



*Sent via email*

**MEMORANDUM OF SUPPORT  
for Preservation of the New York Pretrial Reform Law**

Dear New York State Assembly and Senate members:

Human Rights Watch urges you to resist calls to weaken New York State’s landmark pretrial reform law. In the brief time since implementation, this law, one of the strongest in the nation, has undone much of the harm caused by decades of unfair pretrial incarceration in New York — restoring a degree of credibility to state courts by making procedures more fair, saving taxpayers money otherwise spent jailing people who have not been convicted of crimes, and, most importantly, allowing people to remain with their families and communities while resolving their cases.

The law has prevented harmful incarceration of thousands of presumptively innocent people. Prosecutors, law enforcement, and bail bonds agents, who have lost money or power because of this law, seek to reverse it, publishing misleading crime statistics and exploiting stories about the relatively small number of people who have been released and committed new crimes since the law took effect, often falsely attributed to the new law, to further that end. Meanwhile, the news media has published many fewer stories about the systemic positive effects of the new law than about those that generate sensationalized headlines.

Lawmakers have a responsibility to look beyond these sensational stories and misleading statistics, and instead, ground policy in the facts that demonstrate enormous overall benefits of the reforms. Lawmakers did engage in lengthy and measured debate when crafting and passing this law; to rush changes based on hysterical and self-interested publicity would betray that responsibility.

Human Rights Watch urges lawmakers to preserve the existing pretrial reform law without some of the changes that have been proposed, as explained below, and allow it to continue reducing pretrial incarceration and improving the lives and opportunities of those benefiting from its enactment.

## Harms of Pretrial Incarceration

Human Rights Watch is an international non-profit organization dedicated to investigating and monitoring violations of basic human rights throughout the world, including in the United States.<sup>1</sup> Human Rights Watch has produced reports on violations in over 90 countries. Our US Program focuses on, among other things, human rights compliance within the criminal legal system.

Human Rights Watch has produced three major reports and many shorter pieces documenting the harms of pretrial incarceration and the injustice of the money bail system employed in nearly all US criminal courts. We have recommended reforms. Those reports specifically highlighted the systems in New York,<sup>2</sup> Oklahoma,<sup>3</sup> and California,<sup>4</sup> but the principle problems of money bail and pretrial incarceration apply almost universally.

Pretrial incarceration betrays the presumption of innocence, a fundamental guiding principle of our legal system, by keeping people in jail who have not been convicted of a crime. Our California report documented that hundreds of thousands of innocent people have been held in pretrial detention in recent years, an unjust punishment that cost taxpayers millions of dollars.<sup>5</sup> Data from New York similarly indicates that, for example, in 2018, of the over 100,000 people arrested for felonies, 35 percent were either acquitted or had their cases dismissed. Less than 20 percent of those people were convicted of felonies, the rest were mostly reduced to misdemeanors or even lesser offenses.<sup>6</sup> The previous system held a large portion of those people, including those never convicted, in custody.

Human Rights Watch has documented families losing homes, selling cars, and foregoing basic living necessities to afford bail.<sup>7</sup> People who stay in jail lose jobs, cannot care for their children or relatives with disabilities, miss much-needed health care, while suffering boredom, violence, disease, and physical and mental anguish.<sup>8</sup>

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<sup>1</sup> Human Rights Watch, Home Page, <https://www.hrw.org/#>.

<sup>2</sup> Human Rights Watch, *The Price of Freedom: Bail and Pretrial Detention of Low Income Non-Felony Defendants in New York City*, December 2, 2010, <https://www.hrw.org/report/2010/12/02/price-freedom/bail-and-pretrial-detention-low-income-nonfelony-defendants-new-york>.

<sup>3</sup> Human Rights Watch and the American Civil Liberties Union, *“You Miss So Much When You’re Gone”: The Lasting Harm of Jailing Mothers Before Trial in Oklahoma*, September 26, 2018, <https://www.hrw.org/news/2018/09/26/us-devastating-impact-jailing-mothers>.

<sup>4</sup> Human Rights Watch, *Not in it for Justice: How California’s Pretrial Detention and Bail System Unfairly Punishes Poor People*, April, 2017, <https://www.hrw.org/report/2017/04/11/not-it-justice/how-californias-pretrial-detention-and-bail-system-unfairly>.

