

BROKEN PROMISES: LARRY KRASNER AND THE CONTINUATION OF PRETRIAL PUNISHMENT IN PHILADELPHIA

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INTRODUCTION

[T]he need to lend a voice to suffering is a condition for all truth.

- Theodor Adorno¹

In the early hours of September 4, 2019, Jennifer,² a single mother, sat

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1. THEODOR ADORNO, *NEGATIVE DIALECTICS* 17-18 (1973).

2. The name Jennifer is a pseudonym used to protect the identity of the person charged

in a holding cell in a Philadelphia police precinct. Guards soon escorted her from her holding cell to a small, enclosed room where—without an attorney—she “appeared” for her bail hearing via videoconference.³ Jennifer could hardly hear the magistrate on the screen before her, as he listed the charges against her and stated that she would be assigned a public defender because of her low-income status. She clearly heard, however, the bail amount that District Attorney’s office requested for her release—\$60,000. After some argument from the public defender representative in the room—citing Jennifer’s employment status, her lack of arrest history, her being a single mother—⁴Unable to pay for her freedom, Jennifer was transported to Riverside Correctional Facility, one of Philadelphia’s five jails, where she was isolated and locked into a single cell immediately upon her arrival.

Exactly one week later, Philadelphia District Attorney Larry Krasner received a star’s welcome as he traveled to law schools in Massachusetts to speak with aspiring lawyers about the “progressive” prosecutorial movement. At Suffolk Law School, he was dubbed a “leader in progressive prosecution.”⁵ At Harvard Law School, he was designated “the most progressive DA in the country.”⁶ For Jennifer, however, Krasner was the man partly responsible for her pretrial caging in a Philadelphia jail based on her inability to post bail.

Jennifer’s case highlights the central paradox of Larry Krasner’s misunderstood record on cash bail. This Article assesses Krasner’s bail reform actions to date from the local, on-the-ground perspective of the Philadelphia Bail Fund, a community-based organization dedicated to ending pretrial punishment in Philadelphia. We recognize that Krasner lacks the power to unilaterally end cash bail and pretrial detention in Philadelphia.⁷ Despite these limitations, however, Krasner has substantial power to fundamentally transform Philadelphia’s grotesque practice of caging people pretrial solely based on their poverty—most notably through prosecutorial discretion over requests for cash bail. However, he has introduced minimal reforms, and his office continues to regularly request unaffordable bail amounts for arrestees in Philadelphia. While many journalists, academics, and activists have praised Krasner’s record on bail, this essay provides a

and arraigned.

3. All bail hearings (preliminary arraignments) in Philadelphia are conducted through closed-circuit television (CCTV). For information on Philadelphia’s use of CCTV during bail hearings, see Bryce Covert, *Video Hearings: The Choice ‘Between Efficiency and Rights’*, APPEAL (June 5, 2019), <https://perma.cc/9RB8-ATJS>.

4. In Philadelphia, a person is required to pay 10% of the bail amount set to be released from custody.

5. Suffolk Univ. L. Sch. Off. of Professional and Career Dev., *MLSC Presents: Leaders in Progressive Prosecution*, FACEBOOK (Sept. 11, 2019), <https://perma.cc/YW82-HV2S>.

6. Harvard Law Bernard Koteen Office of Public Interest Advising, *Progressive Prosecution: 2 Years in with DA Larry Krasner* (Sept. 11, 2019), <https://perma.cc/PM6D-F6CX>.

7. In Philadelphia, while prosecutors make a bail amount request, bail is ultimately set by magistrates—commonly known as bail commissioners—who are employees of the judiciary.

more critical assessment. It seeks to lend a voice to the suffering that we see every day in Philadelphia as a result of bail and, in so doing, highlight the inadequacy of Krasner's actions to date as compared with his campaign promises.

Part I provides an overview of cash bail in Philadelphia and the Philadelphia Bail Fund. Part II describes Krasner's campaign for Philadelphia District Attorney and the promises he made to end cash bail, and examines the initial reforms he has enacted since being sworn in. Part III argues that Krasner's rhetoric and actions have not amounted to radical change and have, in some cases, impeded further progress. Part IV offers concluding thoughts on how to work toward pre-trial freedom while a "progressive prosecutor" holds office.

I. CASH BAIL IN PHILADELPHIA, AND THE PHILADELPHIA BAIL FUND

A. The Bail Process in Philadelphia

The conditions of a person's pretrial release are set at the preliminary arraignment hearing, also referred to as a bail hearing, held within 24-48 hours of arrest. After an individual is arrested in Philadelphia, they are brought to a nearby police station, where they are booked and placed in a holding cell. The police then prepare and send an arrest report to the district attorney's office, where prosecutors decide if and how they would like to file charges. Once charges are filed, and after a pretrial services interview, a person "attends" their preliminary arraignment hearing by appearing through a closed-circuit TV screen before a bail magistrate who is physically present in the criminal courthouse (the Criminal Justice Center). A representative from the District Attorney's Office ("DAO") and the public defender's office (the Defender Association) are also present in the courtroom with the magistrate.⁸ The magistrate informs the individual being arraigned of their charges and the next court date in their case, and determines their eligibility for public counsel. The DAO and public defender representatives then make requests for a particular cash bail amount, or other release conditions, and present an argument in support thereof. The magistrate sets one of five types of release conditions:

- Release on Recognizance ("ROR"): release conditioned upon signing a written agreement to appear for future court dates.
- Release on Non-monetary Conditions (also known as supervised release): release conditioned on an agreement to comply with conditions imposed by the magistrate, such as reporting to pretrial services.
- Released on Unsecured Bond (also known as "sign on bond," or "SOB"): release conditioned on a written agreement to be liable for a certain sum of money if they fail to appear for court (no initial payment is required for release).

8. In general, neither the DAO representative nor the representative from the Defender Association are attorneys. The magistrates are appointed by the president judge of Municipal Court and are typically not attorneys either.

- Release on a Monetary Condition, or cash bail: a person is required to pay 10% of a sum assigned by the magistrate to be released.
- Bail Denied: person is detained pre-trial (used in Philadelphia almost entirely for first degree homicide).

The entire bail hearing typically lasts up to two minutes. If cash bail is set, and an individual is unable to make the payment within four hours, they are transported to the local jail, where they are detained until bail is paid, bail is reduced and paid, or until the conclusion of their case. Every night, hundreds of people languish in Philadelphia's jails – convicted of no crime other than an inability to pay for their freedom.

B. The Philadelphia Bail Fund: Mission and Operation

The Philadelphia Bail Fund (“PBF”) was founded in 2017 with the goal of ending cash bail and pretrial punishment in Philadelphia. We are a local, community-based, primarily volunteer-run organization that provides bail assistance to our neighbors in need to prevent incarceration. We focus on paying bail at the earliest possible moment—ideally within 72 hours after arrest—to avoid the collateral damage of pretrial incarceration—i.e., job loss, family separation, loss of one's home, disruption of medical treatment, to name a few. We see paying bail as a disruption of Philadelphia's cash bail system and as a form of resistance against a system that criminalizes race and poverty. Since our founding in 2017, thanks to the support of the community, we have, to date, helped bring nearly 500 people home from Philadelphia's jails, allowing them to reunite with their families and their communities and to fight their cases from home. Once released, our organization works with individuals to support them over the course of their case.

