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JUSTICE IN AMERICA EPISODE 1: JUSTICE FOR THE RICH, MONEY BAIL

Introducing a new podcast from The Appeal, featuring Josie Duffy Rice and Clint Smith III.

Justice in America is a podcast for everyone interested in criminal justice reform—from those new to the criminal justice system to experts who want to know more. Each episode we cover an issue related to the criminal justice system. We explain how it works and look at its impact on people, particularly poor people and people of color. We'll also interview activists, practitioners, experts, journalists, organizers, and others, to learn. By the end of the episode, you'll walk away with a better understanding of what drives mass incarceration and what can fix it.

The first season will cover bail, plea deals, prosecutors, prosecutor elections, voter disenfranchisement, crimmigration, women and families in the criminal justice system, and more. It will feature interviews with Ta-Nehisi Coates, John Legend, and many others, including Rashad Robinson, John Pfaff, Gina Clayton, and more.

Episode 1: Justice for the Rich, Money Bail

States and cities across the nation are talking about reforming the money bail system. But what does that mean? What exactly is money bail? Who does it harm and who does it benefit? How does the bail system work? How does a bail bondsman fit into the picture? How are Black, brown, and poor people disproportionately impacted by money bail? What's a community bail fund? And are the efforts to reform money bail working?

On our first episode we try to answer these questions!

We also interview Alec Karakatsanis, the founder and executive director of Civil Rights Corps. His organization is bringing lawsuits in different counties and states nationwide, arguing that their money bail systems are unconstitutional. Alec talks to us about their cases in California and Texas, risk assessments, and the unbelievable things he's heard in court from the counties trying to preserve their draconian money bail system.

If you enjoy the episode and want to know more, never fear—we'll be discussing bail again later this year! In the meantime, here are some things you can read to learn more.

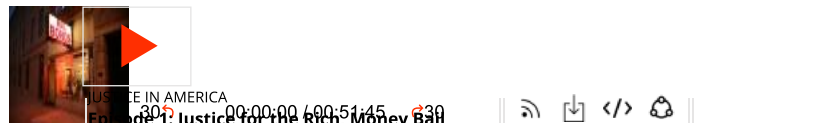
[Bail Reform: Explained](#) from The Appeal's Jessica Brand and Jessica Pishko provides a great overarching look at bail reform.

Another great [resource](#) from The Pretrial Institute, plus [this one](#) made for the "concerned public" in particular.

From the [New York Times](#), a look at how bail bondsmen prey on the desperate.

[This report](#) from the ACLU and Color of Change looks at how insurance companies underwrite the billions of dollars of bail bonds issued every year. It's another disturbing reminder of how that often, corporations benefit from our criminal justice system, often on the backs of poor people.

Justice in America is available on [iTunes](#), [Soundcloud](#) and [LibSyn RSS](#). You can also check us out on [Facebook](#) and [Twitter](#).



Transcript:

Alec Karakatsanis: The bail system is one of those ways in which the processing of human beings has become so corrupt that we now have four hundred and fifty thousand human beings every single night in this country in jail cells just because they can't make a monetary payment.

[End Clip]

Clint Smith: Hey everyone. I'm Clint Smith.

Josie Duffy Rice: And I'm Josie Duffy Rice.

Clint: And this is Justice in America. Each show we discuss a topic in the American criminal justice system and try to explain what it is and how it works.

Josie: So I'm a senior strategist with The Justice Collaborative and a Senior Reporter with The Appeal and I'm a lawyer and writer living in Atlanta. And most of my work focuses on the impact that prosecutors have on communities in America, particularly for poor people and people of color.

Clint: And I'm a writer, a teacher and a Ph.D. student living in DC who has spent a lot of time teaching in prisons. And my research is centered on putting the system of criminal justice in its larger historical context. And something we both found is that in academia and in the media and in politics, people sometimes talk about criminal justice with the assumption that everybody is familiar with the terminology or the historical context or the specific details and ways that can make it tough for people to actually understand what's going on.

Josie: Right. I mean criminal justice is an issue that so many people care about and mass incarceration is a popular buzzword, but there's a wide chasm between the experiences of those involved in the system and the perceptions of those on the outside. So this podcast is for everyone from the people who care about criminal justice reform, but don't know a lot about it, to the experts that just want to know more about some of these issues.

Clint: We'll dive deep into the weeds so that we can explain and unpack why our criminal justice system looks the way that it does today. We'll be interviewing experts from the field, talking to people on the frontlines of this work and trying to really just understand our criminal justice system is situated among the other social and political systems that exist in the US.

Josie: Thank you everyone for joining us today. You can find us on Twitter @Justice_Podcast. You can like our Facebook page, you can find us at Justice in America on Facebook and subscribe and rate us on iTunes. We're looking forward to hearing from you. So we started the show with a clip from our guests, Alec Karakatsanis, who is the Executive Director of Civil Rights Corps. His work centers around reforming our bail system and today we're talking about something that you may have been hearing about more and more lately and that's bail. Here's a clip from Baratunde Thurston in a video created by the Brooklyn Defender Service talking about bail.

[Begin Clip]

Baratunde Thurston: We have a money sensitive justice system and the less money you have, the more screwed you are, the more time you spend in jail. It's a great misconception that I was carrying around, you think jail, you think that's where criminals are. It's like, no, that's where people who got busted and were poor are.

