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LECTURE BY LARRY KRASNER

District Attorney for Philadelphia County, Pennsylvania

TABLE OF CONTENTS

I.	LECTURE	99
II.	QUESTIONS & ANSWERS.....	112

I. Lecture

I was a public defender for three years in the county, two years in the federal system, then I started my own law firm, and for twenty-five years I did criminal defense work there. I was in court four to five days a week for thirty consecutive years—federal court, mostly state court in Philadelphia county—but many other counties and a couple of other states. When I wasn't doing that, I was doing civil rights work for plaintiffs. Specifically, my focus was on lawsuits against the Philadelphia police because no one else ever held them accountable for anything. When they would frame people, when they were corrupt, when they would shoot people in the back—we sued them to hold them accountable.

Needless to say, I was trying as much as possible to never be elected to public office and, obviously, I screwed up completely because the exact opposite happened, as I was elected as the 26th District Attorney of Philadelphia in 2017. Based upon that guidance in my life, I can tell you that my plan for the next four years is to try to do everything possible not to be elected, and then I may be elected again. We'll see how it goes.

There is a reason that this election occurred and it's not because I've been in politics my whole life; I have not. In fact, I really did not intend to run for anything. The reason this election occurred is because the people in Philadelphia, much like people in many other locations around the country, are in a very different place than the criminal justice system in terms of what they believe. They have had a very different experience, different viewpoints, and different goals for the system, and I have watched many of those factors play out over the course of my career.

I came out of law school in 1987. If you look at the charts for mass incarceration and you look at where we were in 1987 and you compare it to where we are now,¹ then you will see that there is tremendous overlap

1. See Lawrence A. Greenfield, *Prisoners in 1987*, Bureau of Justice Statistics (1988); see also E. Ann Carson, *Prisoners in 2016*, Bureau of Justice Statistics (2018).

between the years when I happened to have been a lawyer, and when mass incarceration went through the roof while crime simultaneously fell virtually every year.²

We have five times as many people in custody in the United States as we did at the beginning of this cycle approximately forty ago³ and if you look behind that you'll see for decades the level of incarceration in the United States was not going up; instead, it was pretty steady.

What happened in the late 1970s and in the 80s, especially around the time of the war on drugs and the war on crack—aka, the war on black people—when this strategy was developed, we saw this tremendous surge in people being incarcerated. To me that is radical. It is a radical thing for people on the right, who would like to tell you they're not radical, to start locking up everybody. And that is why I actually don't see what we are doing as being radical. I think what we're doing is going back to a position of balance that existed before the whole thing went off the rails.

Here's another fact you should know. For thirty years there has been polling in the United States of the population, asking if they think crime was going up or down, and for thirty years 65 percent of the U.S. population has said its going up⁴. In actuality, for these thirty years, crime was going down. How do you get to that place? How do you get to the place where the public believes something, at an incredibly high level, that is completely untrue? And what are the implications for policy when the public is so misled?

It's important to understand how we get to this position. The way you get there—there are two basic problems—is an unholy alliance between egomaniacal politicians who became district attorneys only to run for something else and a media that makes tons of bucks off of playing into fundamental human fears and treating law as something that was entirely anecdotal, intuitive, and unscientific. This was totally in contradistinction to medicine, where a long time ago, we accepted that this is all about science, this is all about prevention, and we had reasonable expectations. In medicine, you don't think mortality is going to end just yet, do you? Your standard is that they're going to make the quality of life better, and hopefully for everyone—not just for people who've got a lot of money. Yet, if you actually read the rhetoric in the media around crime, it's always along the lines of: “well, crime should end, there should be no crime, there never should be crime. Crime should be over.” Really? Is that actually how this works?

You look at the science around medicine, the peer-reviewed studies, the care that is taken with all of that, and then you go into the Philadelphia

2. See generally UNIFORM CRIME REPORTING STATS., <https://www.ucrdataatool.gov/Search/Crime/State/StatebyState.cfm> [<https://perma.cc/6YQM-FBPK>].

3. Benjamin H. Renshaw III, *Prisoners 1925–81*, Bureau of Justice Statistics (1982).

4. Justin McCarthy, *More Americans Say Crime Is Rising in U.S.*, GALLUP (Oct. 22, 2015), <https://news.gallup.com/poll/186308/americans-say-crime-rising.aspx> [<https://perma.cc/TS9D-VPE3>].

District Attorney's Office, or frankly almost all of them, and say, "Has anybody here ever spoken to a criminologist? Even once? Have you ever even bumped into a criminologist in the hallway?" The answer is no. There was no criminologist employed in the Philadelphia DA's Office when we went in. And when we employed one, we brought in a young professor who was connected around the country, and therefore was able to leverage all of their resources. As we spoke to all those criminology professors, including some very impressive ones in the Philadelphia area, we found out that none of them had ever been consulted by the Philadelphia DA's Office with an eye towards seeing what actually does and does not work. That was not part of the culture. A proper understanding of criminality wasn't making media money and it wasn't advancing the careers of politicians.

Arlen Specter was the DA in Philadelphia and then became a US Senator. Ed Rendell was the District Attorney at thirty-five in Philadelphia and then became the mayor and then became the governor.⁵ These district attorneys becoming high-profile figures is something that we've seen in Pennsylvania for a long time. There has been for fifty to one hundred years, a period of time when the popularity of the district attorney has paralleled the rise of the celebrity chef. Well, celebrity district attorney, which we didn't use to have—just like how we used to just have chefs, and now they're celebrities. I'm not saying that's a bad thing; the attention that has risen with their work is probably a good thing. But that's what happened. What happened with district attorneys is they weren't high-profile figures, they were just people who prosecuted until a certain point when it became useful on their resume—if you wanted to be President of the United States—to have been a prosecutor somewhere. And that brought us to the position where you had people in district attorney's offices who didn't really want the job—which I do—but wanted instead to use it as a springboard to run for something else. What's the best way to run for something else? Politics. What's the best kind of politics, at least in the last 100 years? It's fear. That is what it has been for a very long time.

For those of you who remember Willie Horton or maybe read about it,⁶ that is just one salient example of how fear has dictated our politics for a long time. So, this is going on at the same time as William Randolph Hearst and others figured out (and yes, this is documented), that when homicide goes up X percent, you're making good money if you report that it actually went up seven times X percent.⁷ So, what's in your

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5. *Biography of Edward G. Rendell*, Official Site of Edward G. Rendell, <http://www.edwardrendell.com/biography> (last visited Mar. 20, 2019) [<https://perma.cc/PM8E-EDDE>].
 6. Doug Criss, *This Is the 30-Year-Old Willie Horton Ad Everybody Is Talking About Today*, CNN POL. (Nov. 1, 2018), <https://www.cnn.com/2018/11/01/politics/willie-horton-ad-1988-explainer-trnd/index.html> [<https://perma.cc/2GX8-RP5N>].
 7. Deborah Serani, *If It Bleeds, It Leads: The Clinical Implications of Fear-Based Programming in News Media*, 24(4) PSYCHOANALYSIS AND PSYCHOTHERAPY 240–250 (2008).

newspapers? Do you have a page or a section which is about justice? No. Instead you have a section which is about crime.