Ultimately, however, our goal is not merely to pay bail but to dismantle the very system that requires us to pay. Our theory of change relies on multiple tools designed to disrupt the status quo and advocate for change, including direct action, community-based research, political advocacy, public education, litigation, and community organizing. One important feature of our organizing is our court watch program; we invite community members to attend and document bail proceedings with us and share our observations with the public. Since the inception of our court watching efforts in 2018, with the assistance of over 250 volunteers, we have observed over 3,000 bail hearings in Philadelphia, resulting in three public reports.⁹ We see court watching not just as a vehicle to collect data and monitor prosecutors and judges, but also as a means to shift power in the courtroom to the community. Moreover, by engaging directly impacted individuals as court watchers, we seek to build power and agency among the very people our criminal legal system seeks to undermine. We see our work as aspirational in

9. Reports can be found on our website. *See* PHILA. BAIL FUND, <https://perma.cc/CR2Z-FG34>.

principle, fighting for a world where freedom is no longer for sale.

II. CAMPAIGN PROMISES FOR BAIL REFORM MEET REALITY

This is a story about a movement . . . and this is a movement that is tired of seeing a system that picks on poor people, primarily Black and brown people. This is a mandate for a movement that is loudly telling the government what it wants: criminal justice reform in ways that require transformative change within the Philadelphia District Attorney's Office.

-District Attorney-elect Larry Krasner, November 6, 2017¹⁰

A. The Promise

Before being elected as Philadelphia's 26th District Attorney in 2017, Larry Krasner had never prosecuted a case. He began his legal career as a public defender in Philadelphia before opening up his own law practice, specializing in criminal defense, police misconduct, and civil rights. Throughout his thirty-year career as a defense and civil rights attorney, Krasner filed more than seventy-five lawsuits against the Philadelphia Police Department and represented, pro bono, protestors involved in movements such as Black Lives Matter, Occupy Philadelphia, and ACT UP.¹¹ With his unconventional background, Krasner, many commented, was the radical outsider needed to upend the criminal justice apparatus in Philadelphia, the poorest and most incarcerated big city in the country.¹²

Among his six competitors for the Democratic primary, Krasner's campaign platform was, by far, the most progressive. In particular, Krasner premised his campaign on a promise to "end mass incarceration" through a five-prong approach: ending the prosecution of insufficient and insignificant cases, reviewing past convictions and freeing the wrongfully convicted, ending cash bail imprisonment, treating addiction as a medical problem rather than a crime, and bringing police and communities together.¹³ A profile in *The New Yorker* described an even more concise campaign platform, noting, "[Krasner] likes to say he wrote his campaign platform—eliminate cash bail, address police misconduct, and end mass incarceration—on a napkin."¹⁴ Ending cash bail was a keystone of his platform and helped him secure both grassroots coalition support and endorsements

10. WHYY, *Larry Krasner Wins District Attorney Race in Philadelphia*, YOUTUBE (Nov. 7, 2017), <https://perma.cc/Q7EC-2TY5>.

11. See Alice Speri, *Meet Philadelphia's Progressive Candidate for DA: An Interview with Larry Krasner*, INTERCEPT (May 6, 2017, 4:22 PM), <https://perma.cc/6Q9F-V94M>; Holly Otterbein, *Meet the D.A. Candidate Who's Defended Black Lives Matter and Occupy in Court*, PHILA. MAG. (Feb. 22, 2017, 1:24 PM), <https://perma.cc/UTZ5-JNMH>.

12. Alexander Sammon, *After a Career Suing Cops, This Lawyer Wants to Be Philly's Next District Attorney*, MOTHER JONES (May 12, 2017), <https://perma.cc/P7B5-RPW8>.

13. KRASNER FOR DISTRICT ATTORNEY, <https://perma.cc/J4LW-DZSS>; see also *On the Issues*, KRASNER FOR DISTRICT ATTORNEY, <https://perma.cc/Z8SZ-RSE7>.

14. Jennifer Gonnerman, *Larry Krasner's Campaign to End Mass Incarceration*, NEW

from local and national organizations concerned about reforming Philadelphia's criminal legal system. In early 2017, Krasner explained his position that Philadelphia should cease imposing cash bail in an interview with *Philadelphia Magazine*:

I believe that . . . we should move toward the no-cash bail system . . . When you arrest a poor person and you require cash bail that they simply can't pay, what you're doing is sentencing them from the moment of arrest. You're not doing that to someone who is middle class or someone who has plenty of assets. It's a very perverse system. You almost take away any sort of fact-finding about the truth for poor people, and you place them in a position where they're going to be feeling a coercive push to plead guilty later to some kind of time-in sentence even if they haven't done it . . .¹⁵

After winning the Democratic primary in May 2017 (all but guaranteeing his election in November), Krasner outlined his plan for ending cash bail—that is, shifting Philadelphia's bail system from one based on wealth to the presumption of release for the overwhelming majority of those arrested. He stated he would replace the routine practice of the District Attorney's Office of requesting "middling" bail amounts with a practice of "asking for one of two things: 1) full release, with or without conditions, or 2) a high bail that's similar to no bail at all (think something like \$20 million) for the most extreme cases."¹⁶ Krasner identified "the ideal situation" as "eliminat[ing] cash bail entirely."¹⁷ When asked during a candidate forum about his plan on cash bail he promised that if elected he would "go directly to a system of no cash bail as quickly as we can," noting "I do not know why this is controversial."¹⁸

On the night he won the election to be the new District Attorney of Philadelphia, Krasner doubled down on his commitment to end cash bail, appealing to the jam-packed crowd at his victory party and, ostensibly, the people of Philadelphia with the invitation, "If you, like us, believe it's time to end the death penalty . . . mass incarceration . . . if you think it's time to stop making prisoners of poor people by using cash bail . . . we hope to hear from you!"¹⁹

B. The Reality

As District Attorney, Larry Krasner has revised policies and brought about changes unthinkable under previous district attorney regimes. Just three

YORKER (Oct. 22, 2018), <https://perma.cc/6YR6-2H9F>.

15. Otterbein, *supra* note 12.

16. Anna Orso, *How Philly Plans to Ditch Cash Bail and What Stands in the Way*, BILLY PENN AT WHYY (Sept. 11, 2017, 7:00 AM), <https://perma.cc/6JMK-GH8H>.

17. *Id.*

18. PHILLY DA FOR THE PEOPLE, <https://perma.cc/MH44-3ELZ>; *see also Candidates for District Attorney: Positions on Pre-Trial and Ending Cash Bail*, PHILLY DA FOR THE PEOPLE, <https://perma.cc/TA7K-WTFX>.