[End Clip]

Clint: Money bail is a major part of the way that our system discriminates against the poor. Across America there are people who haven't been convicted of any crime, but who are still sitting in jails anyway, simply because they can't afford to pay the bail. Meanwhile, wealthier people get to go home and if that isn't bad enough, our bail system, like many parts of our criminal justice system, is also a source of racial discrimination and we'll talk about that later. But before we get there, let's kind of just cover the basics. So what is bail? How does it work? Why is it getting so much tension? Who is it hurting? These are all questions that we're going to try to answer this episode.

Josie: Yeah, so first let's talk about what bail is. Bail is a term that we use to define the conditions required to release someone from incarceration pretrial. So those conditions are imposed to ensure that the defendant actually returns to court. Now, if the term "condition" sounds kind of vague, we get it, it is, but that's because bail can take a few different forms. Most people automatically associate the term bail with money, but money bail is actually just one of the types of bail that exists. The two have kind of become synonymous as money bail has become more and more common in the criminal justice system. So for the purposes of this episode, if you hear someone use the term bail with no other qualifiers, you can assume that they mean money bail.

Clint: Now, let's talk about how money bail actually works and we should tell you off the bat that bail operates differently in different jurisdictions. So this is the sort of most places description, not necessarily one that applies everywhere.

Josie: Let's say you're arrested, you've been accused of, I dunno, drug possession and you're handcuffed, you're sent to jail, you're held in a cell and eventually, it could be hours or it could be days, you go to an arraignment hearing.

Clint: And for folks like me who might not have originally been familiar with that term, an arraignment is essentially just your initial hearing where the judge decides if you will be held in prison or released on bail until trial.

Josie: Right. It's where you're likely to find out sort of what you've been charged with, um, you might get the opportunity to be appointed a public defender, although that's not always the case and some places call it something different than an arraignment hearing, but yeah, we'll use that term.

Clint: Sometimes the defendant is released on what's called regonizance, which means basically that they are released after promising in writing to show up in court for all the upcoming proceedings. They get to go home without paying any money. But other times, and this is most of the time, the court sets a dollar amount that the defendant has to pay if they want to be released. Then if they appear at court for all of their court dates, theoretically they get their money back.

Josie: You may be wondering how they set the bail amount. Sometimes there's a bail schedule, which is basically a guidebook that lists the dollar amounts for different charges. So if you have been arrested for possession the bail schedule may state that your bail is \$5,000 automatically. The judge tells you that amount and boom, that's it. Other times the judge or the magistrate judge sets your bail with no input from outside parties, but in a lot of places a prosecutor requests a bail amount. So in this first hearing a prosecutor might say, 'Bail should be \$5,000, your honor.' And he may lay out some reasons why he chose that number.

Clint: So for most people it might sound like they're just kinda making this number up out of thin air. And the truth is that it kind of varies. There's often no rhyme or reason to the number that they propose and this is often something that's also very easily skewed by the prejudices and biases of people making these decisions, which we know is endemic to the system of criminal justice at large.

Josie: Yep, exactly. So the prosecutor proposes an amount and then the defendant or his attorney can respond and suggest a lower number or suggest that the defendant be released on his own recognizance. But in many places, what the prosecutor says goes, the judge or magistrate will approve the number and set bail and that's it.

Clint: So how do people pay this bail? Well theoretically, defendants or their relatives or their friends can either post cash bail personally or in most states there are for profit bail bondsmen who can do it for them. So again, let's say that bail is set at \$5,000. If you personally post the whole \$5,000 and the defendant shows up to their court date, then they get their money back. But if you go through a bail bonds company, things are a little bit different.

Josie: And if you've ever driven by a local jail, you've seen the bail bonds companies nearby. They usually have the neon signs and they're always just within a few blocks of the local jails.

Clint: Yeah, they're not known for their subtlety, those bail bondsmen.

Josie: Right. So a bail bonds company usually requires the defendant or his loved ones to pay about ten or twenty percent of the bail amount. So again, you've been arrested for possession, your bail has been set at \$5,000 and you now owe the bail bondsman somewhere between five hundred and a thousand dollars. And in return they'll pay the court the entire \$5,000 bail to secure your release.

Clint: But there's a catch.

Josie: Always. So once you give that money to the bail bondsman, that's it. You never get that money back. So as long as you go to all your court dates, they get the \$5,000 bail back that they gave the court, plus they get the ten to twenty percent profit that you paid them, but that five hundred or a thousand dollars that you paid the bail bondsman, that's gone. And when money bail is set these are basically your options. You can post the full amount and hopefully get it back eventually or pay the bail bondsman less money, but that money is gone forever.

Clint: So just to make sure that everyone is with us, if you are arrested, given a \$5,000 bail and you don't have the money to pay it, you can pay a bail bondsman upwards of \$1,000 to get you out of jail. And even if you are innocent and found not guilty, that bondsman keeps that thousand dollars anyway.

Josie: Yep.

Clint: Which is insane.

Josie: It really is. Now, in some places there are exceptions, so more and more we see community bail funds, which are nonprofit organizations that pool of money to pay people's bail and unlike bail bondsmen, they don't require anything from the defendant and those are great, but they just, they're not everywhere.

Clint: Oftentimes we hear about bail and bond and those two terms are kind of used interchangeably in the media and people sometimes wonder if there's a difference. Functionally, there's not really a difference at all.