And what's contained in there is a narrative that is true about specific, horrifying crimes that are fascinating to us because we're human beings, and we find these things interesting in the same way we find Grimm's Fairy Tales culturally important and interesting. When I was a teenager, I was fascinated by John William Gacy. All of these corpses of teenage boys are being pulled out of a basement and a yard in Chicago, and this guy who dresses up as a clown is catching them and doing these horrifying things. The Zodiac Killer, Charles Manson. These infamous names really were the stuff of nightmares! You know here we are on Halloween, right? Why do we have Halloween? It's the stuff of nightmares! Because it's fascinating to us in the same way watching a horror movie is fascinating to us. And what is fascinating to us is what sells papers.

From this, politicians figured out that the politics of fear would get them somewhere. And most of the stuff that they cared about was not the people they were supposed to serve—it was about getting somewhere. So what do you do? What you do is, you explain that the prosecutor, male or female, is going to be the fascist ideal; let's call it what it is. The strong person who stamps the foot, beats the chest, and singlehandedly stops this ultimate evil. You characterize the whole world in cartoon terms. Victims are never perpetrators. Perpetrators are never victims. Victims are always perfect. Perpetrators are always as satanic as they could possibly be. This is a cartoon world; it is not actually our world, but it is a world that plays into a politics of fear. And newspapers not only report crime in a certain way, but they then endorse the candidates who seem to be helping them with that narrative—not only helping them in terms of campaign rhetoric but helping them by actually feeding them stories all the time. I mean who wants to do the hard work of journalism if you can just show up at the door of the DA's office and be given a file and have access to all the inside information about whether the body was dismembered or not? This unholy alliance has persisted for a very long time and that is why 65 percent of the United States population, every year when crime is going down, is convinced that crime is going up.

And what do we get from this dichotomy? We get mandatory sentences.⁸ We get sentencing guidelines⁹ that put people through the roof. We get three strikes.¹⁰ We get all these sports analogies: zero tolerance, three strikes, etc. We get all of these simplistic, bite-size approaches to what always should have been a very individual justice, where the facts of

8. United States Sentencing Commission, *Overview of Mandatory Minimum Penalties in the Federal Criminal Justice System* (2017).

9. United States Sentencing Commission, *Guidelines Manual*, § 3E1.1 (Nov. 2018).

10. Memorandum from Jo Ann Harris, Assistant Att'y Gen., *Sentencing Enhancement—"Three Strikes" Law*, (Mar. 13, 1995), <https://www.justice.gov/jml/criminal-resource-manual-1032-sentencing-enhancement-three-strikes-law> [<https://perma.cc/DA9Q-7N8G>].

every case matter. And the facts about every victim, and every witness, and every defendant *do* matter. And we didn't get that; we got this. You might even call it vote-laundering. Politicians use the politics of fear to lock up lots of people, promise more convictions next year, more charges next year, more years next year because they have convinced the population that this is how you keep them safe. And then they take tax money and put it into jail cells and put people in those cells to get votes. It's vote-laundering—jail cells for votes. This has gone on for a very, very, very long time, and it's only now when we actually see the tremendous and terrifying consequences of this that people start to feel differently.

The election of my campaign would have been impossible ten years ago, and at least very unlikely only five years ago. But this movement is not just limited to my campaign; around the country in the last couple of years we have seen this explosion of progressive prosecutors being elected. Yes, there were some progressive prosecutors elected before: Ken Thompson in Brooklyn who passed away from a brain tumor; arguably Elizabeth Holtzman in the late 70s and early 80s in Brooklyn, who then became one of the first women in the US House of Representatives; arguably Dan Satterberg, notably a Republican, in Seattle who has been there for about seven or eight years after being in the office his whole career; and arguably George Gascon in San Francisco. There is a spectrum and some are more progressive than others. But Gascon was a career police officer, a career Chief of Police in San Francisco before he was made into the District Attorney in San Francisco, when Kamala Harris became the California AG, and then he was reelected. So, he's been there for about six years. These are some of the earlier ones.

But look the progressive prosecutors we have now. We have Aramis Ayala in Orlando; Kim Foxx in Chicago; Andrew Warren in Tampa; Melissa Nelson in Jacksonville; Mark Gonzales in Corpus Christi; Kim Ogg in Houston. You have Diana Becton in Contra Costa; Tori Verber Salazar in San Joaquin; City of St. Louis prosecutor Ken Garner and most interestingly now you have the county of St. Louis' Wesley Bell.

Wesley Bell was supposed to lose; Wesley Bell just won by 13 percent. Wesley Bell had almost no union support; he is a forty-two-year-old city councilperson from Ferguson, Missouri who was up against a twenty-six-year incumbent so tightly wrapped with the local police department. Remember the police department involved with the Michael Brown case? That incumbent within twenty-six years became so closely wrapped with the police department and local politicians that Wesley Bell could not even scrape off any significant labor support; all of it lined up behind the incumbent. And Wesley Bell, a progressive and ex-public defender defeated that incumbent by 13 percent.¹¹

11. Jim Salter, *Game Changer: Wesley Bell Ousts Bob McCulloch for Prosecutor in St. Louis County*, NBC NEWS (Aug. 10, 2018), <https://www.nbcnews.com/news/nbcblk/game-changer-wesley-bell-ousts-bob-mcculloch-prosecuting-attorney-stl-n899671> [https://perma.cc/NMM9-DLFB].

Up in Boston, Rachael Rollins just won the primary up there. Very progressive candidate. This has never happened before. We have never seen all these people saying, “Elect me: I will reduce mass incarceration. Elect me: I will protect immigrants. Elect me: sentences should be shorter. Elect me: more people should not be prosecuted; they should have their cases diverted. Elect me: we need to put more money back into the public schools—that’s how you actually prevent crime. Elect me: addiction is a medical problem, it is not a criminal problem, and spending forty or fifty or sixty thousand dollars a year to put someone suffering from addiction in a jail cell with no treatment is flat out stupid. Elect me: we don’t have a safety net for people who are suffering from mental illness anymore, we call it jail. The first responders to their mental health issues are called police officers, and our police officers never signed up for that job. It is not fair to them. They are not equipped for that job. That is not a way to heal people. It doesn’t make things better.”