<sup>5</sup> *Ibid.*, p. 3.

<sup>6</sup> “Disposed Adult Arrests Data Source Notes,” *New York Division of Criminal Justice Services*, <https://www.criminaljustice.ny.gov/crimnet/ojsa/dispos/nys.pdf> (accessed March 19, 2020).

<sup>7</sup> Human Rights Watch, *Not in it for Justice: How California’s Pretrial Detention and Bail System Unfairly Punishes Poor People*, April, 2017, <https://www.hrw.org/report/2017/04/11/not-it-justice/how-californias-pretrial-detention-and-bail-system-unfairly>.

<sup>8</sup> Anna G. Cominsky, “The people bail reform is helping: Look past the fearmongering at stories that don’t make the headlines,” *New York Daily News*, March 2, 2010,

People held in pretrial custody routinely face the option of pleading guilty in order to be released immediately, or asserting their innocence and staying in jail longer, as in the infamous Kalief Browder case,<sup>9</sup> whose abusive prosecution and treatment at Rikers Island inspired many of the changes the new law brought about. Given the coercion inherent in this choice, convictions of innocent people are inevitable. The large-scale use of pretrial detention, resulting in pressured guilty pleas, may increase conviction rates for prosecutors and police, but it damages the credibility of our entire criminal legal system.

Given these well-documented inequities of the pretrial incarceration system, Human Rights Watch supported New York State's careful and deliberate efforts to make the pretrial detention system more just.<sup>10</sup>

### **New York's Positive Reforms**

Recognizing the harms of pretrial detention, the New York legislature passed the most effective pretrial reform law in the US. It honors the presumption of innocence by limiting those eligible for money bail setting or preventive detention to those accused of the most serious offenses. It does not mean that criminals go free—only that incarceration must follow an actual conviction and judicial determination of the appropriate punishment.

This law resulted from extensive negotiations and compromises at the Capitol in Albany over the course of months and years, in which all stakeholders had opportunities to participate. It forbids money bail and preventive detention for misdemeanors and low-level felonies, with some exceptions related to sex offenses, domestic violence and witness intimidation, a carefully negotiated list of exceptions that should not be expanded. It established alternative security to money bail and ability to pay standards. The law appropriately reduces pretrial incarceration.<sup>11</sup>

Prior to implementation of the reforms, approximately 70 percent of people in jail were there pretrial.<sup>12</sup> Black New Yorkers were less than half as likely to be released the same day their

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<https://www.hrw.org/report/2017/04/11/not-it-justice/how-californias-pretrial-detention-and-bail-system-unfairly>; See also, Human Rights Watch, *Not in it for Justice: How California's Pretrial Detention and Bail System Unfairly Punishes Poor People*, April, 2017.

<sup>9</sup> Jennifer Gonnerman, "Kalief Browder Learned How to Commit Suicide on Rikers," *The New Yorker*, June 2, 2016, <https://www.newyorker.com/news/news-desk/kalief-browder-learned-how-to-commit-suicide-on-rikers> (accessed March 19, 2019); See also Human Rights Watch, *Not in it for Justice*.

<sup>10</sup> John Raphling and DeAnna Hoskins, "The Right Kind of Bail Reform: New York Must Learn from California's Bad Example," *The New York Daily News*, March 4, 2019, republished at Human Rights Watch, <https://www.hrw.org/news/2019/03/04/right-kind-bail-reform-new-york-must-learn-californias-bad-example>; See also, Laura Pitter, "Don't Roll Back Progress on Bail," *New York Daily News*, January 15, 2020, republished at Human Rights Watch, <https://www.hrw.org/news/2020/01/15/dont-roll-back-progress-bail>.

<sup>11</sup> "Bail Reform in New York: Legislative Provisions and Implications for New York City," *Center for Court Innovation*, April 2019, [https://www.courtinnovation.org/sites/default/files/media/document/2019/Bail\\_Reform\\_NY\\_full\\_o.pdf](https://www.courtinnovation.org/sites/default/files/media/document/2019/Bail_Reform_NY_full_o.pdf) (accessed March 19, 2020).