Josie: Right, so now, again, like we've said before, there are different systems in different places. There are countless jurisdictions in America, thousands of jurisdictions, and every place does things just a little bit differently. So some states don't permit the use of bail bondsmen at all and in some counties bail is set before the prosecutor gets involved and in other places the bail hearing isn't even public, but this is the basic idea. You know what we've just described might sound pretty innocuous. The prosecutor requests bail, the defendant responds, the judge sets it and you pay and you're out of jail, but our bail

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 system is actually a major, major source of injustice in this country and it burdens some people so much more than it burdens others. Now, bail has been around in America forever. Seriously, it's actually part of the constitution.

Clint: The Eighth Amendment literally says, quote, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

Josie: And bail is pretrial, which means it's part of the process before someone has been convicted and it's functionally a punishment, right? You know you're supposed to be innocent until proven guilty. Jailing people before they've been convicted is supposed to be rare.

Clint: But more than sixty percent of people in jail are held before they've ever been convicted of any crime, and over thirty percent can't afford to post bail in the first place. Frequently those being held on bail simply have been accused of what are considered quote "low level offenses." And seventy five percent of people in jail before even being convicted have only been charged with drug or property crimes. So I think most people know that we have a mass incarceration crisis in this country, and that's one of the reasons we've started this podcast. The numbers we often hear are 2.2 million people incarcerated in both prison and jail and that's just on any given day and we have around four or five percent of the world's population and around a quarter of its prison population. Excessive bail is part of the reason that our jail system is just out of control.

Josie: Yeah. So if that sounds like a lot that we have 2.2 million people incarcerated at any given time, think about this number: every year, 11.7 million people are admitted to local jails.

Clint: And as a reminder, over sixty percent of the people currently in jail have not been convicted of any crime at all. Sixty percent.

Josie: Yeah. And this problem has just gotten so much worse over time. I mean, pretrial incarceration has tripled nationally since 1970 and it's extremely expensive. Pretrial incarceration costs \$13.6 billion every year. Unsurprisingly perhaps, the pretrial incarceration rate in the United States is among the highest in the world. More than four times of the world's media and pretrial imprisonment rate and with just over four percent of the world's population, again, the United States has almost twenty percent of the world's pretrial jail population.

Clint: Exactly. Bail contributes to our mass incarceration problem, which is bad enough, but there's more obviously. It's not only excessive, it's discriminatory. Our bail system is just one way that our criminal justice system discriminates against poor people. When setting bail, a judge is supposed to consider a defendant's ability to pay, but that often just doesn't happen at all. As a result, we have people sitting in jail for days, weeks, months, even years, simply because they can't afford to pay bail.

Josie: Yep. And in the meantime, they can lose their job, lose their housing, lose custody of their kids, and they haven't even been convicted of a crime yet. So take Miguel from Brooklyn. Miguel was arrested a few years ago for driving with a suspended license and he was taken to Rikers Island and held on \$1,000 bail and he couldn't afford it. This is a clip from an interview with his partner, Stephanie, talking about what her family went through.

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Stephanie: They take him to Rikers Island, like, like if it was some big criminal offense and I realized that he had bail. I don't have the money, he doesn't have the money, so it was hard because I had to, I had to try to borrow money from this person and this person and this person to try to get him out.

[End Clip]

Josie: So that was from a video made by the Brooklyn Community Bail Fund. And what Stephanie is describing is, is common. There are people sitting in jail every day who are innocent, but they can't get out because they can't afford bail. And often that bail is just a couple hundred dollars. And here's another example.

Clint: In September of 2017, Atlanta police arrested 48 year old Sean Ramsey for holding up a sign that read "Homeless. Please help." Apparently, he violated a law forbidding pedestrians from soliciting rides or business.

Josie: So Sean was arrested and then he spent 72 days in jail because he was unable to pay the \$200 cash bail, which is unsurprising because he was homeless. Meanwhile, it cost the county almost \$6,000 to keep him in jail. Bryan Stevenson started the Equal Justice Initiative in Alabama and he's one of the most famous defense attorneys in America. And how he describes it as he says, our system of incarceration is better to the rich and guilty than it is to the poor and innocent. And like so many other parts of our criminal justice system it punishes people of color more than white people.

Clint: For example, black and Latino folks make up fifty percent of jail populations, but only twenty nine percent of the US population. In one study in New York City, more black defendants were held before trial than any other race. The disparity was particularly large for misdemeanor offenses where black people were twenty percent more likely than whites to be detained.

Josie: So it's racist, it's classist, but there's something else too. It makes it much harder to fight your case. Here's Josh Saunders who now works for the Department of Public Defense in Seattle in the video from the Brooklyn Community Bail Fund:

[Begin Clip]

Josh Saunders: So because of their poverty alone, they're unable to take advantage of the entire purpose of the law, which is to get people out of jail pretrial. The effects of this are that people who might otherwise have a strong case, people who are stopped and searched unconstitutionally or people who are simply innocent cannot fight their case.