That’s where we are. We are at a point where—for those of you who have read Michelle Alexander¹²—we’re at a point where we have more people of color in prison, jail, on probation or parole, than were in slavery around the Civil War; where we have a higher level of incarceration than applied in South Africa during Apartheid.¹³ We’re beating out China and Rwanda¹⁴—that’s what we’re doing in terms of our level of incarceration. And for those of you who find that at all surprising, well I’m not surprised at your lack of surprise. We have locked all of these people up in a place where you can’t see and then we made sure they couldn’t vote; isn’t that a nice way to make sure certain people get elected and certain people don’t?

And don’t underestimate the extent to which this was actually in the back of some people’s minds while the incarceration problem was developing. In the same way that we now know that Richard Nixon and his crew specifically planned to go after the people he called his enemies—which were actually antiwar protesters and black people.¹⁵

12. See generally MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010).

13. Thoai Lu, *Michelle Alexander: More Black Men in Prison than were Enslaved in 1850*, COLOR LINES (Mar. 30, 2011), <https://www.colorlines.com/articles/michelle-alexander-more-black-men-prison-were-enslaved-1850> [https://perma.cc/7337-32F4].

14. Jon Greenberg, *Kristof: U.S. Imprisons Blacks at Rates Higher than South Africa During Apartheid*, POLITIFACT, (Dec. 11, 2014), <https://www.politifact.com/punditfact/statements/2014/dec/11/nicholas-kristof/kristof-us-imprisons-blacks-rates-higher-south-afr> (comparing Department of Justice incarceration figures with estimates of imprisonment during apartheid) [https://perma.cc/DNJ6-UMA9].

15. *Highest to Lowest—Prison Population Rate*, WORLD PRISON BRIEF, http://www.prisonstudies.org/highest-to-lowest/prison_population_rate?field_region_taxonomy_tid=All (showing US incarceration rate higher than that of any other nation) [https://perma.cc/S7KE-XL5L].

And they did so by going after marijuana. How many people spent their whole lives in jail on marijuana charges because Richard Nixon found it politically expedient?¹⁶ I was with a professor from USC the other day whose father was sentenced to twenty-two to fifty-five years for dealing marijuana. And he had to win his own freedom in front of the Sixth Circuit Court of Appeals by arguing his case himself on the following legal issue: Is it okay for a prosecutor to flat-out lie to a jury about whether or not an informant is receiving consideration? He won his case, but he still spent eight years in jail for dealing marijuana in a state where it's now legal.

We have a really, really, really messed up criminal justice system.

And that's why when I go around in Philadelphia (being a public-school grad myself), I see "for sale" signs on public schools that are so poorly maintained that the city decided to sell them off to real estate developers. The average class size in most public schools in most cities is going to be approaching thirty.¹⁷ Do you know where it was when I went to school? I graduated high school in 1979, it was about twenty-two.¹⁸ Do you know what the graduation rate is in a lot of our major cities? Do you know which direction this is going? The short answer is down.¹⁹

So, what do you think really causes crime? Well I am going to suggest to you that mass incarceration does not merely fail to prevent more crime; mass incarceration causes crime. Eliminating the safety net for people in poverty, eliminating the safety net for mental illness, and the treating addiction as a crime instead of treating it for what it is, a medical condition, causes crime and makes thing worse.

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16. Dan Baum, *Legalize It All*, HARPER'S MAG. (Apr. 2016), <https://harpers.org/archive/2016/04/legalize-it-all> (quoting Watergate coconspirator John Ehrlichman: "The Nixon campaign in 1968, and the Nixon White House after that, had two enemies: the antiwar left and black people. You understand what I'm saying? We knew we couldn't make it illegal to be either against the war or black, but by getting the public to associate the hippies with marijuana and blacks with heroin, and then criminalizing both heavily, we could disrupt those communities. We could arrest their leaders, raid their homes, break up their meetings, and vilify them night after night on the evening news. Did we know we were lying about the drugs? Of course we did.") [<https://perma.cc/5SQC-FZ47>].
 17. *National Teacher and Principal Survey*, NATIONAL CENTER FOR EDUCATION STATISTICS (2015–2016), https://nces.ed.gov/surveys/ntps/tables/ntps_7t_051617.asp [<https://perma.cc/44VB-LSGD>].
 18. G. Glass & M. Smith, *Meta-Analysis of Research on Class Size and Achievement*, 1 EDUC. EVALUATION AND POL'Y ANALYSIS 1, 2–16 (1979).
 19. This is questionable based on national data showing graduation rates trending up, albeit slightly. *Public High School Graduation Rates*, NAT'L CTR. FOR EDUC. STATS., (2009–10), https://nces.ed.gov/programs/coe/pdf/Indicator_COI/COE_COI_2013_05.pdf [<https://perma.cc/X2JT-YNP2>]; but see Bryan Cook & Terry W. Hartle, *Why Graduation Rates Matter—And Why They Don't*, AM. COUNCIL ON EDUC. (2011), <https://www.acenet.edu/the-presidency/columns-and-features/Pages/Why-Graduation-Rates-Matter%E2%80%94and-Why-They-Don%E2%80%99t.aspx> [<https://perma.cc/8TD8-37DX>].

Let me propose an alternative. Imagine a prevention model. There is no dispute that high-level education reduces crime.²⁰ There's no dispute that quality drug treatment, quality job training reduces crime.²¹ So what if we move the money from all these jail cells and we reinvest it into things that prevent crime? What if we go to a prevention model? And what if we are willing to actually do metrics and look at results to see what's going on, because our current media is giving us nothing but the perception that crime is going up when it's been going down for decades. What if we actually measured things?

We have been in office now for ten months as of today. Forty-five days in, we came up with a plan to try to reduce the county jail population which was very high. At times Philadelphia, which is the poorest of the ten largest cities²², has had the fourth largest police force.²³ At times Philadelphia has been the most incarcerated county of all of those ten.²⁴ The most incarcerated city. Which is actually odd, because it's 45 percent black, it's 45 percent white, it is 10 percent other people of color.²⁵ It is 7 to 1 democratic.²⁶ And we have federal parks dedicated to freedom, like Independence Hall, the Constitution, among others. How did we end up in this situation where people so unlikely to incarcerate are doing it at such a high rate? Well, really the answer has to do with what we already