19. Bobby Allyn, *Krasner Routs Grossman, Coasting to Victory in Philly DA Race*, WHYY (Nov. 7, 2017), <https://perma.cc/ZNJ9-GJEB>.

days after taking office in January, he fired 31 prosecutors²⁰ and began to recruit and hire prosecutors who shared his vision for reform.²¹ Soon after, Krasner received national media attention for a memo to his staff listing new sentencing and charging guidelines.²² The memo directed prosecutors to decline to prosecute marijuana possession and sex work; divert more cases and offer shorter prison sentences in plea deals; ask for shorter probation sentences; and perhaps most unconventional, instructed prosecutors, at sentencing, to explain why they believe a particular sentence is appropriate given the \$42,000 annual cost to incarcerate someone in Pennsylvania.²³ Through his subsequent creation of a proactive conviction integrity unit, to releasing a list of rogue police officers, Krasner has shown he has the willingness and ability to use his prosecutorial discretion to introduce some decarceral policies.²⁴ Unfortunately, on bail—or as Krasner refers to it, “imprisonment for poverty”—Krasner’s reforms have been modest and restrained, and have not fundamentally challenged Philadelphia’s flawed pretrial system.

On February 21, 2018, in what he referred to as the “first [effort] of an ongoing review of cash bail,”²⁵ Krasner announced his office-wide policy on bail. The policy dictated that the Philadelphia District Attorney’s office would no longer seek cash bail for a select 25 “nonviolent, low-level offenses.”²⁶ The charges include primarily misdemeanor offenses, including fraud, several theft offenses, driving under the influence, trespass, criminal mischief, possession of marijuana, and prostitution, and a few felonies, including possession with intent to deliver (PWID) a controlled substance, non-residential burglary with no person present, and receiving stolen property.²⁷ Notably, the policy also includes a number of exceptions and carve-outs. For example, the presumption against

20. Bobby Allyn, *Philly’s New DA Fires 31 from Office*, WHYY (Jan. 5, 2018), <https://perma.cc/C5ZZ-U74U>.

21. See, e.g., Alexander Quinn, *Phila. DA Larry Krasner Stops at Penn Law on Recruiting Tour*, DAILY PENNSYLVANIAN (Sept. 18, 2018, 4:49 PM), <https://perma.cc/3UAU-UXVQ>.

22. Memorandum from Dist. Att’y Larry Krasner to Assistant Dist. Att’ys, Dist. Atty’s Off. (Feb. 15, 2018), <https://perma.cc/VS7V-XFQJ>. Activist Shaun King stated about the memo, “I’ve never seen anything like this document. It’s a dream come true for those of use who’ve been fighting our hearts for justice reform for years.” Shaun King, *Philadelphia DA Larry Krasner Promised a Criminal Justice Revolution. He’s Exceeding Expectations*, INTERCEPT (Mar. 20, 2018, 12:59 PM), <https://perma.cc/FM8R-ZURK>.

23. Memorandum, *supra* note 23.

24. Since taking office, Larry Krasner has expanded the Conviction Integrity Unit, a unit that revisits past cases and investigates claims of innocence by those convicted. The unit has won release for ten individuals to date. See Richard Oppel Jr. & Farah Stockman, *Prosecutors Usually Send People to Prison. These Are Getting Them Out*, N.Y. TIMES (Nov. 28, 2019), <https://perma.cc/FS4X-5YA3>; see also Mark Fazlollah, Craig R. McCoy & Julie Shaw, *Under Court Order, District Attorney Krasner Releases List of Tainted Police*, PHILA. INQUIRER (Mar. 6, 2018), <https://perma.cc/5ZD9-4L9P>.

25. *Larry Krasner Announces End to Cash Bail in Philadelphia for Low-Level Offenses*, PHILA. DIST. ATTY’S OFF. (Feb. 21, 2018), <https://perma.cc/K4LE-Q942>.

26. *Id.*

27. *Id.*

money bail does not apply to a person arrested for a PWID charge for a substance other than marijuana who 1) has another open PWID case, or 2) recently finished serving a sentence for PWID or a violent felony.²⁸ Further, while noting that a presumption against cash bail applies to the 25 identified charges, the memo to Assistant District Attorneys announcing the policy clarifies that a request for cash bail can still be made where “justice requires.”²⁹ The memo characterizes the policy as “a decisive step toward ending the use of cash bail . . .”³⁰ The new policy advertised as intending to have a significant impact, given that it was set to apply to over 60% of all criminal cases.³¹

Despite these high hopes, Krasner’s bail policy proved to have a minimal impact on the rate at which cash bail is set in Philadelphia, with the cash bail rate hovering close to 50% and very little reduction in the number of cases in which case bail is set. And despite signifying at the time of implementation that this policy was merely the beginning of “an ongoing review of cash bail,” this was Krasner’s singular move in this area over the course of more than two years in office; and as discussed in the postscript, his more recent policy change in the face of the global health crisis has been similarly ineffective. According to data released by the DAO tracking the cash bail rate on a year to date basis as of August 20, cash bail was set in approximately 48% of cases in 2019, as compared with 52% in 2018, 59% in 2017, 60% in 2016, 64% in 2015, and 66% in 2014.³² This data indicates that, year to date, in the nearly three years since Krasner took over as District Attorney, cash bail has been set in close to half of all cases initiated by his office. There has been a very slight reduction in the total number of cases in which cash bail has been set since Krasner took office: the DAO reports that cash bail was set in 4575 cases in 2019, as compared with 5659 cases in 2017, the year before he took office.³³ An independent study released on January 19, 2020, which looked at the impact of Krasner’s bail policy by comparing data six months prior to and five months post implementation, found that Krasner’s policy had an extremely limited impact on pretrial incarceration.³⁴ Specifically, it found that while the policy contributed to a slight decrease in the use of monetary bail, it had no detectable influence on pretrial detention rates.³⁵

The study found that one of the primary reasons the policy had a minimal effect on wealth-based detention was the fact that most individuals who were

28. *Id.*

29. Memorandum, *supra* note 23.

30. *Id.*

31. Samantha Melamed, *Philly DA Larry Krasner Stopped Seeking Bail for Low-Level Crimes. Here’s What Happened Next*, PHIL. INQUIRER (Feb. 19, 2019), <https://perma.cc/U68Q-UJYJ>.

32. *Bail Report*, PHILA. DIST. ATTY’S OFF. (Apr. 5, 2021), <https://perma.cc/253K-2V3U>.

33. *Id.*

34. Aurelie Ouss & Megan T. Stevenson, *Bail, Jail, and Pretrial Misconduct: The Influence of Prosecutors*, GEORGE MASON LEGAL STUD. RESEARCH PAPER No. LS 19-08, 2020, at 19.

