 6:50 PM), <https://www.latimes.com/local/lanow/la-me-porter-ranch-settlement-20160913-snap-story.html> [<https://perma.cc/4RQD-L99N>].

⁷² Walton, *supra* note 71.

⁷³ Alejandra Borunda, *The Science Connecting Wildfires to Climate Change*, NAT’L GEO. (Sept. 17, 2020), <https://www.nationalgeographic.com/science/article/climate-change-increases-risk-fires-western-us> [<https://perma.cc/K4GS-VHV9>].

⁷⁴ Dan Whitcomb, *PG&E Pleads Guilty to 84 Counts of Involuntary Manslaughter in California Wildfire*, REUTERS (June 16, 2020, 3:22 PM), <https://www.reuters.com/article/us-california-wildfires-pg-e/pge-pleads-guilty-to-84-counts-of-involuntary-manslaughter-in-california-wildfire-idUSKBN23N35T> [<https://perma.cc/9JZN-C2ER>].

Investigators quickly pointed to a poorly maintained PG&E power line as the likely source of the fire.⁷⁵

As a result of these deaths, the Butte County DA Office brought felony charges against PG&E.⁷⁶ Reassigning prosecutors and partnering with the California Attorney General's Office, the Butte County DA convened a grand jury that reviewed troves of evidence over the course of nearly a year.⁷⁷ The grand jury ultimately recommended eighty-five felony counts, including one count of "unlawfully and recklessly causing the Camp Fire as a result of [PG&E's] gross negligence in maintaining its power line" and eighty-four counts of involuntary manslaughter.⁷⁸ While the DA's report concluded that the evidence did not support indictments against any of the company's executives, PG&E itself was indicted based on its reckless behavior and knowledge of the risk its actions created.⁷⁹ PG&E ultimately pled guilty to the charges and, in its plea deal, agreed to pay "a maximum \$3.5 million fine plus \$500,000 in costs, and up to \$15 million to provide water to residents after the fire destroyed the utility's Miocene Canal."⁸⁰ California DAs brought similar charges after the 2019 Kincade Fire and the 2020 Zogg Fire.⁸¹

In addition to pursuing charges for *causing* disasters, local prosecutors have also recently sought to charge corporate failures to *prepare* adequately for climate-driven disasters. These investigations could take place in the context of workplace safety, where researchers have noted that local prosecutors have taken an increasingly active role by bringing charges for "workplace or involuntary manslaughter, criminally negligent homicide, reckless endangerment, and assault," in addition to regulatory violations.⁸² With respect to climate change, such charges

⁷⁵ See BUTTE CNTY. DIST. ATT'Y, *THE CAMP FIRE PUBLIC REPORT 2–3* (2020).

⁷⁶ See Whitcomb, *supra* note 74. It's worth noting that prosecuting failures to prevent wildfires can also be considered an effort to mitigate climate change: wildfires not only create "immense emissions of carbon dioxide," but they also hamper the effectiveness of renewable energy technologies. Josh Lappen, *How Climate-Driven Disasters Threaten Climate Progress*, THE NATION (Oct. 19, 2020), <https://www.thenation.com/article/environment/climate-fires-california-blackout> [https://perma.cc/VR6S-FBNZ].

⁷⁷ BUTTE CNTY. DIST. ATT'Y, *supra* note 75, at 3–4.

⁷⁸ *Id.* at 4.

⁷⁹ *Id.* at 79–80.

⁸⁰ Whitcomb, *supra* note 74.

⁸¹ See Kavya Balaraman, *PG&E Will Fight Criminal Charges Tied to 2019 Kincade Fire, CEO Patti Poppe Says*, UTIL. DIVE (Apr. 30, 2021), <https://www.utilitydive.com/news/pge-will-fight-criminal-charges-tied-to-2019-kincade-fire-ceo-patti-poppe/599325> [https://perma.cc/V9Q2-Y46C]; J.D. Morris, *Shasta County D.A. Hits PG&E with Involuntary Manslaughter Charges over 2020 Zogg Fire*, S.F. CHRON. (Sept. 24, 2021, 6:42 PM), <https://www.sfchronicle.com/bayarea/article/Shasta-County-D-A-hits-PG-E-with-manslaughter-16485257.php> [https://perma.cc/8K5J-JTD7]. Both prosecutions are ongoing as of this writing.

⁸² TERRI GERSTEIN, ECON. POL'Y INST., *HOW DISTRICT ATTORNEYS AND STATE ATTORNEYS GENERAL ARE FIGHTING WORKPLACE ABUSES* 18 (2021).

could follow from, for example, failures to provide workers with adequate protective equipment, shade, or rest during periods of extreme heat. In 2009, for example, prosecutors in San Joaquin County, California, charged the owner, supervisor, and safety director of a farm with criminal manslaughter and labor code violations after the death of a seventeen-year-old worker from heat exposure.⁸³ Failures to stop work or protect workers in advance of or during a natural disaster could also lead to criminal sanctions.⁸⁴