20. See Lance Lochner, *The Impacts of Education on Crime, Health, and Mortality, and Civic Participation*, CTR. FOR HUMAN CAPITAL & PRODUCTIVITY No. 3 (Dec. 2011), https://economics.uwo.ca/chcp/chcp_docs/policybrief3.pdf [<https://perma.cc/8TGG-HWSG>].
21. Doug McVay, *Treatment or Incarceration?*, JUST. POL'Y INST. (Jan. 2004), http://www.justicepolicy.org/uploads/justicepolicy/documents/04-01_rep_mdtreatmentorincarceration_ac-dp.pdf (surveying research purported to show that drug treatment and job-skill training is more effective at preventing crime than incarceration) [<https://perma.cc/5LJ8-6L3M>].
22. *The 50 Largest Cities in the United States*, POLITIFACT (2015), <https://www.politifact.com/largestcities> (listing ten largest cities: New York, Los Angeles, Chicago, Houston, Philadelphia, Phoenix, San Antonio, San Diego, Dallas, San Jose) [<https://perma.cc/7ZGH-HQ23>]; Melissa Romero, *Census: Philly Remains the Poorest Major US City*, CURBED PHILLY (Sept. 14, 2017), <https://philly.curbed.com/2017/9/14/16307258/philadelphia-poverty-rate-versus-major-cities> (citing census data supporting claim that Philadelphia has highest poverty rate of major U.S. cities) [<https://perma.cc/YB5U-3XRV>].
23. *America's Largest Police Departments*, LAW ENFORCEMENT EDU (Mar. 27, 2014), <https://www.lawenforcementedu.net/2014/03/americas-largest-police-departments> [<https://perma.cc/G84Y-2H29>].
24. Jen Kinney, *Philadelphia Awarded \$3.5 Million to Reduce Prison Population*, NEXT CITY (Apr. 15, 2016), <https://nextcity.org/daily/entry/philadelphia-3.5-million-macarthur-grant-reduce-prison-population> (claiming that, presumably in 2016, Philadelphia had the highest incarceration rate) [<https://perma.cc/HK7L-LJ3K>].
25. *QuickFacts, Philadelphia County, Pennsylvania*, July 1, 2018, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/philadelphiacountypennsylvania> [<https://perma.cc/GKY8-QRBF>].
26. Julia Terruso, *Registered Dems Still Outnumber Republicans 7 to 1*, PHILA. INQUIRER (Apr. 27, 2015), https://www.philly.com/philly/blogs/heardinthehall/Registered_Democrats_still_outnumber_Republicans_7_to_1.html [<https://perma.cc/6U4E-ZJA6>].

discussed. But what do we do about it? One of the things that happens when you have lots of poor people is they can't pay any bail. Why should they? Money bail is a stupid idea. Why do I always say that? Look at Washington D.C. for thirty years, in Washington D.C. it's been the law that judges can never, ever, ever require any money from anyone to get out of jail on bail. They either hold you because you're a danger or you're not going to show up for court, and if you aren't a threat for either of these, they let you go.²⁷

So how has this thirty-year experiment worked out? 12 percent of people get held; 88 percent get out. The people who get out show up for court. The people who get out, because there's good funding for this in DC, are sometimes made to go to check-in centers.²⁸ This is, for example, to deal with homelessness or mental illness or drug issues if they exist. But they show up for court, and they show up for court at very good rates.²⁹ Recidivism for those released is quite low.³⁰ Recidivism for violent crime is incredibly low.³¹ In DC, there's not one dollar involved in the whole thing.

We can't do that in Pennsylvania. Guess why? For the same reason you can't do it in California. Because the bail bondsmen are in the pockets of the legislators, and they are pumping the money they take mostly from poor people into the pockets of the legislators. But what can you do? And this is where we get to the point of why it's so important to pay attention to who your chief prosecutor is. Back when all chief prosecutors had a very retributive, very punitive "too-many-people-in-jail-is-not-enough" attitude, they were given a whole lot of discretion and this discretion got baked into the law. It was not for a prosecutor to say, "No, I'm not going to pursue the death penalty. No, I think he's innocent, I'm not going to pursue it at all. No, I'm going to divert it." Prosecutors were given this tremendous power but also this tremendous ability to stay their hand and not to use that power.

Well oh my goodness, what happened now, what a mess, we've given all this power to progressive prosecutors! What are they going to do? Well, I'll tell you what we did. We looked at what was going on with bail, we had our criminologists dig into it and we said, let's do something that's not too difficult. Since we can't make the state legislature in Pennsylvania pass a law, all that we could really control—which is important—is our recommendation to the judges about what amount of bail should be paid. So let's look at five years of what's really going on and let's look for

27. Ann E. Marimow, *When It Comes to Pretrial Release, Few Other Jurisdictions Do It D.C.'s Way*, WASH. POST (Jul. 4, 2016), https://www.washingtonpost.com/local/public-safety/when-it-comes-to-pretrial-release-few-other-jurisdictions-do-it-dcs-way/2016/07/04/8eb52134-e7d3-11e5-b0fd-073d5930a7b7_story.html?noredirect=on&utm_term=.f317cff1a788 [https://perma.cc/E46G-Y68D].

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

nonviolent offenses; let's look at offenses that are not sex offenses and those that do not include a felon in possession of a firearm. And, let's look at offenses that do not include high-level white collar crime which is chronically underenforced. Take all the rest of them, the stuff that is not so serious, not so scary, not so threatening. What have they been doing on bail? And what we found, for about twenty-five offenses, is that judges routinely gave an amount of bail that was between zero and one thousand dollars to get out.³²

Okay, so, working people are getting out, affluent people are getting out, but guess who's not getting out? Poor people are not getting out because they don't have two hundred dollars for bail. They don't have two hundred dollars, and anybody who's really been poor knows that—sometimes, you just don't have it.

So, what happens then? These poor people sit in jail for a hundred and thirty-five dollars a day, and the taxpayers pay that.³³ By the time they go to court, they'll take any plea deal, innocent or not, they'll just take anything because they've already served the sentence. And the statistics are very clear: once you've already served the sentence, you're taking the damn deal.³⁴ You're not going to risk a longer sentence to try your case even if you have legitimate constitutional claims or claims of innocence.

Alright, so we took those twenty-five offenses where it was usually zero to a thousand bucks and we knew that the judiciary essentially bought-in that these kinds of cases were not that serious. So we made a presumption of zero dollars bail—we're just going to recommend zero dollars—let them out.³⁵

If we ran across the exceptional case, the world's worst criminal—let's just say Pablo Escobar is you know, with the trunk of his car full of skeletons, is seen jaywalking; yes, we would like some bail on Mr. Escobar. The other 99 percent? No. But Mr. Escobar can pay some damn bail. And we would like to keep him under wraps. We keep the exceptional case with bail and presume for everyone else that there should be no money bail, and that's what we've been doing in practice.

32. Alicia Victoria Lozano, *Philadelphia District Attorney Larry Krasner Ends Cash Bail for Low-Level Offenses*, NBC PHILA. (Feb. 22, 2018, 11:07 AM), <https://www.nbcphiladelphia.com/news/local/The-End-of-Cash-Bail-in-Philadelphia-District-Attorney-to-Issue-Policy-Change-474728233.html> [<https://perma.cc/TP4H-2B4M>].

33. Summaries of Research by Vera Institute of Justice, *The Price of Prisons: What Incarceration Costs Taxpayers* 63, (Jan. 2012), https://storage.googleapis.com/vera-web-assets/downloads/Publications/price-of-prisons-what-incarceration-costs-taxpayers/legacy_downloads/the-price-of-prisons-40-fact-sheets-updated-072012.pdf [<https://perma.cc/JXW7-FWDV>].