[End Clip]

Josie: So Josh is making the point that is often lost in the conversation about bail, but which really makes a lot of sense when you think about it. Bail makes people, especially poor people, more likely to plead guilty even when they're innocent. So let's say you've been arrested for drug possession, but you didn't actually have drugs. You go to jail and your bail is set at our magic number that we've been using during this episode, which is \$5,000, and it's just too much money. Even the \$500 you'd need minimum to pay the bail bondsman is too much money. The prosecutor offers you a plea deal, you can plead guilty and get two years probation or because you're innocent, you could wait in jail for trial. Well, you're innocent, right? Who would plead guilty to something they didn't do, and we'll talk about this more on an upcoming episode about plea

deals, but if you wait for trial, you'll be waiting a very long time. It could take months, sometimes years, and you're gonna have to sit in jail until then because you can't afford bail or you can plead guilty and walk out of jail right now. So what would you do?

Clint: Well you and I both have families, right? And we both have rent to pay and young children and spouses. I know that I'd want to get home. So honestly I'd probably plead guilty.

Josie: Right. Me Too.

Clint: And that's a decision that a lot of people make.

Josie: Right. So here's Stephanie, who you heard from earlier, whose partner Miguel didn't have money to pay his bail. And she's talking about this exact thing.

[Begin Clip]

Stephanie: He told the judge I can't afford a thousand dollar bail. So he really didn't have a choice. But to plead guilty.

[End Clip]

Josie: And this is him in a 2015 interview talking about the impact that guilty plea had on him and his family.

[Begin Clip]

Miguel: I wouldn't wish Rikers on my worst enemy because it's rough. Before I got arrested my life was basically work, home, take care of the kids, you know, I was a provider and now since I've been arrested, it's all gone downhill. Criminal record, no job. You know what happened. And it's hard though because now I have to start from scratch. I have to start over. (Sounds of children, home life) I'm a family man. My family comes first. So that's why I pleaded guilty.

[End Clip]

Clint: And many stories about unaffordable bail aren't just unjust, they're really tragic. So for example, Kalief Browder is a really famous example and he spent three years in Rikers Island without being convicted of any crime. He was 16 at the time and his family couldn't afford to post bail for him. He was accused of nothing more than stealing a book bag. Eventually the case was dismissed, but by then he had spent over eight hundred days in solitary confinement, enduring brutal treatment. There's literal footage of him being beaten by both prison guards and prisoners. A few years after he was released, he committed suicide as a result of the trauma he experienced in Rikers. And there are so many stories like this, some of which you've probably heard of like Sandra Bland in Texas, for example, but we'll talk more about the human cost of this unjust bail system on our next bail episode.

Josie: So suffice it to say that bail has been a major, major problem for a long time, but now more than ever, there are real efforts to change the system and bail has kind of become this major focus of criminal justice advocates and some elected officials even more over the past few years. So some places are moving towards bail reform. In 2016, forty four states and DC passed a hundred and eighteen new pretrial laws and there are a few prosecutors out there that are refusing to seek bail for some offenses. Larry Krasner, the District Attorney of Philadelphia made headlines when he was elected a few months ago just because he's this radically different prosecutor and he recently announced his

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 office would no longer seek cash bail for about twenty five different crimes including prostitution, retail theft, trespassing. Krasner estimated that about twenty percent of the 6,100 people in Philadelphia jails were in jail just because they couldn't pay bail.

Clint: In other places, they're replacing bail with what's called risk assessments. That may sound like an improvement and sometimes it is, but risk assessments have a lot of problems themselves and we'll discuss that a little bit later. So generally things are looking up in some places when it comes to bail, but it's still not great. The Pretrial Justice Institute does a report card where they grade each state's bail system. Last year only once they got an A and that was New Jersey, which has almost totally gotten rid of their money bail system. Before that, almost seventy five percent of the state's jail population was being held pretrial and over seventy percent of the jail population was black or Latino and almost forty percent of them were in there just because they couldn't pay bail.

Josie: So to help us dig in more on bail, we have Alec Karakatsanis, the Executive Director of Civil Rights Corps and Civil Rights Corps has been suing counties and courts for setting bail too high and they'd been at the front lines of bail reform. Alec is coming up next.

[Music]

Josie: Thank you so much Alec for joining us.

Alec Karakatsanis: Thank you for having me.

Clint: Yeah, thanks so much for coming on Alec, we really appreciate it. And you're obviously an expert in this field and have done a lot of work on the ground pushing back against the traditional setup of, of our current bail system. And so I was wondering if you could sort of give us a sense of what you were doing before this work, how you, how you came into this work and maybe lead us into understanding what Civil Rights Corps is and what led you to start it?

Alec Karakatsanis: Sure. Before I started working on these systemic challenges to the bail system and into other aspects of our American criminal legal system, I was a public defender. First in Alabama and then in Washington DC. One of the things that always struck me when I was a public defender was the extraordinary extent to which everybody acting in the system, the lawyers, the officers, the probation department, even the public defenders, the judges, were all desensitized to the incredible brutality of putting a human being in a cage. And that's not surprising, right? Because this country now cages human beings at a rate that is unprecedented in the recorded history of the modern world. And you can't accomplish all of that without creating a giant bureaucracy to process bodies from their homes and schools and families and jobs and communities and churches into government run cages. And so all of us who work in the system we get used to it and we stop questioning the brutality inherent in taking someone away from her home and her kids and putting her in a jail cell. And so I was fascinated by all of the different mechanisms that the system used to accomplish that human caging. And so I wanted to start, I left my job as a public defender and I wanted to start using civil rights cases to tell a different story about our criminal legal system to challenge some of the accepted notions of, of what was right and what was justified and to use civil rights cases to resensitize all of the players in the legal system to the incredible suffering and misery that they're inflicting through these daily norms that none of us are really questioning. And so I think as a legal matter, the existence of this giant bureaucracy and the need to process twelve million bodies every year, who are arrested in this country, created a legal system that operates in practice as a daily matter, in a way that is extraordinarily inconsistent with the way that the law is supposed to work. So at Civil Rights Corps, we try to close that gap