Some local prosecutors have, more controversially, demonstrated an interest in prosecuting corporate failures to prepare for climate disasters that lead to even greater environmental harm. In 2018, for example, prosecutors in Harris County, Texas, indicted chemical manufacturer Arkema North America, its chief executive, and a plant manager following a chemical plant explosion in the wake of Hurricane Harvey.⁸⁵ Floodwaters from the devastating, climate-aggravated storm had knocked out power to the plant, which led to chemical stores at the plant overheating and combusting.⁸⁶ A grand jury indictment pursued by the DA alleged that the company had acted recklessly by not taking adequate precautions as the storm approached, and that the “toxic cloud” caused by the explosions “could and should have been prevented.”⁸⁷ The corporation strenuously contested the charges and the underlying evidence, and the trial court ultimately issued a directed verdict resulting in no convictions, and it found that the Harris County attorneys had committed prosecutorial misconduct.⁸⁸ While the case suggests that

⁸³ Brian Edwards & Jacob Margolis, *Why California Workers Are Still Dying from Heat — Despite Protections*, KQED (Sept. 8, 2021), <https://www.kqed.org/news/11886402/why-california-workers-are-still-dying-from-heat-despite-protections> [<https://perma.cc/7J3A-R9F4>]; see *California Employer Charged with Manslaughter in 2008 Death of 17-Year-Old Farm Worker (4/27)*, INDUS. SAFETY & HYGIENE NEWS (Apr. 27, 2009), <https://www.ishn.com/articles/88246-california-employer-charged-with-manslaughter-in-2008-death-of-17-year-old-farm-worker-4-27> [<https://perma.cc/S9A9-XG5F>].

⁸⁴ Cf. Edward Segal, *OSHA Launches Investigation into Amazon Warehouse Hit by Tornado*, FORBES (Dec. 13, 2021, 7:30 PM), <https://www.forbes.com/sites/edwardsegal/2021/12/13/oshalaunches-investigation-into-amazon-warehouse-hit-by-tornado> [<https://perma.cc/KB5L-EL9N>] (discussing worker deaths after Amazon warehouse collapse caused by tornado and noting federal inspectors could elevate case to local DA if workplace safety violations constitute criminal negligence).

⁸⁵ Christopher Mele, *Chemical Maker and Its Chief Indicted for Explosions During Hurricane Harvey*, N.Y. TIMES (Aug. 3, 2018), <https://www.nytimes.com/2018/08/03/business/arkema-chemical-plant-explosion-texas.html> [<https://perma.cc/CP98-KEB7>].

⁸⁶ *Id.*; see Scott Waldman, *Global Warming Tied to Hurricane Harvey*, SCI. AM. (Dec. 14, 2017), <https://www.scientificamerican.com/article/global-warming-tied-to-hurricane-harvey> [<https://perma.cc/A66U-8VYZ>].

⁸⁷ News Release, Kim Ogg, Harris Cnty. Dist. Att’y, Tex., *Arkema Indicted for Toxic Cloud* (Aug. 3, 2018), <https://app.dao.hctx.net/arkema-indicted-toxic-cloud> [<https://perma.cc/A292-HQ4M>].

⁸⁸ Cameron Langford, *Texas Judge Throws Out Charges over Chemical Plant Fire*, COURTHOUSE NEWS SERV. (Oct. 1, 2020), <https://www.courthousenews.com/texas-judge-throws-out-charges-over-chemical-plant-fire> [<https://perma.cc/3BAU-3G3E>].

such prosecutions may for now be somewhat untenable, Professor Tracy Hester argues “the door is now open” to similar prosecutions.⁸⁹

(b) *Analyzing Efficacy*. — These types of prosecutions, while promising, have obvious shortcomings. In the immediate sense, they are inherently reactive: they can occur only after fires have burned or pollutants have been released into the atmosphere. And to the extent prosecutions like these serve to prevent future harms, the deterrent effect of fines, restitution, and stipulated remedial actions is dubious at best.⁹⁰ Although the SoCalGas settlement required the company to pay for new methane-detection equipment and policies, one local environmental leader described the action as “barely a slap on the wrist for [SoCalGas],” given the billions of dollars in profits its parent company makes every year.⁹¹ The \$3.5 million fine secured against PG&E in the Camp Fire prosecution similarly translates to “about as much as its parent company collects in revenue [in just over] 90 minutes”⁹² and amounted to a little more than one-hundredth of one percent of the fire’s cost.⁹³ These comparatively small fines may undermine the “expressive” purpose of a criminal prosecution, especially where corporations, like PG&E and SoCalGas, control a monopoly such that the public cannot effectively express disdain by divesting from the company’s goods; or where, like Arkema, the public is not the primary consumer. Furthermore, even when prosecutors do pursue stringent penalties, courts may nevertheless impose lower sentences.⁹⁴ And where both regulatory and criminal penalties exist, the former may be much larger, suggesting the additional deterrent effect of criminal sanctions is fairly small.⁹⁵

⁸⁹ Tracy Hester, *Criminal Liability for Environmental Disasters in a Climate Changed-World: Implications of Post-Harvey Enforcement Action 6* (2018) (unpublished manuscript), https://www.americanbar.org/content/dam/aba/administrative/environment_energy_resources/2018/fall/course_materials/14-hester.pdf [https://perma.cc/4WU9-LUCB].

⁹⁰ See Diamantis & Laufer, *supra* note 64, at 466.

⁹¹ Walton, *supra* note 71; see Proposed Settlement Agreement Between the People of the State of California and Defendant Southern California Gas Co. app. 1–3, *State v. So. Cal. Gas Co.*, No. 6SC00433 (Cal. Super. Ct. Sept. 13, 2016).