34. Emily Yoffe, *Innocence Is Irrelevant*, THE ATLANTIC (Sep. 2017), <https://www.theatlantic.com/magazine/archive/2017/09/innocence-is-irrelevant/534171> [<https://perma.cc/Z6ZB-7YUH>].

35. See Lozano, *supra* note 32.

About 99, or 99.5 percent of the time we recommend no bail, judges are following it. It's not that different than what they did before, it's just that nobody looked at it scientifically. And what did we see? Between that change and a change in what sorts of offers we would give on cases, we saw a decline of our county jail population from 6,500 to 5,000 in ten months.³⁶ We compared that rate to prior years, because the McArthur foundation came to Philadelphia, gave it a boobie prize for being terrible for its levels of county incarceration.³⁷ And when they came to give us a boobie prize, it did a lot of constructive things. The county of Philadelphia had already brought down the levels somewhat, but this change to bail protocol caused a rate of decline that was faster than had occurred at any point over the McArthur era and occurred after the McArthur changes had essentially flattened out. There had been no real reductions the year before. It became the quickest decline that had been seen. Prior declines had been on the order of six people a day; it went up to thirteen people a day!³⁸ And that's how we got it down. Even though we were fighting, among other things, a weather cycle that was very much against us, because crime is low in January and crime is high in August, we still got such a significant change.³⁹

So that is a very simple thing that we could do, make a very selective decision about when you're not going to ask for cash bail. We didn't need the legislature, we didn't have to trade some kind of pork-barrel with somebody to get a vote that would be in our favor. We just did it 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.

We are actually doing some pretty remarkable things. We're doing remarkable things in terms of our policies. Many of them were laid out in a document that we put out,⁴⁰ which we thought was an internal doc-

36. Samantha Melamed, *Philly DA Larry Krasner Stopped Seeking Bail for Low-Level Crimes. Here's What Happened Next.*, PHILA. INQUIRER (Feb. 19, 2019), <https://www.philly.com/news/philly-district-attorney-larry-krasner-money-bail-criminal-justice-reform-incarceration-20190219.html> [<https://perma.cc/P8AQ-D5B5>].

37. Tom Jackman, *Justice Reform Takes Hold, the Inmate Population Plummets, and Philadelphia Closes a Notorious Jail*, WASH. POST (Apr. 23, 2018), <https://www.washingtonpost.com/news/true-crime/wp/2018/04/23/justice-reforms-take-hold-the-inmate-population-plummets-and-philadelphia-closes-a-notorious-jail> [<https://perma.cc/6ZKW-FG65>].

38. Melamed, *supra* note 36.

39. Janet L. Lauritsen & Nicole White, *Seasonal Patterns in Criminal Victimization Trends*, BUREAU OF JUST. STATS. (Jun 2014) <https://www.bjs.gov/content/pub/pdf/spcvt.pdf> [<https://perma.cc/33GR-P8V4>].

40. *Philadelphia DA Larry Krasner's Revolutionary Memo*, THE INTERCEPT (Mar. 20, 2018, 6:21 AM), <https://theintercept.com/document/2018/03/20/philadelphia-da-larry-krasners-revolutionary-memo> (purporting to display internal memo by Larry Krasner) [<https://perma.cc/UK7B-KLAX>].

ument, but it somehow was accessed nationally. It has been taught by James Forman at Yale Law School; it has been taught at the Divinity School in Boston; it is being taught to undergrads at Georgetown; and it was picked up by activists around the country in at least thirty jurisdictions, who went to the door of their chief prosecutor and said we want to talk about these things—these sort of straightforward things. Some of the titles of these policies were things like “Divert More Cases,” not very complicated right? “Don’t Use Cash Bail,” things like that.

Young assistant district attorneys and prosecutors, when they’re going to ask for jail time, tell the judge how much it’s going to cost and then explain why it’s worth it. So, we’re not just going to say two years; we are going to say that it costs about 100,000\$ to house someone, and Judge, this is why it’s worth it to not house this defendant. You would have thought we had committed the ultimate crime! Why? Because it gets at the heart of it; the heart of it is that they have been burning up tax money like crazy on stuff that does not actually prevent crime, that does not make society better, and this old guard has been doing it for their own advantage.

Think about a judge, and there aren’t—thankfully—there aren’t that many of these, but there are some.⁴¹ Imagine a judge who will take a plea for two years in jail if you don’t try the case, and then if you try it and lose—it’s twenty years at \$50,000 a year. So, in other words, your punishment for asserting your right to trial is the biggest crime, and it is worth eighteen years in prison! That has gone on all the time. You start to put a metric on how much that judge is charging tax payers for that judge’s time. Think about it, trial might have been two or three days. Eighteen years times \$50,000—900,000 dollars in tax money so that judge can scare the crap out of every defendant and then go home early. Who does this hurt? The people who are most likely to try their case. Either brand new flyers—those who have never been in the criminal justice system before and they refuse to believe anything so unjust will happen (the people who have been in the system a long time know it can happen)—or the innocent. It is a system that is basically a guided missile aimed at innocent people because all the ones who have committed crimes several times and been caught for it and paid the price will not take that risk of refusing a plea deal.

I would like to suggest something to my friends who are looking to be public defenders. I was a public defender for five years. I did court appointed work for many of the next twenty-five, including triple-murder death penalty cases as well as things as mundane as underage drinking. I think, and James Forman thinks, that there is in many ways nothing more honorable than being the second-most hated person in a criminal courtroom. I took delight in it, honestly; I tried a ton of cases, and I loved doing it. But the fact is, when I hit fifty-six (and I’m now fifty-seven), I looked back on my life. I had won more than my share of cases. I had done a really good job for my clients, but nothing that I had done had stopped mass incarceration. In fact, that runaway train didn’t pay attention to

41. Yoffe *supra*, note 34.

anything that I had done. I had done God's work for individuals, but I had also been a conductor on a train that was driven by Jeff Sessions and his people. I had done no global justice. The people I represented who were convicted could not have been convicted had I not been standing there next to them. The fact is, despite all my good intentions, I had, to some extent, been a conductor on that train.

So, I'm going to suggest to some of you who are thinking about being public defenders—that's a fine thing to do if you're in a jurisdiction where the prosecution is old school, probably the best thing for you to do. Because if you go into an office that still thinks it's 1954, they will do nothing but snatch your soul and try to crush you, and if you actually stand up to them, they will fire you. That's what will happen. So, go be a public defender. Except, it's more difficult now because you have a lot of jurisdictions where you could be a progressive prosecutor. Maybe it's immoral to be a public defender in those jurisdictions. Maybe all of you feel like I felt: pretty virtuous coming out of law school because you were public interest-oriented. You're going to help the poor, going to be a check on the system. Maybe the choice you're making is immoral. What I hear all the time is this—I hear, "I'm going to be a public defender. I couldn't lock up people. I couldn't convict them. I understand the history. I understand the racism. I understand all that. I couldn't do that." What you're saying over and over is, "I." Who do you serve? What is your purpose if you intend to be a public defender? Is your purpose to go to parties and say, "I couldn't do that?" Or is it a little bit more directed at the people you serve?