between the way that impoverished people and people of color experience our legal system in reality and the way that our laws that are etched in our scrolls and our marble monuments say that people should be experiencing the legal system. And the bail system is one of those ways in which the processing of human beings has become so corrupt that we now have four hundred and fifty thousand human beings every single night in this country in jail cells just because they can't make a monetary payment. And it's that kind of systemic injustice that Civil Rights Corps seeks to challenge and it's through those cases and telling the stories of our clients that we're trying to resensitize the legal system to the consequences of what it's doing on real human beings and their bodies.

Clint: And when you say "resensitize" the system to what it's doing, what exactly do you mean by that?

Alec Karakatsanis: If you go into any local American courtroom and you sit and you watch, you'll see a process that looks like an assembly line. Decisions that are vital for people and their families, like whether they're going to be put in a cage, take five seconds, ten seconds, twenty seconds, thirty seconds. There's no intellectual or evidentiary or moral rigor being applied to that decision. I think it evolved in that way because of the need of the system to process so many people. And so when you have a need to process a hundred people in a courtroom in a morning, it's impossible to devote the requisite level of attention to each person's life, each person's story, and so gradually we lose touch with how brutal it is to put a person in a cage and we haven't been sensitive enough to the stories of the people on who we're inflicting that kind of suffering, largely because of who we're doing it to.

Clint: Right.

Alec Karakatsanis: It's largely very poor people. It's largely people of color and so one of the things that we try to do in our cases is to tell those stories, to talk about what it's like to be in a jail cell. Where you're extraordinarily likely to be sexually assaulted, to get an infectious disease, to be denied basic medical and mental health care, to be physically assaulted, to lack the things that we all take for granted every single day, like fresh air and sunlight, and the ability to determine what we want to do at every moment, the ability to hug our child or to care for our sick mother. So these are the kinds of stories that we tell in our cases so that the legal system can start thinking about this decision that it's making, this decision that determines the course of so many people's lives with more rigor.

Josie: Alec, I'm interested in what made you decide to, um, to look at bail from the court system. So to bring these cases in different counties and different states across the country. This is the way that Civil Rights Corps approaches reforming the bail system. And as you know, obviously different people in different organizations are doing different things, right? They're trying to pass legislation in states for example, or there's grassroots organizing happening around ending bail or people are starting community bail funds. And I'm interested in why you took this approach to attacking the bail system? Why bring these cases versus a different tactic?

Alec Karakatsanis: Well on the one hand, it seems natural to bring legal cases because the way that the American money bail system is operating is so blatantly unconstitutional, so inconsistent with governing legal principles that you're likely to win a lot of these cases if you can get the courts to hear them. And so on the one hand, it seems like a natural thing to do. On the other hand, if you think about your goal as radically changing the way that our court system is functioning, it seems like a strange choice to ask those very same courts. Those courts who in many respects throughout their entire history have been

agents of preservation of certain hierarchies of power and white supremacy, property rights. Judges see themselves and have seen themselves over the last couple of centuries as preservers of stability. They don't see themselves as agents of radical social change. So there is that constant tension in our work between trying to radically change the way the court system functions and asking that same court system to be the agent of that radical change. But I think that court cases are important, not just because they are, you know, producing legal victories, I think court cases provide a locus for telling a story. They provide a place we can organize around. They provide a way of getting people in the community involved and engaged. And so when we do our legal cases, we don't just make dry legal arguments in a courtroom. We go to a community, we talk to directly impacted people, we talk to community organizers, we've work with them, we work with local nonprofit organizations, we work with local journalists, we work with national journalists, we work with people that are doing legislative work, we work with groups of people of faith. We engage with the whole community because the goal isn't just to have a couple of discrete legal victories that could be ephemeral, the goal is is to have lasting radical change in the way that our legal culture and our society more generally think about human caging. And so, you know, back when I first started bringing these challenges to the money bail system, three and a half years ago or so, there wasn't a lot of conversation going on around the money bail system, but it was because of a lot of the work of people all over the country and the death of Kalief Browder and the death of Sandra Bland and the activists and the organizers and the journalists who covered this issue and a lot of the legal victories that we were able to get in our cases really put the money bail system on the, on the public consciousness. And so now I think it's actually vital to our chances of broader reform that we employ a multitude of different strategies. Not just legal cases, but you know, back a few years ago, it seemed to me like, given the set of skills that I have, which is very limited, which is just being a lawyer, one of the ways I can try to help spark that conversation was to use legal cases as a way of telling a story and creating space for people to tell their own story.

Clint: Let's get concrete a bit, so I know you had a major case recently in Harris County which covers Houston, Texas. Can you tell us about that case and what made that case unique to some of the other cases that you've done?