⁹² Michael Hiltzik, *Column: How the Criminal Conviction of PG&E Lets the Real Wrongdoers Go Free*, L.A. TIMES (Aug. 10, 2016, 12:20 PM), <https://www.latimes.com/business/hiltzik/la-fi-hiltzik-pge-criminal-20160810-snap-story.html> [https://perma.cc/L4XK-44Q7] (discussing a \$3 million penalty resulting from a criminal conviction against PG&E stemming from the 2010 San Bruno pipeline explosion).

⁹³ See Sarah Ruiz-Grossman, *California's Camp Fire Was the Most Expensive Natural Disaster Worldwide in 2018*, HUFFPOST (Jan. 10, 2019, 5:02 PM), https://www.huffpost.com/entry/california-camp-fire-costliest-disaster-2018_n_5c37b1b4e4b045f6768a484f [https://perma.cc/SSC7-SMRW] (reporting the cost of the Camp Fire at \$16.5 billion).

⁹⁴ See, e.g., Jody Godoy, *Judge Cuts Max Criminal Fine to \$562M in PG&E Pipeline Blast*, LAW360 (Dec. 9, 2015, 6:10 PM), <https://www.law360.com/articles/736087> [https://perma.cc/33DY-RBH9].

⁹⁵ See, e.g., Hiltzik, *supra* note 92 (comparing a \$1.6 billion penalty against PG&E by the state Public Utilities Commission with a maximum \$562 million criminal fine, which was not pursued).

Moreover, even where corporate prosecutions are appropriate, local prosecutors may be ill suited to undertake them given the “special investigatory and prosecutorial problems that make successful application of the criminal law complicated and difficult” in this area.⁹⁶ While they may be fully prepared to investigate ordinary street crime, “local prosecutors must rely on personnel from criminal justice and regulatory agencies to build cases against corporations and business executives who violate the law.”⁹⁷ These investigations are difficult, expensive, and time consuming; prosecuting executives is especially challenging given that “piecing together who did what within a complex organization is no easy task.”⁹⁸ And even offices that have specialized environmental or consumer protection units often dedicate few resources to them.⁹⁹ This might explain why, in most states, these types of investigations fall to state-level prosecutors.¹⁰⁰

Individually, then, such prosecutions may be of limited utility in actually preventing climate change or climate-caused disasters. But they may have an impact in the aggregate. The enhanced threat of local prosecution — on top of federal prosecution, state regulatory sanction, and suits by private attorneys general — may encourage corporations to step up their preventive and adaptive efforts in order to avoid liability.¹⁰¹ As climate change accelerates, the risk of disasters increases, and as the need to curb emissions becomes more dire, prosecutions such as these could prove to provide an important additional incentive for corporations to take climate change seriously. This is especially true where local prosecutors are willing to investigate and charge corporate officials, who are “more likely to comply with the law when they fear that they may go to jail if their violations are discovered.”¹⁰² Further, such prosecutions could help communicate the seriousness of climate change to the local community in which the prosecution is brought and to the public more broadly.¹⁰³ And when such investigations do lead to convictions

⁹⁶ Benson, *supra* note 58, at 89.

⁹⁷ *Id.*

⁹⁸ Diamantis & Laufer, *supra* note 64, at 466.

⁹⁹ E.g., Allison Haley & Patrick Collins, Commentary, *What Is the District Attorney's Consumer/Environmental Protection Unit?*, NAPA VALLEY REG. (Aug. 27, 2021), https://napavalleyregister.com/opinion/letters/what-is-the-district-attorneys-consumer-environmental-protection-unit/article_b2552186-9b88-557d-bc92-56a31bfa1026.html [<https://perma.cc/Y2BM-QPN3>] (noting that the Napa County DA's office staffs only “two full-time attorneys, one part-time attorney,” and three support staff in its environmental protection unit).

¹⁰⁰ See Barkow, *supra* note 35, at 547–48.

¹⁰¹ See Hester, *supra* note 89, at 5; GERSTEIN, *supra* note 82, at 11.

¹⁰² David M. Uhlmann, *After the Spill Is Gone: The Gulf of Mexico, Environmental Crime, and the Criminal Law*, 109 MICH. L. REV. 1413, 1443 (2011).

¹⁰³ See Anthony Moffa, *Environmens Rea*, 122 PENN. ST. L. REV. 299, 305 (2018) (noting social science indicates reframing bad environmental actions as crimes may change cultural values, which is the most effective way to change minds).

or settlements, local prosecutors can pursue remedies that center the harms of the communities most immediately affected.¹⁰⁴

2. *Prosecuting Political Failures to Prepare.* — Beyond corporations and executives whose actions contribute to climate change or facilitate climate-related disasters, government officials could also be held criminally liable for their policy choices. While such prosecutions have thus far been virtually unprecedented, prosecutors in Michigan are currently pursuing such a strategy in the wake of the Flint water crisis.¹⁰⁵ In 2014, local officials, attempting to save money, switched the city's water supply without adopting an anticorrosion agent, exposing thousands of residents (including many children) to lead from the aging pipes; this led to an outbreak of Legionnaire's disease that killed twelve people and left dozens more sickened.¹⁰⁶ Following a nearly seven-year investigation, the state, working with the Wayne County Prosecutor's Office, convened a grand jury that secured the indictment of nine state and local government officials on a variety of charges including involuntary manslaughter, willful neglect of duty, and official misconduct.¹⁰⁷