We're now going to take a poll of all the invisible defendants in the court system today in Los Angeles and say, "You can either have Jeff Sessions' kid as your prosecutor or you can have somebody at UCLA who thinks he or she wants to be a public defender, believes in equality, cares about poverty, cares about justice, believes in *Brady*. Who would you like?" And you know exactly what they're going to say. They're going to say, "Give me the one that's not a nut like Jeff Sessions. I'll take that one. I care more about who the person in the room with the power is than I care about having someone defend me who has less power."

I mean, let's call it what it is. I get in trouble when I say, "progressive prosecutor," "prosecutor," and "public defender." Those words have been defined in your minds by your experience—what you've seen. You know what, I think I'm still a public defender and I think that because the district attorney's obligation is to represent the *entire* commonwealth in Pennsylvania, or the *entire* state in California. That means the victim. That means the witness. That means the defendant. It's to represent the *entire* commonwealth. It's also to represent all the people who are not named in the case—specifically, the young boys and girls who are in elementary school who don't have a good class size. That's your job. That's what justice requires.

So, you have a choice. If you're thinking you might want to be a public defender—and I've been one for a long time—you have a choice.

You can do God's work. You can rail against the system. You can hold your fist high in the air. You can wear your leather jacket and your beret. You can be so cool. Your social life can be wonderful because "I could never do those things." Or you can get into work and go do a job that's been done by racists and retributive people that does in fact, to some extent, come out of slavery. You can get in the murk, you can get your hands dirty, and make those really difficult decisions with a sense of history, and a sense of justice, and a sense of purpose, understanding that people are not cartoon characters, that individual justice is really hard work.

II. Questions & Answers

Question: I'm from Riverside, CA which has the highest death penalty rate in the state, and perhaps in the country.⁴² I started here in 1L and I listened to Adam Foss say if you want to be a prosecutor, well go somewhere else then; don't go to Riverside. But I can't do that because that's my home, those are the kids I care about, those are the people I care about. But having followed you, and having read the plan, having read all of that, it's enticing . . . My question is, where is your limit? Like if I tell you, hey I think we should end collaboration with ICE just categorically, right, will then you say, or will the office say, no, we can't do that . . . Here at UCLA, and just in life, we have critical race theory and these are notions that stem from Michelle Alexander, James Foreman, among others. So, we recognize the dynamics and those intersectionalities, but can we implement them? Or, will even progressive Adam Foss say no?

Krasner: For ten years, Philadelphia the city had a contract with ICE that ICE could have access to what's called a preliminary arraignment reporting system.⁴³ It's essentially an electronic system that contains descriptions of crimes. The advantage for ICE was that they could more quickly identify people they wanted to grab and try to deport. That contract ended this year and it ended because there were three votes that determined whether or not ICE could continue that contract: the mayor, me, and the court system. The courts ducked their heads and ran and got under a table, and the mayor and I voted "No." And so for the first time in ten years that contract has ended.⁴⁴ We may lose a million or a million-and-a-half dollars as a consequence, but who cares?

42. *Riverside County, "The Buckle of a New Death Belt"*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/node/6566> (last visited Mar. 20, 2019) [<https://perma.cc/6APF-H8WR>].

43. Alicia Victoria Lozano, *End ICE Access to PARS, Says Philadelphia District Attorney Larry Krasner*, NBC PHILA. (Jul. 11, 2018, 8:03 PM), <https://www.nbcphiladelphia.com/news/local/End-PARS-Says-Philadelphia-District-Attorney-Larry-Krasner-487903131.html> [<https://perma.cc/WZ84-7Q9W>].

44. *Philadelphia Mayor Kenney Won't Renew PARS Agreement with ICE Amid Protests*, NBC PHILA. (Jul. 27, 2018, 10:15 AM), <https://www.nbcphiladelphia.com/news/local/End-ICE-PARS-Kenney-City-Hall-489332541.html> [<https://perma.cc/MK5Q-FK56>].

The reality of what happened [was] because of the Trump policies. And I say this as someone who for a time was working with the Mexican Consulate in Philly and who had a lot of Latino clients, including, over the years as our immigration evolved, clients from Mexico. The reality of the situation is that women who are immigrants, from whatever background, are not reporting domestic violence. And women who are raped are not reporting the rape. And people who are robbed in the street by American criminals, by that I mean U.S. citizens, are not reporting it. That's because it has been made very clear from the Federal Government that they'll get deported; they'll get deported going to court to be complainants. And the same is true when they're only going to court to be witnesses—even where the victim may be a U.S. citizen—to help American prosecutors prosecute an American criminal.

So, what all of that did is the same thing that happened to sex workers a long time ago, which is: when you declare a population untouchable and they're unable to access the court, you might as well paint targets on their back. That's not worth a million in your hand, having someone be killed who didn't need to be killed just because they couldn't access the court system or, just because you're playing footsy with Trump's frankly outrageous immigration policies, not something we were going to do; so, we didn't do it.

The bigger question, I think, is in general, how far does this go? I firmly intend to disappoint some people some of the time, I mean, that's just how it is. Not everybody's going to agree all the time. But as far as I'm concerned, as long as we continue to try to make decisions that we honestly believe are right, and we don't make them for reasons that are political, we don't make them just because we're afraid of getting beat up in the press, then we're doing the right thing. You know, my mother graduated high school at sixteen and became a tent preacher, an Evangelist. What she used to say is, "You know you're doing something right when you're angering up the devil." Well every time I pick up my local newspapers, it's clear I'm angering up the devil, because they've got all kinds of nasty things to say about me and my office. And you know, meanwhile, they might not notice that yesterday the New York Times Magazine did a huge feature on our office; today News Week Magazine did a huge feature on our office; tonight, Samantha Bee is actually doing an interview about our office; and last week, the New Yorker Magazine did a huge feature on our office.

Maybe, eventually, the people in Philly will understand, but I actually take some comfort in the fact that the local insiders are upset. And I take some comfort in that because I had to study movements when I was defending movements so that I would have something to say to juries. The usual cliché is, "First they ignore you, then they laugh at you, then they fight you, then you win." Right? Well, they're at fight, we've got them past "ignore." "Laugh" was when I started running my campaign. Were all the way up to "fight." And they're not just fighting me, they're

fighting progressive DAs all across the country. So, if you understand that this is the civil rights issue of our time, which it is I'm certain of that, then you understand that this is an arc of many years. You know some fifty-seven-year-olds right now may be the technicians for this movement, but they'll be passing this baton off.