Alec Karakatsanis: So the Harris County case is the first time that I'm aware of in our legal system in which the money bail system was really put on trial. We ended up having an eight day very long and arduous federal evidentiary hearing in front of Chief Judge Rosenthal in the southern district of Texas Federal Court and it was a chance for, for both sides to come in and to try to, to understand how the bail system works and on our side we were saying it doesn't make sense to put human beings in jail cells just because they can't make a payment. And the government came in, Harris County, Texas and in many of its judges and they came in and they tried, they had a chance to really justify, you know, why are we doing this? I think it's important to to understand that Harris County's bail system is an abomination, but it's not uncommon. So in Harris County, this case involves misdemeanors, there's about fifty thousand misdemeanor arrests every year. That makes Harris County the third or the fourth largest criminal processing jurisdiction in the whole country behind LA and New York and close to Chicago. And forty percent of all of those misdemeanor arrestees are detained in jail even though they're presumed innocent for the entire duration of their detainment. And they're detained because they can't afford to pay a few hundred dollars. If they could pay that amount of money they would be out of jail. And so our case asked an essential question, does the government have a good reason for detaining over twenty thousand people in Houston every single year just because they're poor.

Josie: Right.

Alec Karakatsanis: And I think it was extraordinarily telling that over the course of litigating that case, it was as if the entire Harris County community became involved and had opinions about it and it became a very important local political issue. So in the middle of our case, um, organizers had been working really hard since we filed the case. They'd been going door to door. They'd been holding community education events. They'd been holding press conferences and they'd been showing the videos at these bail hearings to people all over Houston. Journalists had been covering it and it became a big political issue in the 2016 election and in fact all of the local candidates who ran on a bail reform platform actually won. So in the middle of our case, there was a new DA and a new sheriff and one of the sixteen judges was up for election and a bail reform candidate won and so all of a sudden the top officials in Harris County switched sides and began supporting our case. So the Harris County DA Kim Ogg and the Harris County Sheriff Ed Gonzalez, they said it doesn't make any sense from a public safety perspective to keep people in jail just because they can't pay. And it certainly is devastating to the thousands of people in their families who are stuck in jail every single year in Harris County just because they can make a payment. Not to mention it's extraordinarily expensive for Harris County, which I believe spent about \$500,000 a day on jails. And so it created this really interesting dynamic in in court where a bunch of the old guard judges had been vehemently defending their old system and when it came time to actually make arguments in the court, something really incredible happened. They didn't really have any good arguments. Instead they argued that the people that are stuck in the Harris County jail, the twenty thousand people a year that can't afford their bail, they're not in there because they can't pay, they're not in there because they're poor, but they argued in federal court that those people are there because they want to be there. They want to be in jail.

Clint: So the government is claiming that people are staying in jail because they want to be there.

Alec Karakatsanis: Yes. It was a really incredible moment.

Clint: Wow.

Alec Karakatsanis: The federal judge sort of stopped in her tracks. I mean she's one of the most well respected federal judges in the United States, both for her legal acumen, her intellect and she was a George Bush appointed federal judge, a Republican and there was a democratic elected district attorney. It was really a bipartisan, all of us sort of couldn't believe what Harris County and it's judges were arguing. They were essentially saying that people aren't in jail because they can't afford bail. They're there because they want to be there for free medical care, free food, and it was the kind of argument that nobody who's ever been in a jail would ever make. And the federal judge actually stopped them and said what you're saying sounds a lot like people who argued that people wanted to be in slavery and it was this inability for them to justify a practice they'd been using for decades that has inflicted such misery on so many thousands, hundreds of thousands of people in Harris County that was quite striking. And so at the end of this eight day trial, the federal judge wrote a remarkable 193 page ruling that eviscerated the factual and legal justifications for the money bail system. Not just in Harris County, but really as it's used all over the country. And so we've been filing similar cases in dozens of places all over the country making the same sorts of arguments. And it all boils down to the following point: No human being should be kept in a jail cell because she can't make a payment. And so after the judge issued that 193 page ruling, she issued a preliminary injunction that stopped what they were doing and ordered people released from jail. And since the judge issued that preliminary injunction in June of 2017, over nine thousand people have been released from the Harris County jail who would have been stuck in that jail just because they couldn't afford to pay a few hundred dollars in misdemeanor cases.

Josie: Yeah, that's incredible. And I know that, um, Harris County, I mean watching the case has just been incredible and seeing how, what a major influence your work has had on the bail system in Harris County. And I'm interested in the work that you've done in California because I think that what you've done in Harris County looks very different than what's happening in California. And I, I'd love to hear about your work there.

Alec Karakatsanis: Sure. So the California work we've been doing is very exciting to me for a lot of reasons. One, it's taking place in the context of a beautiful movement of directly impacted people who all across the state are telling their stories. They're telling stories about what it was like to be stuck in jail because they couldn't make a payment. They're telling the stories of what it was like for their families to spend tens of thousands of dollars in non refundable premiums to for profit bail agents. Just in Los Angeles police department arrests alone, not even the entire Los Angeles County, just that one police department from 2012 and 2016, poor families gave \$193 million to the for profit bail industry. Just in one cities police department's arrests. That's one of the other hidden costs of the money bail system. Not only are a lot of people stuck in jail, but the people whose families are able to come up with some money to get them out end up paying extraordinary amounts of money to this for profit industry and there's really no reason for that. And so all of these people around California are creating a movement. And then at the same time there's a legislative battle underway where people are trying to reform the bail system from a legislative perspective and then our cases. We'd been litigating a number of cases in California and in January of 2018, we secured a landmark victory from the California Court of Appeal, which essentially struck down the state's money bail system. And it said that the way that we've been setting money bail all over the State of California violates basic federal constitutional principles. And these are old principles. It wasn't like the case was really charting any new territory from a constitutional perspective, but it was basically saying we have devolved in California to such an extent where the way we've been setting bail as a matter of practice in courtrooms all over the state is fundamentally unfair and wrong. And that decision was just called Humphrey, which involved our client, Kenneth Humphrey, the 64 year old man who is actually still in jail. He's been in jail for over eight months because he can't afford the money bail imposed in his case. Just one example of how one person's story and one person's case can lead to a ruling that really changes the game and now activists and organizers all over the state are using the Humphrey ruling to go into their local public defenders offices in their local courts and to demand that the bail setting process be done with much more rigor and and it's really changing what's possible at bail hearings and we're seeing all over the state that bail hearings are being converted from fifteen second to twenty second sort of assembly line hearings where generic predetermined amounts of money are applied to hearings where we talk about someone's life and their ties to the community and the effect of losing their job if they're stuck in jail and the effect on their children and their families. And so we're changing the conversation about money bail in California. I'm very excited about that work.