<sup>12</sup> "New York State Jail Population. 10 Year Trends: 2009 – 2018," *New York State Division of Criminal Justice Services*, Jan 28, 2019, [https://www.criminaljustice.ny.gov/crimnet/ojsa/jail\\_pop\\_y.pdf](https://www.criminaljustice.ny.gov/crimnet/ojsa/jail_pop_y.pdf) (accessed March 18, 2019).

bail was set as white New Yorkers.<sup>13</sup> This high level of incarceration came at a high cost to taxpayers.<sup>14</sup>

The reforms have resulted in substantial decreases in pretrial jail populations in New York.<sup>15</sup>

While New York City police have publicized statistics indicating an overall rise in crime in January and blamed that rise on pretrial reform, some crimes, including homicides, have decreased.<sup>16</sup> In fact, crime numbers respond to a variety of factors and it is too soon to understand crime trends and their relation to the reforms that have just begun.<sup>17</sup> Research indicates that incarceration itself can stigmatize those who are confined, spawn antisocial attitudes and increase recidivism.<sup>18</sup>

### **The Legislature should not reverse the pretrial reform law.**

Reversing New York's pretrial reforms would be a grave mistake. Proposals rumored to be under consideration, including expanding judicial discretion to detain or set bail, allowing consideration of perceptions of "dangerousness," or using algorithm-based risk assessment tools to inform decisions, would all increase pretrial incarceration and return to or even enhance the harms of the previous system.

Risk assessment tools recycle and give the appearance of scientific legitimacy to racial bias within law enforcement and court systems.<sup>19</sup> These tools create profiles of people, with limited, non-contextual data, and make statistical estimates of a person's future behavior based on how that profile compares to the actions of large numbers of others with similar

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<sup>13</sup> "Presume Innocent for a Price: The Impact of Cash Bail Across Eight New York Counties, New York Civil Liberties Union," March 2018,

[https://www.nyclu.org/sites/default/files/field\\_documents/bailreport\\_20180313\\_final.pdf](https://www.nyclu.org/sites/default/files/field_documents/bailreport_20180313_final.pdf)

<sup>14</sup> "Open Book: New York, Office of the State Comptroller, March 18, 2020,

<http://www2.osc.state.ny.us/transparency/LocalGov/LocalGovIntro.cfm> (accessed March 19, 2020)

<sup>15</sup> "Jail Population in New York State," Department of Criminal Justice Services,

[https://www.criminaljustice.ny.gov/crimnet/ojsa/jail\\_population.pdf](https://www.criminaljustice.ny.gov/crimnet/ojsa/jail_population.pdf) (accessed March 19, 2020).

<sup>16</sup> "NYPD Announces Citywide Crime Statistics for January 2020," *New York Police Department*, February 4, 2020, <https://www1.nyc.gov/site/nypd/news/po204a/nypd-citywide-crime-statistics-january-2020> (accessed March 19, 2020); See also, "Vera Institute of Justice Responds to Critics' Fearmongering of Bail Reforms in New York State," *Vera Institute*, January 28, 2020,

<https://www.vera.org/newsroom/vera-institute-of-justice-responds-to-critics-fearmongering-of-bail-reforms-in-new-york-state>.

<sup>17</sup> Lindsay Beyerstein, "Did bail reform really cause a crime wave? An honest look at the actual numbers," February 17, 2020, <https://www.cityandstateny.com/articles/opinion/commentary/did-bail-reform-really-cause-a-crime-wave.html> (accessed March 19, 2020).

<sup>18</sup> "Jail in New York City, Evidence-Based Opportunities for Reform," *Center for Court Innovation and Vera Institute of Justice*, January 2017,

[https://www.courtinnovation.org/sites/default/files/documents/NYC\\_Path\\_Analysis\\_Final%20Report.pdf](https://www.courtinnovation.org/sites/default/files/documents/NYC_Path_Analysis_Final%20Report.pdf) (accessed March 19, 2020).

<sup>19</sup> Martha Minow, Jonathan Zittrain, and John Bowers, "Technical Flaws of Pretrial Risk Assessments Raise Grave Concerns," July 17, 2019, <https://cyber.harvard.edu/story/2019-07/technical-flaws-pretrial-risk-assessments-raise-grave-concerns> (accessed March 19, 2020); See also, "Submission to Illinois Supreme Court Commission on Pretrial Practices," Human Rights Watch, June 26, 2019, <https://www.hrw.org/news/2019/06/26/submission-illinois-supreme-court-commission-pretrial-practices>.

profiles.<sup>20</sup> Similarly, relying on judicial perceptions of “dangerousness” increases the likelihood of racial bias in the system.<sup>21</sup> Generally, expanding judicial discretion would likely erase the gains in pretrial liberty that the law has accomplished and return to the old system of too much pretrial incarceration. One of the strengths of the New York law is that it limits judicial discretion to default to incarceration.