Not too long from now, the people who are probably either sitting in this particular classroom or sitting in some law school classroom will see that we're doing pretty well. We've gotten past ignore and laugh. We've gotten all the way to fight. And so long as we stay on the right track, we're actually going to be able to get to the end. Well, *you'll* get to the end; I'll actually be on a beach chair. I'll be there with the Judge, and I'll be there with Bob Listennee.

By the way, we haven't mentioned the details, but Bob Listennee came from the projects in Michigan and went to Harvard undergrad. Public school kid, Harvard undergrad, and eventually made his way through Boalt Law School. And he then became a public defender, the chief of the juvenile unit in Philadelphia. I think he was a public defender for almost twenty-seven years before Barack Obama decided he should run juvenile justice for the United States of America, and he then became chief of the Office of Juvenile Justice and Delinquency Prevention⁴⁵ with a budget of \$250 million dollars a year. He is a national leader on juvenile justice issues. That is my other First Assistant, so you can see that I'm the dumb one of the team. But he's excited to be part of this too because we're not playing around. We're not. I'm trying to be unelectable; I'm doing my best.

Question: The power that prosecutors have that you described is what makes progressive prosecutors able to make significant change. But it's also what makes the bargaining and the rest of the system so coercive. Is having the right UCLA kids enough to make prosecution a good profession, and if not, what are you doing to make your line of prosecutors less powerful?

Krasner: This really goes to the coercive power that prosecutors have and that power has often been expressed in terms of: we'll maximize charges beyond what they really are, then we will offer something much lower than what we're going to argue for if you try the case. This is often referred to as the "trial tax." It's what I was talking about earlier. "Well we'll give you two years unless you try it, and then we're going to stand up and ask for the max. I consider that to be completely immoral. And one of the policies that we're about to come down with is that people don't do more time just for trying the case. There is no trial tax. I mean sure, you might not get a discount for a genuine expression of remorse, which the law supports, and it should. You might not get a discount for

45. John Kelly & Marion Mattingly, *Obama Administration to Name Bob Listennee to Lead Juvenile Justice Agency*, CHRON. OF SOC. CHANGE (Jan. 31, 2013), <https://chronicleofsocialchange.org/featured/administration-to-name-bob-listennee-as-administrator-of-juvenile-justice-agency> [<https://perma.cc/L8CC-Z72P>].

accepting responsibility when you should have. But we're not going to crush you. We're not going to turn this into 10-to-1 or 5-to-1 or 2-to-1 as a punishment for trying a case. If all you do is sit there in a docile fashion, you never lie, you never present phony evidence, you try your case, you will not be punished for simply asserting your constitutional right.

So that has been our practice, it's about to be our explicit policy, and I think it's a very important one. Your gut might tell you that that means that everybody is going to try their cases; they're not. I'm not exactly sure why, but this is just one more example of how intuition around criminal justice makes about as much sense as intuition around medicine. It's just wrong for the most part. It's not what we're seeing and it's not what we want to see. I cannot of course control what judges do. All we can do is make recommendations and appeal them. But in general, the judiciary has been with us; they've been fine. We do not want to use any coercive power.

The other point is that we have made a serious point of basing our charging on what the result really should be. So, we've got some very high-profile homicide cases, where the old administration would've charged everybody with the first degree. And sometimes we charge them with the first degree at the beginning because we don't have enough facts but, when we have the facts, we knock it down to third degree [or] we knock it down to voluntary, which makes a huge difference. It means the people: (a) can get bail and can get out and then be tried, but also that (b) we're being honest and credible from the beginning. If we believe this is truly a premeditated murder, we'll go with first degree, but we we're not going to go for first degree just to break your arm—just so you won't try the case on voluntary manslaughter. It's alright; we're getting paid for it.

That is how we come at it, and it's different. It's not unique; some of it has been done before. The chief prosecutor in New Orleans, Harry Connick Sr., at least articulated the policy that charges should [be] no higher than the result⁴⁶—that we really should call these cases for what they are. Again, nothing perfect. You don't always know in the beginning. But we do make a very serious effort to not deliberately overcharge for leverage, and we are making it a policy to not go ask for a bunch of time just because someone asserted their constitutional right.

Question: One of the things that led you on your path was the outsize power of prosecutors everywhere, and the belief that the racist and retributive DA is problematic. The question is, do you still have concerns about the outsized power of prosecutors who are not you and is there anything that you think you in your position or, more generally, we can do?

Krasner: So the answer is yes. I do have concerns, not only about other prosecutors or someone who comes later, but about myself. I certainly have concerns about people within the office because I know that

46. Ronald Wright & Marc Miller, *The Screening/Bargaining Tradeoff*, 55 STAN. L. REV. 29, 60–66 (2002) (discussing Harry Connick Sr.'s insistence that plea bargaining have no effect on criminal charges).

policies get written, and when you have an office of 600 (which we do) and you have 250–300 attorneys (which we do), culture will eat policy all day long. So of course that does concern me. But my answer to all of that is that I'd rather have truly public-service oriented people who are hard-working, talented, and who have their moral compasses intact, struggling in that murk. I'd rather have them do it rather than just say, "Ooh that's, too murky for me. I like my hands clean. Where's my beret? I'm going to a party." That's what I would rather have. I think we have to get into that murk.

I mean to some extent this conversation reminds me of a book. A couple of people sitting at dinner who are eating steak and that steak has come wrapped in plastic on a piece of foam, and they are having the following conversation: "I hate hunters. I just could never kill anyone or anything. I just couldn't do it. It's so violent. How's your steak? Is it good? Did he cook it right? Did they?" You know, there's a lot to be said for the murkiness of going into the woods with a gun and violently but, hopefully painlessly as possible, kill an animal that got to live free, as opposed to lining up your protein via misery and agri-business and saying, "I'm too good to kill." That's I think what we're talking about here.

There's a story that Tori Salazar told us. We all have a little cabal, and we met to discuss our slightly differing views about progressive things. And she didn't get a lot of sleep, and she said that the reason she didn't get a lot of sleep is that she had a case in her jurisdiction where a thirteen-year-old boy had murdered an eighteen-year-old young man. The eighteen-year-old was coming out of a fast food place where he worked, and he was getting ready to go to college. He was the pride of his immigrant family. They were all extremely excited. He gets out to get into his little hoop-dee car and the thirteen-year-old and some sixteen-year-olds came up, took the keys, knocked him down, humiliated him and made fun of him and could have just driven off. But instead, the thirteen-year-old stood over him and put five or six bullets in his face, and he died.