35. *Id.*

released under the policy were individuals who “would have otherwise been able to secure their release” prior to its implementation.³⁶ Specifically, the study found that most who are released under Krasner’s policy would have been released without a cash payment (either through release with supervisory conditions or via sign on bond) or assigned low cash bail (less than \$500 payment required for release) prior to the policy changes.³⁷ In practice, the main impact of the reform was to change the conditions of release, not to change the number of people who were released.³⁸ In fact, the researchers observed just a four percent decrease in the rate at which bail was set below \$5,000 (requiring \$500 or less for release), and no statistically significant decline in the rate at which bail was set at an amount over \$5,000 (again requiring a payment of 10%, or more than \$500 for release).³⁹ For poor Philadelphians who do not have access to thousands of dollars to make a payment to secure their freedom pretrial, these changes have not translated into any meaningful relief from pretrial incarceration. Indeed, with just several weeks in 2020, the bail has been set at 49% as of December 14, 1% higher than 2019.

III. HURDLES TO PROGRESS

“Wherever the law is, crime can be found.”

-Aleksandr Solzhenitsyn

The continued media adulation of D.A. Krasner, Krasner’s own continued self-lauding of his progress on the issue of pretrial incarceration, and his increasing use of tough on crime rhetoric have all contributed to an atmosphere in which Krasner consistently avoids accountability for his failure to enact meaningful bail reform. Despite the limited effect of the bail reforms Krasner has introduced to date, local and national media outlets frequently characterize his efforts on this front as the near-elimination of cash bail. For his part, Krasner has continued to make grandiose statements about the injustice of money bail and has claimed substantial success in overhauling the cash bail system. He has also claims that other actors are preventing reform of the money bail system. Further, in an apparent attempt to justify not introducing more changes, he has, in some instances, employed counterproductive “tough on crime” rhetoric and a “non-violent vs. violent” categorization of arrestees, without significant pushback. These communications strategies—and the media’s perpetuation of the myth that Krasner has overhauled the cash bail system in Philadelphia—have confused the public and stymied efforts by activists who seek radical change.

36. *Id.* at 20.

37. *Id.*

38. *Id.*

39. *Id.*

A. Creating Confusion about Progress

Since taking office and introducing his bail reform policy, Krasner has largely maintained the image of the renegade, progressive prosecutor who has significantly reduced the use of cash bail in Philadelphia, despite his active, continued participation in the mass pretrial caging of poor Philadelphians. *The New York Times* Editorial Board stated in late 2019 that Philadelphia had “eliminated cash bail for most misdemeanor and felony offenses in 2018”⁴⁰ and refused to correct this commentary.⁴¹ A January 2020 profile of Krasner by the *New Republic* credits him with having “greatly reduced the use of money bail” since coming into office.⁴² *Philadelphia Magazine* reported that Larry Krasner has “shown he can deliver on what he promised,” including by “seeking lighter (no cash!) bail and sentences across the board,” though it ultimately tempered this comment, in response to our correction, to state that Krasner had “shown he can deliver on what he promised . . . [by] eliminating cash bail for some charges.”⁴³

Krasner himself reinforces the narrative that he has made a significant dent in the use of cash bail in Philadelphia, overstating the progress he has made towards his campaign pledge on this issue. One year after the introduction of his bail reform policy, Krasner held a press conference to claim victory for the fact that 1,750 individuals were released without cash bail as a direct result of his policy, without any increase in recidivism,⁴⁴ failing to address whether any of those individuals would have been subject only to non-monetary conditions, sign on bond, or low cash bail amounts prior to the introduction of his policy.⁴⁵ He asserted: “What we had a year ago was not fair. We do not, we should not, imprison people for poverty.”⁴⁶ He went on: “When you don’t tear apart people’s lives, and when you keep them in contact with the things that keep them on course, they are less likely to commit crimes in the future.”⁴⁷

This co-opting of sweeping decarceral rhetoric in the context of bail, while refusing to acknowledge his ongoing responsibility for implementing a policy of wealth-based mass pretrial caging, has contributed to the idea that Krasner is a radical reformer on cash bail. The widespread, mistaken notion that cash bail has ended in Philadelphia, or that Krasner has overhauled the system in some way,

40. Editorial, *A Sad Last Gasp Against Criminal Justice Reform*, N.Y. TIMES (Nov. 17, 2019), <https://perma.cc/AZ8E-2DSF>.

41. Email from Malik Neal, Phila. Bail Fund Organizer, to Mara Gay, N.Y. Times Editorial Board Member (Nov. 18, 2019, 16:26 EST) (on file with author).

42. Alex Yablon, *Larry Krasner’s Lonely, Radical Crusade to Solve America’s Gun Problem*, NEW REPUBLIC (Jan. 28, 2020), <https://perma.cc/AZ8E-2DSF>.

43. Steve Volk, *Larry Krasner vs. Everybody: Inside the Philly DA’s Crusade to Revolutionize Criminal Justice*, PHILA. MAG. (Nov. 23, 2019, 9:00 PM), <https://perma.cc/VUF3-XMGQ>.

44. Melamed, *supra* note 32.

45. Ouss & Stevenson, *supra* note 36.

46. Melamed, *supra* note 32.

47. *Id.*

has left activists in a bind: forced to expend limited energy towards convincing the public that cash bail continues to present a problem at all.

B. Shifting the Blame

More recently, Krasner has begun offloading his own responsibility for the maintenance of a robust cash bail system in Philadelphia since the implementation of his policy, and pointing fingers at other actors within the criminal legal system. Take, for example, the following tweet from Krasner on November 30, 2019. Reflecting on the case of an individual who had been incarcerated due to his inability to pay outstanding court costs, Krasner wrote:

An individualized bail system won't get bogged down by punishing masses of people for being poor, freeing up resources to make smart decisions about those who present real dangers to the public.⁴⁸

Similarly, in response to comments made on a post on the Krasner campaign Facebook page regarding an ACLU lawsuit challenging Philadelphia's cash bail system, Krasner's team noted that while the D.A. and public defender representatives make recommendations, "decisions are made by bail commissioners."⁴⁹

Our own observations demonstrate the enormous influence of the DAO's cash bail requests in determining the amount of bail ultimately set. As discussed *supra*, the DAO representative present at a bail hearing is given the opportunity to make a particular request for conditions of release. The substance of these requests is fully within the discretion of the DAO. Krasner's office-wide policy on cash bail requests, in theory, controls all of the requests made by line DAO representatives. The Philadelphia Bail Fund observed 125 bail hearings at random over three weeks between March and April 2019, beginning thirteen months after the introduction of Krasner's policy. Of the 125 hearings, there was not a single case in which the DAO representative requested a bail amount lower than what the magistrate ultimately set.⁵⁰ On occasion, the magistrate even described the DAO's bail requests as "punitive" and "ridiculous."⁵¹ In 70% of the cases where cash bail was set (30 of 44 cases), the District Attorney's Office representative requested higher bail than what was issued by the magistrate.⁵² In another 20% of cases (9 cases), the District Attorney's Office representative did

48. Larry Krasner (@DA_LarryKrasner), TWITTER (Nov. 30, 2019, 10:13 AM), <https://perma.cc/H47S-GZ2Y>.

49. Larry Krasner for DA, FACEBOOK (Feb. 1, 2020, 11:20 AM), <https://perma.cc/3TU8-473K>.

50. Malik Neal & Cal Barnett-Mayotte, *Press Release & Report: Court Watch Observations Show Shortcomings in Krasner's Promise to End Cash Bail*, PHILA. BAIL FUND (May 8, 2019), <https://perma.cc/95M7-EFWE>.