Josie: Yeah. It's amazing.

Clint: So I think you've laid out in a pretty compelling way how egregious and insidious the phenomenon of money bail is and the idea that we would force people who can't afford it to remain in a cage simply because they cannot afford to pay the money to have themselves released. And so there's a lot of conversations around alternatives to this and I'm curious to hear sort of how you're making sense of this. I think there's a lot of conversation around risk assessments and I think that there are people who tout risk assessments as the intervention that could change the game with regard to the jail system and the criminal justice system at large. And I also know that there are a lot of activists

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 who are very fearful that risk assessments will, if sort of used in an irresponsible way, can only reify the sort of existing disparities that already exist in the criminal justice system. So I'm curious on your thoughts around risk assessments or sort of any other alternatives that you think represent hopeful or successful interventions as an alternative to money bail.

Alec Karakatsanis: I think your question highlights why we're at such a dangerous time. Throughout the course of this country's history, one major theme is that we identify, uh, an injustice and then entrenched interests sort of coopt that movement and we don't address the underlying causes of the injustice and we just sort of tweak what we're doing and the same mechanism of repression reproduces itself. So you can think, for example, with Brown versus Board of Education, you can get a wonderful legal ruling that says that schools must not be segregated, but then sixty years after that decision, schools around the country and in many places in the country are actually more segregated than they were, right?

Josie: Right.

Alec Karakatsanis: Unless you address some of the underlying structural causes of a problem, it's very likely that the forces that created that problem will reconstitute themselves and find a new way of producing it. We are at that moment with the bail system, so it might be that we're on the verge of winning all of our cases and this claim that no one should be kept in jail because they can't pay money bail. But the forces that relied on the money bail system as a way of manufacturing quick guilty pleas and processing this assembly line are actually proposing alternatives that would make the system look almost identical. So for example, when we're winning this victory in California, the attorney general and other and district attorneys all over California are taking the position that yeah maybe we shouldn't detain people because they're poor, but let's just detain them without bail. Right? And that's what happened in the federal system when we got rid of essentially money bail in the federal system several decades ago. It was seen as a big reform and it was enacted with great fanfare, um, with the support of Bobby Kennedy and Lyndon Johnson. And then in the decades since then, we've seen detention rates in federal court increase astronomically to the point where right now 72.4 percent of all federal criminal defendants are detained prior to trial without bail. And so the system of money bail, which is now detaining people because they're poor, could be morphed into a system of pretrial detention without bail. The second big concern is that all of the financial interests that created and profit off to the money bail system are interested in profiting off of extensive government supervision and surveillance, so the people that are the private prison companies and the people that used to be your bail bondsmen, are now thinking of themselves as able to make extraordinary profits using things like electronic monitors and charging you for drug testing, and so we, the people that are released from jail may now be subject to extraordinary debts paying for them to be monitored with an ankle shackle GPS device and drug testing every week for \$20 a pop and so you can see the system and the interest that support it reconstituting itself to produce the same cycles of debt, the same high rates of pretrial detention, and so we have to be constantly vigilant that we're not just addressing a discrete legal question in the courts, but we're fundamentally changing our culture's understanding of these issues, we're fundamentally changing the structures that have created and supported them, and that's why I'm so fearful. You asked about risk assessments. I think risk assessments are extraordinarily dangerous for another reason. Risk assessments are an algorithm that purports to provide some information about what a person in this person's position is likely to do. So for example, is someone who looks a lot like this person on paper likely to come back to court or likely to commit a new offense. The problem is that risk assessments are just a tool and like any tool they can be used for any purpose that you want. So they can be used to increase detention dramatically or they