So part one is, what do you do? You know, you have a defendant who on the one hand is so psychologically immature—and this is not just my opinion, the U.S. Supreme Court agrees⁴⁷—so psychologically immature they are capable of prosecution but only barely, and you have the most sympathetic victim you could imagine, whose family is traumatized forever and affected forever by this. What do you do with that? What number does that look like? We know it's not the death penalty because the U.S. Supreme Court says that it cannot be the case.⁴⁸ We know it's not life without any possibility of parole because the Supreme Court says the same.⁴⁹ Who's got a number? Feel comfortable with that number? I

47. *Medina v. California*, 505 U.S. 437, 439 (1992) (explaining that trying a defendant who is mentally unfit is a violation of due process).

48. *Roper v. Simmons*, 543 U.S. 551 (2005) (holding that death penalty for a minor is unconstitutional under the Eighth Amendment).

49. *Graham v. Florida*, 560 U.S. 48 (2010) (holding that sentencing a minor to life

mean, this is, this is the murk. This is the struggle. This is where you really have to do things that hurt, knowing that you might be completely wrong. But it's either going to be you or its going to be Jeff Sessions, who isn't going to think very long and then he's going to eat a sandwich and he's going to feel fine about it. Prosecutors have a lot of power, but I would much rather see people with conscience struggling in that murk than see people who think it is all very simple because it's really not simple.

Question: I am wondering how you can consider the defendant's mitigating factors when you are choosing how to charge something and, if so, how do you prioritize that? It seems that the child, the thirteen-year-old who commits this is age something you consider, but what about the defendant's mental health and what about other criteria that aren't as clear cut and if it's just a marijuana charge?

Krasner: The answer is yes, yes, yes, and yes. When you are trying to do individual justice you really have to be able to consider any type of information. You might accept it, you might reject it, you might think it matters, you might not. I think everybody agrees that the age of the defendant and the level of mental development due to what the U.S. Supreme Court has instructed us means a lack of consequential thinking and a greater capacity for rehabilitation is a relevant factor. But there are so many relevant factors that you try to come with hard and fast rules [for], [but] they are really nothing but stereotypes. Same thing with mandatory sentencing, it's just a stereotype. Same thing with some matrix; "it's a zero tolerance"; "anyone who has a gun is going to jail." Well that's good politics, but it's terrible criminal justice policy. Sometimes the one with the gun is someone who has no record, you know, works hard all the time and just got their ass beat somewhere and didn't spend the time to check that they needed to have a permit to carry. That is not a conviction, that is a diversion. That's what it should be for anyone who is willing to dig in to the individual.

So, everyone is important. That is also why it is important for prosecutors to have good relationships with public defenders and private attorneys because the prosecutors have to be trusted enough that the defense attorneys will bring them that mitigation—they will bring them that favorable defense evidence. In all my years going against the Philadelphia DA's office, I wasn't bringing them my good evidence. They would do nothing but try to light it on fire; try to get my witnesses to change what they were going to say; laugh at the discussion about how this defendant's mother was beaten to death in front of him so that requires some level of mitigation based on what we know about the science of trauma.

It's different now. Now, not only do we have the defense coming to us with complicated mitigation packages, but we've done something, frankly, that I have not seen other prosecutors do. In some of these homicide cases where the initial charge is either in the last administration or

without possibility of parole violates the Eighth Amendment).

ours, for first degree murder charges, we've had the criminal defendant, the homicide defendant come in, sit at a table usually with the chief of homicide, often with me, with some other people and talk to us for two hours as a two-hour proffer. In effect, this is a confession and we can't use it unless they say something different on the stand. It's a very common device used in federal court and state courts with informants. What we are doing is allowing defense counsel in some cases to bring in their client to talk to us under those terms. It's really good for us because we're doing it before they get the paperwork on the case. Often, it's at the very beginning of the case. And it is also really good for them because we find out things we didn't know, perhaps things about that relationship between the victim and the defendant, and perhaps what the defense is going to look like in eighteen months when there is a trial. We are going back and looking at the information we already had and are reassessing. In some of these cases we have gone from a first-degree charge to a third-degree charge.

When there is such an adversarial relationship between the defense and the prosecution, there is no trust. But it's happening now because they know what an independent judge this one is, and they know what I was doing for thirty years, and they know that Listenbee was a public defender for twenty-seven years. They think, "We will give them a fair call," that we're the umpires on this stuff, and we won't just use it against them. So that to me is an advantage that I never perceived we would have but I think it's a tremendous advantage. We have one case where the murder weapon would have been long gone except that when the proffer happened, the person came in and he told us where it was, and we went and got it. We have a case where we were able to dump the contents of a cell phone because we did a proffer and the person came in and gave us the code. We dumped the contents of the cell phone some of which helped him, maybe not all of it, but we got more information and we got closer to the truth. To me, the relationship, sure there's a quality of it that is adversarial between the defense and the prosecution, but it's not adversarial as to the truth. And that is the key. When the defense thinks that even though they won't agree with you some of the time, you're going to be fair to them. Then you can get access to information and you can get access to the truth in ways that wouldn't happen otherwise.

Question: I am wondering how you are taking into account defendant's mental illnesses?

Krasner: A great question. So there had been a somewhat constructive development in that regard in Philadelphia before we ever came in, about 5 years ago, and it was constructive in that they set up a mental health court that dealt with two categories of people. The first are people who will never be found competent, and there are actually quite a few of them. You know, let's not get into a debate about IQ, but often you'll find them in the 60s, or maybe in the 50s; those who are simply not capable of understanding the proceedings. You can never try them for

those charges. Under Pennsylvania law, they can be made to come back to court to do treatment or things of that sort, but they cannot be found guilty or go to jail over those circumstances. The second category is people who've been convicted but who have significant aspects of mental health involved in their case. And obviously, there's some special services and so on available.

The missing piece here—and it's a big missing piece—is diversion. The missing piece is the cases where the person could stand trial, but in light of the mental health issues involved, we don't really feel it's necessary to go straight ahead to a conviction. And it may make a lot more sense to give them the opportunity, in some way, to be accountable, but also to receive services.

It all goes back to the fundamental point, are you trying to prevent crime or just be retributive? If you're trying to prevent crime, then you want to get at whatever it is brought the person in contact with the police in the first place, and sometimes that is mental illness. So what we are attempting to do is expand the mental health court. We are much more open to diverting cases where there are issues involving mental health. There's always been some diversion, but we'd like to do a lot more. And it's our hope to shut down some more jails. And by the way, we did shut down a jail in Philadelphia. We had four, four or five, depending on how you count county jails, but because of this huge decrease in the county jail population, we actually managed to close one.⁵⁰ That has been a goal of the mayor's even before we came in, and we are way ahead of schedule on that. So, that is a very short summary.

I recently hired a psychologist who had been an attorney and prosecutor in counties for a while, and whose specialization was cases involving people with mental illness. We also hired from the public defender's office, their former chief of their mental health unit, to be in our mental health unit. So we're trying to gather up the resources we can.

Anyway, I guess we're at the time limit. I'm grateful for your attention. I hope that some of you are offended.

50. Jackman, *supra* note 37.