51. *Observations of 125 Recent Bail Requests*, PHILA. BAIL FUND (May 8, 2019), <https://perma.cc/95M7-EFWE>.

52. *Id.*

not offer a recommendation or none was heard.⁵³

In marked contrast to many of his public statements on the issue, Krasner has at times boasted about the influence his office has on Philadelphia's bail practices. Remarking on his first bail reform policy, he stated: "About 99, or 99.5 percent of the time we recommended no bail, judges are following it. It's not that different than what they did before . . . we just did it [request no cash bail] because prosecutors have that amount of discretion to actually decide what recommendation they are going to make. I don't know if there is any other elected position that has more unilateral power, honestly, than the power the prosecutors have to make those kinds of decisions."⁵⁴ Clearly, Krasner recognizes the power he holds. If he truly believed that Philadelphia's cash bail system was unjust, the sensible course of action would be to remove his office from the process altogether by requesting no bail, rather than actively participating by requesting bail, routinely at higher amounts than what the magistrates ultimately set.

Instead of exercising his discretion to introduce more substantial reforms, Krasner has shifted blame to both the courts and the legislature. In an interview in late 2018, reflecting on the efforts he had made to reform the cash bail system in Philadelphia, Krasner lamented, "[w]e did what we could do . . . we can't change the law in our Trump loving state."⁵⁵ It is unclear what state law Krasner is referring to with comments like this. Applicable law instructs bail magistrates to "determine the type or combination of types of release on bail reasonably necessary, in the bail authority's discretion, to ensure that the defendant will appear at all subsequent proceedings and comply with the conditions of the bail bond."⁵⁶ As our observations demonstrate, the magistrates' bail decisions are strongly influenced by the DAO's requests. Despite Krasner's statutory strawman, there is no statutory barrier to broad-scale pretrial release without cash bail.

Importantly, Krasner has broad prosecutorial discretion in Philadelphia that would allow him to end his office's practice of requesting cash bail without legislative intervention. Moreover, Krasner's framing of this issue constitutes a dangerous mischaracterization of current Pennsylvania law that governs bail. The presumption of pretrial release is enshrined in the Pennsylvania Constitution.⁵⁷ Further, the Pennsylvania Supreme Court has "reaffirm[ed] that the purpose of bail is to ensure the defendant's appearance and that *Pennsylvania law favors the release, rather than detention of an individual pending a determination of guilt or innocence.*"⁵⁸ Neither the judiciary nor the legislature prohibits the District

53. *Id.*

54. Larry Krasner, *Lecture by Larry Krasner*, 3 UCLA CRIM. JUST. L. REV. 99, 109 (2019).

55. USC Gould Sch. of Law, *Transforming Criminal Justice: Philadelphia D.A. Larry Krasner and Prof. Jody Armour Talk Reform*, YOUTUBE (Dec. 6, 2018), <https://perma.cc/6TPB-H2T7>.

56. 234 Pa. Code. § 524(A).

57. See PA. CONST. art. 1, § 14.

58. 25 Pa. Bull. 4100, 4116 (Sept. 30, 1995) (emphasis added).

Attorney from using his prosecutorial discretion in a manner dedicated to moving towards an end to wealth-based detention in Philadelphia, namely, by eliminating DAO requests for cash bail.

C. Employing Tough on Crime Rhetoric

In addition to shifting blame to other actors within the system, Krasner has also worryingly used traditional “tough on crime” rhetoric to justify his failure to introduce further bail reforms. In particular, he has embraced disturbing, debasing rhetoric when speaking about those accused of serious crimes, in effect promoting the view that cash bail is necessary and appropriate in many circumstances. In a late 2018 interview with Philadelphia’s public radio station WHYY, when challenged on the limits of his reforms to date, Krasner explained that his bail reform policy had been intentionally restrained to ensure the maintenance of “public safety,” offering several examples of cases in which he believes cash bail is appropriate—and invoking inflammatory language to prove his point:

I do not want people who are shooting people to be getting out of jail without having to pay bail. I do not want people who are charged with sex offenses to be getting out of jail without having to pay bail. I do not want people who are arrested with a firearm and they have a prior felony conviction, or high-level white-collar criminals to be getting out of jail without having to pay bail. And so we came in with a carefully crafted policy that so far has toed the line between public safety and increasing freedom.⁵⁹

During the 2019 interview in which Krasner criticized the cash bail system for “keep[ing] broke people in jail because they’re broke,”⁶⁰ he immediately switched gears. His very next words: “People should be in jail because they are a menace to society.”⁶¹

Krasner’s fear-mongering language signals his commitment to the inherently discriminatory system of money bail and undermines the presumption of innocence and due process. It also provides an excuse to the general public to sustain this deeply inequitable cash bail system in the name of public safety, despite the total lack of evidence to support this viewpoint. Studies have shown that cash bail and pretrial detention, rather than protecting public safety, undermine it.⁶² To that point, when jurisdictions such as New Jersey and Harris County underwent bail reforms, there was a decline in violent crime in both places.⁶³ Krasner’s

59. Radio Times, *Philly D.A. Larry Krasner on his first year in office*, WHYY, at 21:42 (Dec. 18, 2018, 10:00 AM), <https://perma.cc/D8ED-YRY7>.

60. @Axios, TWITTER (June 9, 2019, 10:00 AM), <https://perma.cc/3HD3-6WVL>.

61. *Id.*

62. An independent study on cash bail in Philadelphia and Pittsburgh showed that pretrial detention increases the risk of recidivism by 6-9%. *see* Arpit Gupta, Christopher Hansman & Ethan Frenchman, *The Heavy Costs of High Bail: Evidence from Judge Randomization*, 45 J. LEGAL STUD. 471, 472, 475 (2016).

63. *See* Editorial, *Has Bail Reform Been a Success? Check Numbers, Then Decide*, STAR LEDGER (Jan. 29, 2019), <https://perma.cc/FBL6-VYH3>; Samantha Ketter, *HPD Chief: City’s*

tough on crime language deflected from the daily brutality inflicted on Black and brown bodies by the criminal legal system. The violence we see in our communities is not due to lack of prosecution—it is the result of decades of poverty and divestment as well as systematically racist carceral policies that have decimated communities.⁶⁴

IV. MOVING FORWARD: STRATEGIES TO ACHIEVE ACCOUNTABILITY

There is never time in the future in which we will work out our salvation. The challenge is in the moment; the time is always now.