While the Flint criminal cases are pending as of this writing, any convictions would "set the precedent necessary to pursue other government officials . . . who knowingly select policies that will result in death when real alternative options exist."¹⁰⁸ These prosecutions could arguably proceed where policymakers act contrary to (or fail to act in response to) the vast amounts of detailed climate modeling and risk assessment data now available to them.¹⁰⁹ Indeed, French prosecutors pursued a similar route in 2010, indicting a village mayor and other local officials on charges of involuntary manslaughter after a cyclone led to

¹⁰⁴ In the SoCalGas prosecution, for example, community members criticized DA Lacey's settlement because it preempted their ability to pursue restitution claims against the company. See Olga Grigoryants, *Attorneys Try to Persuade Judges that SoCalGas Should Pay Restitution to Porter Ranch Residents*, L.A. DAILY NEWS (May 29, 2019, 6:55 AM), <https://www.dailynews.com/2019/05/24/attorneys-try-to-persuade-judges-that-socialgas-should-pay-restitution-to-porter-ranch-residents> [<https://perma.cc/8TWU-E927>]. George Gascón, running against Lacey four years later, criticized the move as clearly illustrating "injustice and indifference for these victims and LA's environment." Press Release, *supra* note 7.

¹⁰⁵ Moffa, *supra* note 103, at 329–30.

¹⁰⁶ Talia Buford, *In Flint Water Crisis, Could Involuntary Manslaughter Charges Actually Lead to Prison Time?*, PROPUBLICA (June 19, 2017, 12:54 PM), <https://www.propublica.org/article/flint-water-crisis-involuntary-manslaughter-charges-lead-to-prison-time> [<https://perma.cc/ZGW8-ZKKR>]; see Brakkton Booker, *Ex-Michigan Gov. Rick Snyder and 8 Others Criminally Charged in Flint Water Crisis*, NPR (Jan. 14, 2021, 6:20 PM), <https://www.npr.org/2021/01/14/956924155/ex-michigan-gov-rick-snyder-and-8-others-criminally-charged-in-flint-water-crisis> [<https://perma.cc/E7JQ-5VBQ>].

¹⁰⁷ Press Release, Dep't of the Mich. Att'y Gen., *Nine Indicted on Criminal Charges in Flint Water Crisis Investigation* (Jan. 14, 2021), https://www.michigan.gov/ag/0,4534,7-359-92297_47203-549541--,00.html [<https://perma.cc/XNF2-JXYE>].

¹⁰⁸ Moffa, *supra* note 103, at 345.

¹⁰⁹ See *id.* at 304.

flooding that killed twenty-nine residents whose homes had been built in an area where “officials should have barred construction.”¹¹⁰ Italian prosecutors brought similar charges against a local official in the wake of an earthquake that killed over 300 people, arguing the officials had criminally “downplay[ed] the risk from earthquakes.”¹¹¹ Analogously, local prosecutors in the United States could pursue or assist investigations of policymakers who downplay known climate risks or who neglect their official duties by failing to take sufficient action to protect residents from climate-fueled disasters.¹¹² Such prosecutions could, like those discussed in the previous section, carry important expressive weight “by reframing bad environmental actions as potential crimes.”¹¹³

Prosecuting policymakers would come with a number of risks and challenges, and in many cases these prosecutions would be plainly inappropriate. “Clearly, society would not be better off,” Professor Anthony Moffa notes, if the threat of prosecution and personal liability “paralyzes” government decisionmaking or discourages participation in government.¹¹⁴ Further, “there are some decisions wherein every option will almost certainly result in loss of life above the baseline.”¹¹⁵ Local prosecutors may also feel reluctant to use their tools to steer public policy or to indict their fellow public servants.¹¹⁶ As a matter of efficacy, individual prosecutions may fail to heal the victims adequately and to deter future harm by the government entity itself.¹¹⁷ Thus, pursuing change through the electoral process, rather than the criminal system, may prove more effective. Prosecutors would also need to navigate around existing immunities for policymakers,¹¹⁸ while increased prosecutions of officials could prompt states to “circle the wagons” and enact

¹¹⁰ Buford, *supra* note 106; see Moffa, *supra* note 103, at 328.

¹¹¹ Buford, *supra* note 106. Both prosecutions resulted in conviction. *Id.*

¹¹² *Cf.* Grand Jury Indictment, *People v. Snyder*, No. 21G0047SM (Mich. Dist. Ct. Jan. 8, 2021) (indicting former Michigan Governor Rick Snyder for “willfully neglect[ing] his mandatory legal duty” under statute “to protect [Michigan] citizens . . . against disaster and/or emergency”).

¹¹³ Moffa, *supra* note 103, at 305.

¹¹⁴ *Id.* at 340; see *id.* at 314.

¹¹⁵ *Id.* at 340.

¹¹⁶ See Faure et al., *supra* note 66, at 569; cf. John V. Jacobi, *Prosecuting Police Misconduct*, 2000 WIS. L. REV. 789, 803–05.

¹¹⁷ See Nora Freeman Engstrom, Opinion, *Op-Ed: The Courts Will Fail Flint, Too*, L.A. TIMES (Mar. 10, 2016, 5:00 AM), <https://www.latimes.com/opinion/op-ed/la-oe-0310-engstrom-flint-water-lawsuits-20160311-story.html> [<https://perma.cc/6TT2-P3F9>]; see also Moffa, *supra* note 103, at 324.