The law has been in effect for less than three months. It has potential to have a large positive impact on the administration of justice in New York and on communities most impacted by decades of over-incarceration. By limiting pretrial detention, fewer people will be pressured to plead guilty simply to get out of jail. The system will be less discriminatory towards poor people. People accused of crimes, including those who are innocent, will not be jailed unless they are found guilty through a fair process and appropriately punished. People awaiting trial will be able to remain with their families and continue working or going to school. For those who are homeless, or in need of mental health or substance abuse treatment, enhanced pre-trial services are already helping people better access the programs they need.<sup>22</sup> In addition, taxpayers will not pay the costs of a great deal of unnecessary incarceration.

### **Pretrial Reform during the COVID-19 Epidemic**

On March 18, a prisoner and a corrections officer tested positive for COVID-19 in the jail on Rikers Island.<sup>23</sup> Jails, under the best circumstances, can be breeding grounds for disease and infection. People are held in close quarters, unable to maintain social distance. They lack access to suitable hygiene. Prisoners have higher rates of illness in general and more compromised immune systems than the general population.<sup>24</sup> The dangers of infection impact prisoners, staff, their families and communities.

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<sup>20</sup> “Submission to Illinois Supreme Court Commission on Pretrial Practices” Human Rights Watch <https://www.hrw.org/news/2019/06/26/submission-illinois-supreme-court-commission-pretrial-practices>.

<sup>21</sup> David Arnold, Will Dobbie, and Crystal S Yang, “Racial Bias in Bail Decisions,” *The Quarterly Journal of Economics*, Volume 133, Issue 4, November 2018, Pages 1885–1932, <https://economics.mit.edu/files/14749> (accessed March 19, 2020).

<sup>22</sup> “City Council Dedicates \$7 Million to Expand Supervised Release Program in Response to State Bail Reforms,” *New York City Council*, November 8, 2019, <https://council.nyc.gov/press/2019/11/08/1830/>; See also Anna G. Cominsky, “The people bail reform is helping: Look past the fearmongering at stories that don’t make the headlines,” *New York Daily News*, March 2, 2010, <https://www.hrw.org/report/2017/04/11/not-it-justice/how-californias-pretrial-detention-and-bail-system-unfairly>; Laura Pitter, “Don’t Roll Back Progress on Bail,” *New York Daily News*, January 15, 2020, republished at Human Rights Watch, <https://www.hrw.org/news/2020/01/15/dont-roll-back-progress-bail>.

<sup>23</sup> Zak Cheney-Rice, “Rikers Island Inmate Tests Positive for Coronavirus, in a First for New York City,” *New York Magazine*, March 18, 2020, <https://nymag.com/intelligencer/2020/03/rikers-island-prisoner-tests-positive-for-coronavirus.html> (accessed March 19, 2020).

<sup>24</sup> Medical Problems of State and Federal Prisoners and Jail Inmates, 2011-12, “Department of Justice, *Bureau of Justice Statistics*, October 4, 2016, <https://www.bjs.gov/content/pub/pdf/mpsfj1112.pdf> (accessed March 19, 2020).

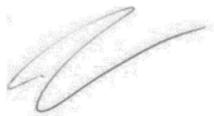
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Jurisdictions across the country are considering ways, especially through pretrial release, to reduce jail populations in order to better manage the spread of COVID-19.<sup>25</sup> Reversing a law that has had such a positive impact on reducing pretrial incarceration in light of the COVID-19 crisis would be irresponsible and dangerous.

We urge New York lawmakers to stay the course.

Sincerely,

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<sup>25</sup> Allen Kim and Anna Sturla, "Cities in the US move to lower inmate populations as coronavirus fears grow," *CNN*, March 16, 2020, <https://www.cnn.com/2020/03/16/us/inmates-released-jail-coronavirus-tmd/index.html> (March 19, 2020).