- James Baldwin⁶⁵

As the example of Krasner demonstrates, a “progressive” prosecutor’s willingness to take radical action on bail and pretrial incarceration can be limited. In Krasner’s case, his actions to date on bail reform demonstrate (1) that he has drastically pulled back from campaign promises to end cash bail, and (2) that he has adopted disingenuous and conflicting positions on the issue of cash bail. While Larry Krasner has the unilateral power to instruct his Assistant DAs to stop requesting cash bail—and thus greatly reduce or eliminate the issuance of cash bail in Philadelphia—he has refused to exercise it, or even come close. As activists seeking an end to cash bail, we must speak out and take action about the injustice wrought by the continued existence of the cash bail system. At the Philadelphia Bail Fund we have identified several strategies that we have found to be effective in enabling us to do so.

A. Lift Up and Center Voices

Activists working to dismantle wealth-based detention must lift up and center the voices of those impacted by its existence. The movement to end pretrial incarceration was sparked, in large part, by the stories and experiences of those who have been caged pretrial. Their participation and leadership remain crucial to the work being done to abolish wealth-based detention. First, it is from the perspective of those who are harmed by pretrial punishment and bail that we can best assess whether reforms are truly authentic and meaningful. Second, knowing, listening, and understanding the experiences of those directly impacted serves as the best check on “progressive prosecutors,” serving to distinguish symbolic reforms from substantive change. Take, for example, reflections from

Violent Crime Down 10%, HOUST. CHRON. (Jan. 28, 2019, 5:28 PM), <https://perma.cc/UYE6-6K7A>.

64. For a more expansive view of violence and the politics of mass incarceration, see DANIELLE SERED, *UNTIL WE RECKON: MASS INCARCERATION, AND A ROAD TO REPAIR* (2019); PATRICK SHARKEY, *UNEASY PEACE: THE GREAT CRIME DECLINE, THE RENEWAL OF CITY LIFE, AND THE NEXT WAR ON VIOLENCE* (2018); and JOHN PFAFF, *LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION AND HOW TO ACHIEVE REAL REFORM* (2007).

65. JAMES BALDWIN, *Faulkner and Desegregation*, in *NOBODY KNOWS MY NAME* 126 (1992).

individuals we have bailed out on their experience going through bail hearings in the last two years:

“I was treated like I was guilty . . . treated horribly. The commissioner didn’t care what I had to say. They were discussing my case and I couldn’t say anything. I was being accused of things, but I felt like a fly on the wall.”

“You’re tried like you’re a criminal before you’re found guilty or innocent.”

“People sitting there making judgments about people’s lives, not caring about the impact. They’re sitting there pretending like they don’t just care about the money.”

“I don’t think anything could be more impersonal than sitting there learning your fate from a TV screen. You can’t plead your case, you can’t state what actually happened, you can’t do any of that. They tell you to sit down, shut up, speak when spoken to.”⁶⁶

Voices like these vividly demonstrate the real brutality of Philadelphia’s cash bail system and how, even with a “progressive prosecutor” in power, the system continues to routinely destroy and disrupt the lives of Black and brown communities. By highlighting the voices of those directly impacted by cash bail in our report writing and drawing on their experiences to develop our priorities for reform, we promote their perspective as the key driver in our advocacy efforts.

Early this year, we at the Philadelphia Bail Fund, in partnership with over a dozen local community groups, hosted a People’s Hearing on the money bail system. As the title suggests, the purpose of the hearing was to shift power away from politicians to where real power lies: with the people. Individuals we bailed out and their family members shared their stories with community members, activists, and Philadelphia policymakers, including Larry Krasner. Lifting up the voices of those who have been impacted by cash bail and building power with and alongside them should be the central guiding strategy for those pushing for the abolition of cash bail and pretrial detention.

B. Watch the Courts

Court watching has been an extremely powerful tool in our fight to end cash bail, particularly against the backdrop of the distorted local and national media presentation about the state of cash bail in Philadelphia. By attending bail hearings in person regularly and observing the implementation of Krasner’s bail policy on the ground, we arm ourselves with facts to cut through platitudes about the significance of Krasner’s election and his bail reform efforts. This enables us to confidently assess the accuracy of media analysis on this issue and to demand truthful reporting about the limited impact of Krasner’s bail reform efforts.⁶⁷ Additionally, our published reports have been instrumental to our advocacy efforts.

66. *Philadelphia Bail Watch Report*, PHILA. BAIL FUND (Oct. 15, 2018), <https://perma.cc/Q36D-FETT>.

67. See, e.g., Volk, *supra* note 43 (updated to reflect the reality of the scope of Krasner’s

By compiling and analyzing observations of hundreds of bail hearings, we were able to identify with specificity the grievous flaws inherent in the bail hearing structure that has persisted in Philadelphia under Krasner's watch. Based on observations of 125 bail hearings over a three-week period more than a year after Krasner issued his bail policy, we were able to publicly demonstrate the limited impact of Krasner's policy, monitor reforms to date, and highlight the substantial contribution of the District Attorney's Office to the routine issuance of unaffordable bails. A representative from Krasner's office stated that the report "caused a good internal discussion," and further commented, "I don't think there's anything we do here at the DA's office that we can't figure out how to do better."⁶⁸

These reports have been tremendous tools in our discussions with policymakers and in our efforts to educate the public about the reality of the use of cash bail in Philadelphia. Beyond serving as an excellent basis of support for our advocacy positions, court watching also offers an opportunity for members of the public to see firsthand what is really occurring with cash bail in Philadelphia. We seek to increase public awareness about the ongoing use of cash bail in Philadelphia by accompanying community members to observe bail hearings, and occasionally sharing what we see publicly through social media.⁶⁹ In the era of "progressive prosecution," court watching has become an instrumental tool of accountability and separating rhetoric from reality.

C. Know Your Role

Finally, remembering and leaning into our role as organizers seeking to exert external influence on the systems of power in Philadelphia has been crucial to our efforts. We do not exist to serve as cheerleaders for D.A. Krasner or to campaign on his behalf. We exist to stake out radical ground and to push D.A. Krasner towards radical action, comfortable in the knowledge that other actors within the system have prioritized the task of ensuring the continued power of his administration. The moment we capitulate to the middle-ground approach and stop calling for truly transformative policies in the name of maintaining mainstream

bail reform following intervention by the Philadelphia Bail Fund); Phila. Bail Fund (@phillybailfund), TWITTER (May 13, 2019, 1:42 PM), <https://perma.cc/YXZ5-EV2U> (addressing the inaccuracy of Bernie Sanders' May 2019 op-ed in the Philadelphia Inquirer regarding Krasner's bail reform efforts).

68. Bryce Covert, *Progressive Philly D.A. Larry Krasner's Bail Reform Plans Seem Stalled, Advocates Say*, APPEAL (June 25, 2019), <https://perma.cc/7723-GA79>.