¹¹⁸ Nearly all states, for instance, recognize some form of legislative immunity that limits criminal inquiry into or prosecution of legislative activity — including that of local legislators. See Steven F. Huefner, *The Neglected Value of the Legislative Privilege in State Legislatures*, 45 WM. & MARY L. REV. 221, 224–25, 234 n.42 (2003). This immunity does not automatically preclude prosecutions for official misconduct, however. *Id.* at 301. And municipal officers are generally not excused “from liability for violating laws applicable to the public generally, including the common law.” 4 MCQUILLIN MUN. CORP. § 12:307 (3d ed.), Westlaw (3d ed., database updated Sept. 2021).

more extensive immunities.¹¹⁹ Finally, prosecuting policymakers may also encourage high-level officials to maintain ignorance of their subordinates' decisions.¹²⁰

Given this, prosecutorial discretion would “counsel[] against prosecution in almost all instances.”¹²¹ But criminal liability may be justified in more extreme cases, like the Flint water crisis, where policymakers knowingly expose residents to serious harm and where alternative courses of action are readily available. In doing so, local prosecutors (likely working in tandem with state analogues)¹²² could potentially spur greater action by government officials to prepare for the “foreseeable harm caused by climate-exacerbated extreme events.”¹²³

3. *Prosecuting Criminal Fraud and Public Nuisance.* — Finally, local prosecutors could, at least in theory, seek criminal charges against fossil fuel companies and others for misleading the public about the dangers posed by climate change or for creating public nuisances through their emissions. In recent years, states and municipalities, including Massachusetts and Oakland, California, have pursued this exact route using civil lawsuits, arguing that fossil fuel corporations knew about the threats posed by their products and deliberately misled the public about the risk.¹²⁴ But even if such corporate action might give rise to *criminal* liability,¹²⁵ securing these prosecutions would be difficult. Beyond the challenges associated with and resources necessary for corporate prosecution, as well as almost-certain procedural and jurisdictional challenges,¹²⁶ local prosecutors have to establish guilt beyond a reasonable doubt, compared to the lower “preponderance of the evi-

¹¹⁹ See Joe Guillen, Christine MacDonald & Jennifer Dixon, *Ex-Gov. Rick Snyder Pleads Not Guilty as Nine Face Charges in Flint Water Crisis*, DET. FREE PRESS (Jan. 14, 2021, 7:42 PM), <https://www.freep.com/story/news/local/michigan/2021/01/14/rick-snyder-not-guilty-flint-water/4156062001> [https://perma.cc/6SM4-8DB2].

¹²⁰ See Bobby Magill & Dean Scott, *Criminal Case in Flint Water Crisis Puts Governors on Notice*, BLOOMBERG L. (Jan. 14, 2021, 3:44 PM), <https://news.bloomberglaw.com/environment-and-energy/criminal-case-in-flint-water-crisis-puts-governors-on-notice> [https://perma.cc/U3TD-M2Q2].

¹²¹ Moffa, *supra* note 103, at 340.

¹²² Cf. Barkow, *supra* note 35, at 546.

¹²³ ALICE C. HILL & LEONARDO MARTINEZ-DIAZ, *BUILDING A RESILIENT TOMORROW* 49 (2020).

¹²⁴ See, e.g., *Massachusetts v. Exxon Mobil Corp.*, 462 F. Supp. 3d 31 (D. Mass. 2020); *City of Oakland v. BP P.L.C.*, 325 F. Supp. 3d 1017 (N.D. Cal. 2018).

¹²⁵ It's not entirely clear that it would. Compare William C. Tucker, *Deceitful Tongues: Is Climate Change Denial a Crime?*, 39 *ECOLOGY L.Q.* 831, 854–77 (2012) (arguing that climate change denial can constitute criminal fraud under two federal statutes), with Richard Mandel & Craig P. Ehrlich, *The Prosecution of Climate Change Dissent*, 19 *MARQ. BENEFITS & SOC. WELFARE L. REV.* 43, 84 (2017) (concluding that a gas company could not be successfully prosecuted for its climate change denial under federal fraud statutes).

¹²⁶ See, e.g., Albert C. Lin, *Dodging Public Nuisance*, 11 *U.C. IRVINE L. REV.* 489, 506 (2020).

dence” standard that even the parallel civil suits have failed to establish.¹²⁷ These obstacles might explain why no such prosecutions have been attempted to date.

C. Day-to-Day Prosecution in a Climate-Changed World

As the climate changes, local prosecutors will be faced with many day-to-day decisions around how to wield their authority in response. This section argues that, in an effort to foster more resilient communities, local prosecutors should first focus on seeking decarceral solutions to crime. Further, recognizing the severity of the climate crisis, local prosecutors should exercise leniency with respect to climate protesters. Finally, this section outlines other forms of advocacy that local prosecutors could use to bring attention to the climate crisis.

i. Decarceration as Climate Policy. — Although climate change is projected to lead to increases in various forms of crime, prosecutors should keep in mind their bedrock principle of promoting community safety and avoid relying on incarceration as the default response to crime. Beyond undermining public health and community resilience, particularly in communities of color, incarceration exposes people to the dangers of extreme heat, wildfires, and flooding with no ability to seek refuge but at the mercy of the state.¹²⁸ Furthermore, incarceration consumes state funding and resources that could otherwise be devoted to more socially beneficial public programs, including those that address climate change adaptation or foster improvements in public health.¹²⁹

Currently, incarceration does assist government efforts to combat climate change in at least one respect: it allows states to rely on unpaid (or extremely low-wage) labor to respond to the effects of climate change.