can be used to decrease detention dramatically depending on what thresholds you set for the tool. So for example, if you wanted to say any person who scores above a certain amount on this tool should be detained, I might think that score should be, you know, pretty high. But somebody else, let's say the DA who's elected in Manhattan might think the score should be pretty low. And so he wants to detain more people. And the second problem with risk assessment tools that I think most people don't understand, and this is why we've been, we created a basic principles document about risk assessment tools that we've been giving out all the country, is that all of the data on which they rely is based on an existing system that everybody understands. It's extraordinarily racist and has all kinds of other flaws. So if you're relying on past data from a system that disproportionately arrests, disproportionately convicts, disproportionately sentences people of color, then any output that the tools produce is also going to be subject to those flaws. There are a lot of other flaws with risk assessment tools but they are not in any meaningful way an alternative to the money bail system. The alternatives that actually make sense to the money bail system are releasing people on their own recognizance and helping them get the tools and services that might help them get back to court. So for example, we know from actual evidence and data that working with people and reminding them about their court date, for example, by sending them a text message or phone call, is actually the best way to get people back to court. Because a lot of impoverished people aren't fleeing to the Cayman Islands or Switzerland when they're arrested for trespassing, they may not have a Google calendar that tells them to be at a certain court house on a certain date at a certain time in a month and a half. Right? And so there are really cheap, really easy ways of getting people back to court and a lot of the other reasons that people have difficulty when they're on pretrial release have to do with things like drug addiction and mental health issues, of lack of childcare, um, poverty, struggling to meet the basic necessities of life. And so there are places all over the country where jurisdictions are realizing that and they're using community based, health based, treatment based alternatives to jailing people and that don't involve trapping people who are able to get out in cycles of debt to for profit companies.

Josie: Great. Thank you for that Alec. And I think what you've really highlighted is that bail is just one part of a system that is unjust on so many different levels in so many different ways at so many different points of contact. And so I'm interested to hear, as someone who's really dedicated their life to addressing the bail system, or I should say is currently dedicated to addressing the bail system, I don't want to prescribe your future for you, but, um, is currently dedicated to addressing the bail system, what does the ideal future look like to you in terms of this work? What's the ultimate goal? What are you hoping to see? Not just around the bail system, but more generally if you have thoughts on that?

Alec Karakatsanis: I'm hoping that a lot of the work that's being done on the bail system won't be thought of as in a silo that's limited to the bail system because these injustices in the bail system are just a manifestation of broader structural problems in our society and our criminal system generally. So what I'm hoping is that all of the narrative that we're, that we're constructing that all the stories people are telling you about what's happened to them in the money bail system and the devastating, uh, empirical literature that's coming out about the harms of that system, will force people to ask the simple question: Is the system that created and tolerated and rationalized and justified this money bail system, is it deserving of our respect and our deference in all of the other myriad ways in which it's operating? And I think we can use the incredible arbitrariness and absurdity of the money bail system to get people to change the way they think about how our criminal system is operating generally because if it can tolerate something that's so ridiculous and so unjust, then what else has it been doing? And I think it's important not to think of the bail

system in a silo. It exists in a context of the society that is surveilling and arresting human beings at rates that no society, that no one has ever tried. It's existing in the context of the society that has harsh sentences in a way that no society has ever tried. A society that has racial injustice in its criminal system in a way that no other society that we know of has ever had. For example, this country incarcerates black people at a rate six times that of South Africa at the height of Apartheid. These are the facts of our, of our criminal system. So just making some tweaks in the bail system isn't going to solve that. And I think one great example of this is our Harris County case. When people who couldn't afford to make a few hundred dollar payment were stuck in jail they pled guilty eighty four percent of the time and they did it in a median of 3.2 days. But for people who could afford a couple hundred dollars to get out of jail, they were actually more likely than not after being arrested in Harris County to never get convicted and their cases lasted one hundred twelve days because they could have a lawyer investigate their case, right? The bail system was, as the federal judge found, coercing tens of thousands of guilty pleas every single year. That's how it's functioning all over the country. We don't have another way of processing all of the people that police are arresting and disposing of their cases unless we coerce them into pleading guilty. And what we're saying to them now all over the country is, if you plead guilty today, we'll let you out of jail. But if you want to fight your case and you can't afford bail you'll be stuck in jail. And so that's an example of why just fixing the bail system isn't going to alleviate that pressure. The system is gonna feel enormous pressure to just reconstitute itself in some other way of processing these cases. And so in an ideal world, I see us as a society asking, you know, why are we trying to deal with so many serious social problems like poverty and racism and mental health issues and racial and economic justice and environmental justice more generally, why are we trying to deal with that through the criminal human caging system? And I'm just hopeful that instead of fixing the bail system in a silo or the other issues that I work on a lot like fines and fees or prosecutorial misconduct, instead of fixing each of those systems piecemeal we'll have a different social and cultural conversation about why we ever want to use the tools of jails and prisons and handcuffs and shackles and cages? And why not try something else that would be much more likely to lead to a society where all human beings can flourish?

Clint: Well Alec, thank you so much for coming on. And for folks who want to learn more about you, learn more about the organization, uh, how do they go about doing that? Do you have a website? Social media?

Alec Karakatsanis: Yes. So please visit our website civilrightscorps.org and we have a Twitter account @CivRightsCorps and I have my own Twitter account @EqualityAlec.

Josie: Great.

Clint: Well we really appreciate it and thanks for coming on and thanks for the work you do.

Alec Karakatsanis: Thank you.

[Music]

Josie: That was Alec Karakatsanis, the Executive Director of Civil Rights Corps. We're so grateful that Alec took the time to join us today.

Clint: We appreciate you all listening. This is Justice in America. I'm Clint Smith.

Josie: I'm Josie Duffy Rice.

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Clint: You can find us on Twitter @Justice_Podcast, like our Facebook page at Justice in America and subscribe and rate us on iTunes. It really helps a lot.

Josie: Justice in America is produced by Florence Barrau-Adams. The production assistant is Trendel Lightburn with additional research support by Johanna Wald. Thank you and join us next week.



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