69. See, e.g., Phila. Bail Fund (@phillybailfund), TWITTER (Mar. 28, 2019, 5:59 PM), <https://perma.cc/7SRZ-6G3H> ("This week: @philadao requests 5k for indigent woman. When magistrate sets 10k sign on bond (no \$ needed), DAO appeals! Judge sets 1k (\$110 needed) but it is still unaffordable. We freed her, but she spent 2 days in a cage. Does this look like the reform @Krasner4DA promised?"); Phila. Bail Fund (@phillybailfund), TWITTER (Jan. 9, 2020, 6:08 PM), <https://perma.cc/SZM3-25BX> ("This week in \$bail hearings: Twice, from CCTV, 20 y/o male pleads with magistrate to speak with an atty before a decision on his freedom is made. It never happens; the hearing goes on. Outraged, he yells 'How can you do this? My rights are being violated!' He is absolutely right.").

support for the “progressive prosecutor” in power, we diminish the possibility of ending wealth-based detention. Our role is to push for transformation of the criminal legal system every single day of the year, as forcefully as we can, regardless of who is in power. By consistently demanding radical change, we believe we can make more meaningful gains in growing the movement to end money bail and pretrial punishment.

CONCLUSION

Keep your eyes on the prize. And hold on, hold on.

-Alice Wine (“Eyes on the Prize”)

The Philadelphia Bail Fund paid Jennifer’s bail several days after she was arrested, allowing her to reunite with her son and fight her case from the position of freedom. Nearly two months and several court dates later, her case was dismissed.

Stories like Jennifer’s are not outliers. They happen every day in our criminal legal system where prosecutors, even “progressive” ones, hold people ransom by requesting bail. If we had not intervened in her case, Jennifer could have spent months caged while she awaited trial, enduring daily the brutality and violence that is jail. We were able to prevent this from happening, but in a just system, we would not need to.

The example of Krasner’s failure to make significant change on bail should serve as a cautionary tale to organizers and anyone seriously concerned about ending mass pre-trial caging. Even with a “progressive” prosecutor in office—and perhaps even more so—organizers must continue to be as aspirational in our goals and as forceful in our drive to achieve them. Most importantly, activists must always keep their focus on liberation, and judge progress by the experiences of individuals and communities who are disempowered by the criminal legal system. As long as power remains with prosecutors, and as long as they are centered in reform efforts, the demand for mass liberation and freedom will be unfilled.

POSTSCRIPT RE: COVID-19

We feel it is necessary to address certain changes that have arisen since the development of the unprecedented public health crisis brought on by the spread of the coronavirus over the past several months. As the pandemic hit, public health experts warned that jails and prisons—where social distancing is impossible and conditions are unsanitary—would become viral hotspots. As the viral outbreak intensified in Philadelphia, a loud public call arose, with demands for large-scale releases from Philadelphia’s jails to reduce the spread of COVID-19.

In response, D.A. Krasner instituted what he labeled, “Bail Phase 2.0,” a new bail policy that he insisted would “decouple pretrial incarceration from an ability

to pay.⁷⁰ The new policy stipulated that in every case initiated his office would request cash bail in the amount of \$999,999 in those cases involving “truly serious offenses”⁷¹ and make no request for cash bail in all other cases. His intent was to relegate the use of cash bail for the sole purpose of seeking de facto detention orders in a subset of “serious” cases, in order to remove inability to pay from the equation.⁷² When describing the policy, Krasner often cited jurisdictions without cash bail as models, saying his new policy would “help to move Philadelphia closer to a system without cash bail, where people are either held or not held, as is the practice in Washington, D.C., and New Jersey.”⁷³

However, Krasner’s high-minded new policy has proven to be a sham in practice. Despite DA Krasner’s implication that the requests for \$999,999 bails (intended to have the impact of a detention order) would be limited, the evidence suggests that his office, in the midst of a pandemic, sought de facto pretrial detention for a strikingly large percentage of people. In our analysis of 451 randomized bail hearings since the policy’s implementation on March 21, 2020 until May 21, 2020, we found the District Attorney’s Office requested \$999,999 in 53% of cases. In 87% of the cases reviewed, bail magistrates set a considerably lower bail than DA Krasner requested, including sixteen instances (7%) where magistrates ordered a person released against the District Attorney’s wishes.⁷⁴ Further, we found that after the Philadelphia Police Department resumed making arrests for certain low-level crimes on May 2, (following a brief hiatus during which such arrests were not made in response to the health risks posed by incarceration during the pandemic⁷⁵), the rate at which the DAO requested \$999,999 cash bail remained nearly constant; the DAO requested \$999,999 cash bail in 55% of cases we reviewed that were initiated between March 21 to May 1 (204 total cases), and in 50% of cases we reviewed that were initiated between May 2 and May 21 (246 total cases).⁷⁶ By comparison, New Jersey and Washington, D.C—the jurisdictions Krasner allegedly meant to emulate—detain around 6%

70. Samantha Melamed, *Amid Coronavirus Threat, Philadelphia Will Follow New Jersey and New York City in a Push to Cut the Jail Population*, PHILA. INQUIRER (Mar. 25, 2020), <https://perma.cc/Y5BR-HFK6>.

71. Kristen Johanson, *An ‘Acceleration of Reform’ from Philadelphia DA in Response to Coronavirus Outbreak*, KYW NEWSRADIO (Mar. 16, 2020, 4:22 PM), <https://perma.cc/MY7J-FJ99>.

72. Melamed, *supra* note 73.

73. Phila. Dist. Atty’s Off., *District Attorney Krasner Announces DAO Review Effort to Address Growing Case Load, Protect Public From COVID-19*, JUST. WIRE (June 11, 2020), <https://perma.cc/HWB6-98Z7>.

74. *Rhetoric vs. Reality: The Unacceptable Use of Cash Bail by the Philadelphia District Attorney’s Office During the COVID-19 Pandemic*, PHILA. BAIL FUND (July 2020), <https://perma.cc/ZT2M-FUUC>.

75. *Id.* See also Max Marin, *Philly Police Roll Back COVID Freeze, Resume Arrests for Burglaries, Theft and Other Offenses*, BILLY PENN AT WHY Y (May 1, 2020 at 7:10 PM), <https://perma.cc/KD9X-Y7WM>.

76. PHILA. BAIL FUND, *supra* note 77.

of people pre-trial.⁷⁷

Finally, out of 267 randomly selected bail hearings in cases in which the lead charge is Drug Possession with Intent to Distribute (PWID), the Philly DAO requested \$999,999 cash bail 33% of the time.⁷⁸ Importantly, PWID is one of the most common victimless crimes in Philadelphia and one of the 25 “low-level” charges that, in February 2018, the DA stated his office would not request cash bail for, subject to certain exceptions.⁷⁹

Aside from its overreliance on cash bail, DA Krasner’s “Bail Phase 2.0” policy is also problematic in two crucial ways. First, procedural protections (i.e., a detention hearing) do not exist for somebody assigned an astronomical bail at an ordinary arraignment hearing. Second, the outcome DA Krasner seeks by requesting \$999,999—that is, incarcerating people pretrial on a monetary bail with no ability to obtain their freedom—is illegal under Pennsylvania law, which mandates that monetary bail “shall not be greater than is necessary to reasonably ensure the defendant’s appearance and compliance with the conditions of the bail bond.”⁸⁰ DA Krasner’s new policy attempts to skirt the law by seeking million-dollar bails as de facto detention orders.