¹²⁷ *E.g.*, Decision After Trial at 1, *State v. Exxon Mobil Corp.*, No. 452044/2018 (N.Y. Sup. Ct. Dec. 10, 2019).

¹²⁸ Kim Kelly, *The Climate Disaster Inside America's Prisons*, NEW REPUBLIC (Sept. 18, 2019), <https://newrepublic.com/article/155092/climate-disaster-inside-americas-prisons> [<https://perma.cc/AP2X-AALK>]; see sources cited *supra* notes 26–30. Decarceration should therefore “undeniably be recognized as climate policy.” *Infra* ch. III, p. 1607; see also Brown, *supra* note 30 (“Experts are increasingly arguing for prison abolition as the most effective climate disaster mitigation strategy.”).

¹²⁹ Some evidence also suggests that incarceration is associated with increased carbon emissions, though the research in this area is limited and somewhat contradictory. Compare Julius Alexander McGee, Patrick Trent Greiner & Carl Appleton, *Locked into Emissions: How Mass Incarceration Contributes to Climate Change*, 8 SOC. CURRENTS 326, 335 (2021) (prisons increase overall carbon emissions), with Helen Skudder et al., *Addressing the Carbon-Crime Blind Spot*, 21 J. INDUS. ECOLOGY 829, 839 (2016) (prisons may reduce overall carbon emissions). Meanwhile, prisons have increasingly begun adopting “green” policies, such as reducing food waste or upgrading facilities to be more energy efficient. *E.g.*, Rob White & Hannah Graham, *Greening Justice: Examining the Interfaces of Criminal, Social and Ecological Justice*, 55 BRIT. J. CRIMINOLOGY 845, 852–55 (2015). Regardless of such efforts, or prisons’ carbon impacts, prisons still leave people in the path of climate disasters; ultimately, “true sustainability hinges upon the impetus to decarcerate, diminish in size and de-commission, restricting the use of confinement as a genuine last resort.” *Id.* at 860.

In 2017, roughly one-third of California's forest firefighters were prisoners who contributed their labor for two dollars a day or less.¹³⁰ And following Hurricane Irma in 2017, Florida prisoners were dispatched to clean up damage from the storm without being compensated at all.¹³¹ Regardless of any cost savings this approach accrues to the state, incarceration undermines the community resilience necessary to survive climate change and forestalls a "fair and just transition to a green society for all" by entrenching the state's reliance on prison labor.¹³²

Instead, local prosecutors should consider turning away from incarceration and toward restorative justice.¹³³ Such policies vary widely in design and application, and local prosecutors can work within their communities to determine what this approach would look like on the ground.¹³⁴ Local prosecutors should also consider adopting non prosecution and/or sentence-reduction policies if they conclude that further prosecution would inhibit community safety and resilience.¹³⁵

2. *Climate Protest.* — As Ward and O'Hara's lobster boat protest suggests, local prosecutors will increasingly be forced to evaluate whether to bring criminal charges against activists. Appreciating the harms of climate change and understanding the potential of protest to spur action, a local prosecutor should not view harsh punishment of climate protest as in the community's best interest. This discretion is particularly relevant in jurisdictions with "critical infrastructure" laws, which are designed to target climate protesters with "particularly harsh penalties" for interfering with infrastructure such as oil pipelines.¹³⁶

¹³⁰ Annika Neklason, *California Is Running Out of Inmates to Fight Its Fires*, THE ATLANTIC (Dec. 7, 2017), <https://www.theatlantic.com/politics/archive/2017/12/how-much-longer-will-inmates-fight-californias-wildfires/547628> [<https://perma.cc/TQ7D-B93B>]. In California, local prosecutors have actively made it more difficult for inmate firefighters to secure postrelease firefighting jobs. See Lizzie Johnson, *After Prison, The Fight to Be a Firefighter*, S.F. CHRON. (Nov. 10, 2021, 10:25 AM), <https://www.sfchronicle.com/california-wildfires/article/After-prison-the-fight-to-be-a-firefighter-16593127.php> [<https://perma.cc/H45T-55QM>].

¹³¹ Jessica Lipscomb, *Unpaid Florida Prisoners Being Used to Clean Up After Hurricane Irma*, MIA. NEW TIMES (Sept. 28, 2017, 8:00 AM), <https://www.miaminewtimes.com/news/unpaid-florida-prison-inmates-being-used-on-hurricane-irma-cleanup-labor-crews-9701867> [<https://perma.cc/GB2W-WNDQ>].

¹³² Wyatt G. Sassman & Danielle C. Jefferis, *Beyond Emissions: Migration, Prisons, and the Green New Deal*, 51 ENV'T L. 161, 200 (2021).

¹³³ See *supra* ch. I, section A.2, pp. 1549–52.

¹³⁴ E.g., VERA INST. OF JUST., HOW CAN DISTRICT ATTORNEYS' OFFICES USE RESTORATIVE JUSTICE? (2020), <https://www.vera.org/publications/how-can-district-attorneys-offices-use-restorative-justice> [<https://perma.cc/2HBD-XRTB>].

¹³⁵ Cf. Press Release, Manhattan Dist. Att'y, Manhattan District Attorney Alvin Bragg Releases Comprehensive Reforms to Deliver Safety and Justice for All (Jan. 4, 2022), <https://www.manhattanda.org/manhattan-district-attorney-alvin-bragg-releases-comprehensive-reforms-to-deliver-safety-and-justice-for-all> [<https://perma.cc/2TXZ-THN6>].