DA Krasner has attempted to justify his policy by, once again, resorting to fearmongering and “tough on crime” framing, stating his office is requesting high bails, “if you’re shooting people, [or] there’s probable cause you raped someone . . .”⁸¹ The true purpose in using such language is, of course, to stymie serious discussion about the harms of his office’s policy. Indeed only 5 percent of all cases we reviewed included lead charges of rape, attempted murder, or discharge of a firearm.⁸²

When criticized, DA Krasner cites the decline in the jail population during the months of March, April, and May as a response. However, the DA’s bail policy is not responsible for the decline in the jail population.⁸³ If DA Krasner

77. Approximately 15% of people arrested in D.C. are held for 3-5 days pending a full-scale detention hearing. Ultimately, only 6% of arrestees are detained following these hearings for the entire pretrial period. PRETRIAL SERV. AGENCY FOR D.C., FY 2019 RELEASE RATES FOR PRETRIAL DEFENDANTS WITHIN WASHINGTON, DC, <https://perma.cc/5GWD-Y3D7>; CRIMINAL JUSTICE REFORM STATISTICS, JAN. 1 – DEC. 31, 2020, N.J. COURTS (2021), <https://perma.cc/5J2S-6V7C>.

78. PHILA. BAIL FUND, *supra* note 77.

79. *Larry Krasner Announces End to Cash Bail in Philadelphia for Low-Level Offenses*, PHILA. DIST. ATTY’S OFF. (Feb. 21, 2018), <https://perma.cc/MY5G-G7RP>.

80. 234 Pa. Code R. 524(C)(5). The official comment to the same provision explains that “[n]o condition of release, whether nonmonetary or monetary, should ever be imposed for the sole purpose of ensuring that a defendant remains incarcerated until trial.”

81. Phila. City Council, *FY2021 Budget Hearings - June 8, 2020*, YOUTUBE (June 8, 2020), <https://perma.cc/JZE6-K4GS>.

82. PHILA. BAIL FUND, *supra* note 17.

83. In April 2020, Philadelphia courts began holding emergency release hearings in response to COVID-19 for people held in custody. We requested data from the District Attorney’s Office on their release requests for these hearings to no avail. *See*, Phila. Bail Fund (@phillybailfund), *Philadelphia Bail Fund Letter to Larry Krasner*, TWITTER (Apr. 28, 2020),

had it his way, according to our estimates, 53% of new arrestees would be incarcerated on \$999,999 bail. Luckily, since the magistrates—no progressive heroes—have not blindly gone along with DA Krasner’s requests, many accused people have either been released without payment, have been able to pay their own bails, or have been bailed by us and our sister organization, the Philadelphia Community Bail Fund. Together, we have bailed out nearly 600 people since the start of the pandemic.

Meanwhile, as Krasner’s office continues to make extraordinary cash bail requests, the DA has taken a starkly contradictory position in his public appearances. Krasner has attended social distancing protests designed to build public pressure on the City to reduce the jail population,⁸⁴ called upon the Philadelphia Mayor⁸⁵ and the Pennsylvania Governor⁸⁶ to take action to reduce the jail population, and expressed frustration with the slow pace at which the jail population has been reduced during the pandemic.⁸⁷ All the while, Krasner has refused to acknowledge the serious role he is playing in sending thousands of people to Philadelphia jails. On July 28, 2020 the DAO released a statement from Krasner in which he denounced the current state of the cash bail system, lamenting “[w]hat we have currently is a system that too often imprisons people pre-trial who are more poor than dangerous, while allowing people who are a danger to the public out pre-trial simply because they have money.”⁸⁸ He repeated the old refrain designed to deflect blame to other players in the system, stating further that “to achieve a truly just and efficient pre-trial detention process, we must have judicial or legislative intervention . . .”⁸⁹ Finally, he doubled-down on his current policy without addressing the significant flaws both in its structure and its implementation, announcing that “my office will continue to simulate a no-cash-bail system by seeking very high bails for the most serious and dangerous offenders and seeking bails that do not require cash for non-serious offenses in order to prevent COVID-19 from spreading in jails during the second wave of the pandemic in Philadelphia.”⁹⁰

While our access to data and direct observation of bail hearings has been

<https://perma.cc/288R-KSZA>

84. Samaria Bailey, *Activists Demand That Officials ‘Free Our People’ and ‘End Cash Bail’ During the Coronavirus Outbreak*, PHILA. TRIBUTE (Mar. 30, 2020), <https://perma.cc/JJ9D-HMJ9>.

85. CBS3 Staff, *Coronavirus Latest: Philadelphia DA Larry Krasner Urges Leaders to Reduce Prison Populations Due to COVID-19 Pandemic*, CBS PHILLY (Mar. 19, 2020, 5:29 PM), <https://perma.cc/TA89-LPHS>.

86. Bailey, *supra*, note 87.

87. Jeremy Roebuck, *As the Coronavirus Gains Strength in Philly’s Jails, Panic and Fingerprinting Mark Efforts to Avert Crisis by Thinning Inmate Population*, PHILA. INQUIRER (Apr. 3, 2020) <https://perma.cc/AD2Y-WPGD>.

88. Phila. Dist. Atty’s Off., *District Attorney Krasner: PA’s Broken Cash Bail System Requires Action, Not Suggestions*, JUST. WIRE (July 28, 2020), <https://perma.cc/5VZX-HRH8>.

89. *Id.*

90. *Id.*

limited during the pandemic, our data shows that the DAO has implemented Krasner's new policy to seek de facto detention at an outrageous rate, appearing to have no cognizable limiting principle.⁹¹ Krasner's statements throughout the pandemic are a continuation of familiar language that seeks to co-opt movement rhetoric to disguise his inaction on an issue he has time and again committed to tackling, and shift the blame to other actors within the system in order to downplay his responsibility for the continued use of cash bail in Philadelphia. While we and so many others throughout Philadelphia had hoped that Krasner would step up to the plate on bail during this unprecedented health crisis, we have been deeply disappointed yet again. If DA Krasner did not act boldly in the midst of a global pandemic, when incarceration could mean life or death, we are left to wonder if he ever will.

91. We sought data from the Philadelphia District Attorney's Office regarding the actions of their office in particular during COVID but to avail. *See, e.g.*, Phila. Bail Fund, *supra* note 86. Similarly, we filed a formal Right to Know request for DAO bail requests, and this request, too, was denied. Letter from Erika Nyborg-Burch, Counsel for Phila. Bail Fund, to Jennifer Lin, Phila. Dist. Atty's Off. Appeals Officer (Jan. 19, 2021) (on file with author).