¹³⁶ Alleen Brown & Will Parrish, *Louisiana and Minnesota Introduce Anti-protest Bills Amid Fights over Bayou Bridge and Enbridge Pipelines*, THE INTERCEPT (Mar. 31, 2018, 11:05 AM), <https://theintercept.com/2018/03/31/louisiana-minnesota-anti-protest-bills-bayou-bridge-enbridge->

Approaching these cases with leniency would not require local prosecutors to adopt a blanket nonprosecution policy toward acts of climate protest. Even Sam Sutter, the DA who dropped the charges against Ward and O’Hara, noted in an interview following the decision that future charges would be decided on a “case-by-case basis” and that, though he agreed with the activists’ aims, he “disagree[d] with the action” and “definitely discourag[ed] anybody from doing this again.”¹³⁷ Nevertheless, in shaping a punishment commensurate with the actual harm, Sutter’s exercise of discretion took a broader view of community safety that included considering the larger consequences of climate change.

Local prosecutors could also exercise leniency by recognizing the validity of the “climate necessity defense.” This defense, a form of the familiar common law necessity defense, posits that the protester’s actions were necessary to prevent the harms caused by climate change.¹³⁸ While courts have historically blocked defendants from raising the defense,¹³⁹ this trend may be changing. In 2018, a group of Massachusetts pipeline protesters charged with civil infractions was acquitted by a judge relying on the theory,¹⁴⁰ and in 2021, an Oregon court allowed climate protesters to present the defense along with expert testimony, resulting in a hung jury and a mistrial.¹⁴¹ Recognizing this trend, local prosecutors should scale back their challenges to defendants’ attempts to present the defense.¹⁴² Moreover, local prosecutors could also conclude that, since a jury that actually hears the defense would be more

pipelines [<https://perma.cc/87QL-G5XY>]. These laws proliferated in the wake of the Dakota Access Pipeline protests, and “at least seven states have introduced or passed” such laws. *Id.*

¹³⁷ Brian Palmer, *Should We Prosecute Climate Change Protesters Who Break the Law?*, PAC. STANDARD (June 14, 2017), <https://psmag.com/environment/prosecute-climate-change-protesters-break-law-93187> [<https://perma.cc/7DS9-LLGK>].

¹³⁸ Grace Nosek, Essay, *The Climate Necessity Defense: Protecting Public Participation in the U.S. Climate Policy Debate in a World of Shrinking Options*, 49 ENV’T L. 249, 250, 258–60 (2019).

¹³⁹ Anna Facciola, *Common Law and Environmentalism: How the Necessity Defense Has Adapted to Climate Advocacy*, EMERALD REV. (Jan. 26, 2022), <http://emeraldreview.com/common-law-and-environmentalism-how-the-necessity-defense-has-adapted-to-climate-advocacy> [<https://perma.cc/97CZ-EMFT>] (“[T]he list of denied climate necessity defenses is much, much longer than the list of accepted ones.”).

¹⁴⁰ See Kevin Gosztola, *Judge Rules It Was Necessary for Activists in Massachusetts to Engage in Civil Disobedience to Stop Pipeline*, SHADOWPROOF (Mar. 27, 2018), <https://shadowproof.com/2018/03/27/judge-rules-civil-disobedience-necessary-fight-climate-change> [<https://perma.cc/234G-9UM9>].

¹⁴¹ Lee Van Der Voo, *Is Climate Change Urgent Enough to Justify a Crime? A Jury in Portland Was Asked to Decide*, INSIDE CLIMATE NEWS (Mar. 3, 2020), <https://insideclimatenews.org/news/03032020/portland-oregon-necessity-trial-climate-change> [<https://perma.cc/TTW2-RMRN>]. *But see, e.g.*, Facciola, *supra* note 139 (discussing 2020 Montana case denying defendant’s request to present climate necessity defense). As of this writing, no American climate activist appears to have been acquitted by a jury under the climate necessity defense. Juries did acquit anti-nuclear activists raising similar necessity defenses in the 1970s. William P. Quigley, *The Necessity Defense in Civil Disobedience Cases: Bring in the Jury*, 38 NEW ENG. L. REV. 3, 27 (2003).

¹⁴² See, e.g., *State v. Ward*, No. 77044-6-I, slip op. at 2 (Wash. Ct. App. Apr. 8, 2019).

likely to acquit,¹⁴³ some charges would not be prudent given that a conviction may be more difficult to secure.¹⁴⁴

3. *Advocacy Efforts.* — Finally, local prosecutors wield tools outside of actual prosecution that could be deployed to address climate change. First, given their substantial influence over the development of criminal justice legislation and their ability to shape the community's view of criminal justice policy,¹⁴⁵ local prosecutors should use their platforms and political connections with legislators to advocate for equitable criminal justice policies in light of climate change. This could include, for instance, advocating in favor of different or more severe criminal penalties against polluting corporations where the current statutes do not adequately deter or remediate the harm posed by this pollution.¹⁴⁶ By the same token, local prosecutors could advocate *against* legislative attempts to, for example, create harsh penalties for looting in the wake of climate-driven natural disasters.¹⁴⁷ Local prosecutors could also lobby for the redistribution of resources away from the criminal legal system and, instead, to improving public health or tackling climate change, such as by building green energy infrastructure on former prison land.¹⁴⁸

In addition, local prosecutors could write or join amicus briefs in civil climate change lawsuits. While their work mainly addresses individual cases, local prosecutors have used amicus briefs to weigh in on broader systemic issues, such as challenges to the death penalty and to abortion restrictions.¹⁴⁹ Local prosecutors could similarly file briefs in some of the civil suits against fossil fuel companies and other corporations, illustrating the public safety impacts raised by climate change and the need to hold its most egregious corporate contributors to account.

¹⁴³ Joseph Rausch, Note, *The Necessity Defense and Climate Change: A Climate Change Litigant's Guide*, 44 COLUM. J. ENV'T L. 553, 559 n.24, 569 (2019).

¹⁴⁴ While this section focuses on climate protest, local prosecutors could also apply the logic of the necessity defense when considering other protest cases, including those seeking to advance civil rights. See Quigley, *supra* note 141, at 60–61.

¹⁴⁵ See Bruce A. Green & Lara Bazelon, *Restorative Justice from Prosecutors' Perspective*, 88 FORDHAM L. REV. 2287, 2310 (2020).

¹⁴⁶ E.g., Diamantis & Laufer, *supra* note 64, at 462 (discussing proposed “equity fine” that would transfer corporate shares to the government); see also Lea Babucke & Max Schwerdtfeger, *Climate Change and Criminal Law*, FRESHFIELDS BRUCKHAUS DERINGER (Jan. 7, 2022), <https://riskandcompliance.freshfields.com/post/102hfrx/climate-change-and-criminal-law> [<https://perma.cc/REK9-DCZS>] (anticipating expansion of German corporate criminal law to combat climate change).

¹⁴⁷ See Lisa Grow Sun, *Disaster Mythology and the Law*, 96 CORNELL L. REV. 1131, 1197 (2011).

¹⁴⁸ See Kate Aronoff, *Turn Rikers Island into a Solar Farm*, NEW REPUBLIC (June 19, 2020), <https://newrepublic.com/article/158225/turn-rikers-island-solar-farm> [<https://perma.cc/RZ48-UX48>]; cf. Levin, *supra* note 17, at 1444–46.

¹⁴⁹ See Brief Amici Curiae of Six Present or Former District Attorneys in Support of Appellant, *People v. McDaniel*, 493 P.3d 815 (Cal. 2021) (No. S171393); Brief of 128 Current and Former Prosecutors and Law Enforcement Leaders et al. as Amici Curiae in Support of Petitioners, *Whole Woman's Health v. Jackson*, 142 S. Ct. 522 (2021) (No. 21-463).

Finally, a local prosecutor's act of publicly acknowledging the climate crisis could help build support for climate action, both within their communities and beyond. By discussing climate change's impact on the criminal legal system, or attending climate rallies,¹⁵⁰ local prosecutors would help signal to the public that climate change is not just an issue that scientists and environmentalists care about.¹⁵¹ In addition to potentially helping spur support for local climate change measures, such support may also, in the aggregate, help build a political environment that "trigger[s] action at higher levels of government."¹⁵²

Conclusion

It is encouraging that some local prosecutors have begun to acknowledge the climate crisis and to pledge their support for efforts to address it. But public statements of support are not enough; nor is it sufficient for prosecutors to acknowledge that climate change may require them to invest in new office technology or to hire additional translators to help interface with climate refugees.¹⁵³ Rather, the magnitude of the climate crisis, and its impact on the criminal justice system, should prompt local prosecutors to fundamentally rethink what it means to keep a community safe in light of unprecedented disruption.

Many of the solutions proposed in this Chapter ask local prosecutors to take on tasks and assume priorities they may be largely unfamiliar with or skeptical of.¹⁵⁴ And, especially if "mass migration is perceived to pose a threat to internal order," it may be difficult for local prosecutors to "stem the 'law and order' brigade" and its demands for harsh criminal enforcement.¹⁵⁵ But taking the climate crisis seriously means that local prosecutors must discard failed approaches of the past and look for alternatives that rise to the challenge, even if these require departing from the status quo. As the author and activist Naomi Klein has famously declared, the climate crisis changes everything;¹⁵⁶ local prosecution, in turn, must change as well.

¹⁵⁰ Notably, DA Sam Sutter did exactly this after dropping the charges against Ward and O'Hara. See Kieffer, *supra* note 2.

¹⁵¹ See Anthony Leiserowitz, *Building Public and Political Will for Climate Change Action*, in A BETTER PLANET: 40 BIG IDEAS FOR A SUSTAINABLE FUTURE 155, 158–59 (2019).

¹⁵² Kirsten Engel, *State and Local Climate Change Initiatives: What Is Motivating State and Local Governments to Address a Global Problem and What Does This Say About Federalism and Environmental Law?*, 38 URB. LAW. 1015, 1026 (2006).

¹⁵³ See Phila. Dist. Att'y's Off., *supra* note 13, at 12.

¹⁵⁴ Cf. Green & Bazelon, *supra* note 145, at 2296–98.

¹⁵⁵ WHITE, *supra* note 8, at 124; cf. Benjamin Wallace-Wells, *The Trial of Chesa Boudin*, NEW YORKER (July 29, 2021), <https://www.newyorker.com/news/annals-of-inquiry/the-trial-of-chesa-boudin> [<https://perma.cc/GE65-CFD3>].

¹⁵⁶ NAOMI KLEIN, THIS CHANGES EVERYTHING (2014).