

Is Less Always More? The Unintended Consequences of New York State's Parole Reform

Charles Fain Lehman

FELLOW
Manhattan Institute

Elias Neibart

JD CANDIDATE
Harvard Law School

Executive Summary

In September 2021, New York Governor Kathy Hochul quietly signed into law the Less Is More: Community Supervision Revocation Reform Act, the state's fourth major criminal justice reform enacted in the past three years. Less Is More made dramatic changes to the state's parole system, specifically:

- Creating a system of earned time credits to incentivize good behavior;
- Significantly limiting reincarceration for "technical" violations of the terms of parole (i.e., a violation other than committing a new crime), and shortening the length of reincarceration;
- Limiting the presumption of detention for parole violators, such that technical violators are detained only if they abscond, and criminal violators detained only if a judge rules them at risk of absconding;
- Raising the burden of proof at revocation hearings and expediting their processing time;
- Shifting revocation hearings to court rooms and otherwise giving them the trappings of a court proceeding.

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These changes, supporters argued, were necessary to minimize the unnecessary and counter-productive reincarceration of petty technical violators—the parolee who is on the straight and narrow but who nonetheless finds himself back in prison due to a minor slip-up. In making these changes, however, they also made it harder to detain many serious offenders, including serious criminal violators; evidence from NYC jails show that detention of even violent criminal violators fell in the wake of Less Is More. In addition, it created a greater burden on victims, who are often now involved in revocation hearings in addition to new criminal proceedings.

This, we argue, is due to the broad-reaching procedural changes enacted by Less Is More. The lost presumption of detention, heightened evidentiary standards, and constraints placed on the use of technical violations—all of which apply not only to petty technical violators but to more dangerous parolees—have defanged the supervision system. While reforms that reward good behavior and do not over-punish minor violations are desirable, we propose a series of changes to blunt the unintended effects on the more serious offender population. Specifically, we suggest several reforms of the reform:

- Permitting judges to remand supervisees pending revocation if they find them to be a threat to public safety;
- Restoring old evidentiary standards for certain serious violators;
- Allowing victims' sworn, written statements to be used as witness testimony;
- Fully funding lawyers, paralegals, and victim advocates focused on prosecuting parole revocations, to give the Department of Corrections and Community Supervision (DOCCS) equal footing with supervisees' counsel;
- Creating a safety valve that allows a technical violation to lead to revocation if the violation puts the supervisee or someone else in danger.

Introduction

On July 10, 2021, an unknown assailant barged into the boarding-house room where 47-year-old Heather Majors was sleeping and attacked her with a hatchet, slashing her more than 30 times. Rochester, New York, emergency responders were called to the scene, but Majors's injuries proved too much—she died two days later.¹

Two weeks later, Joseph Rivera was detained as a suspect in Majors's murder. The 21-year-old Rivera was then currently out on parole, so police coordinated with his parole officer to charge him with violating the terms of his community supervision, allowing him to be detained while they prepared murder charges. Rivera's final revocation hearing was set for December, giving them plenty of time.² But on September 22, without warning, Rivera was sprung from Monroe County jail.³ He was subsequently rearrested, but the release shocked Majors's sister, Jessica. "He's 21 years old and if he can be that brutal, commit that brutal of a crime at 21, he doesn't need to be out," she told reporters, adding, "it puts the community at risk. And if these people get out they might commit another crime."⁴

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52 Vanderbilt Ave.
New York, NY 10017
(212) 599-7000
INFO@MANHATTAN-INSTITUTE.ORG

Rivera's unexpected release, along with hundreds of others,⁵ was precipitated by the otherwise little-noticed signing of the Less Is More Act,⁶ the most recent in the spate of criminal justice reform bills passed in New York State over the past three years. The law dramatically overhauled New York State's community supervision system, which supervised nearly 35,000 New Yorkers out on parole as of March 2021.⁷

Proponents presented Less Is More as focused on reducing the consequences for "technical" violations—violations of those terms of community supervision, like failing to report to a parole officer, which were not themselves new crimes. Too many supervisees, proponents argued, were being returned to prison every year on petty technical offenses, with black and Hispanic New Yorkers disproportionately affected. Less Is More would reduce these disparities and, they claimed, even improve public safety.

However, cases like Rivera's reflect the reality that Less Is More not only protects those slipping up on their parole but also puts serious, violent offenders back on the streets. Using data from the New York City jail system (home to roughly a third of New York State's jail population), this report shows that the pretrial detention of both technical and criminal violators—supervisees rearrested for new crimes—cratered after the signing and implementation of Less Is More. There is good reason to believe that the same holds true for full revocations. In other words, Less Is More dramatically reduced community supervision's incapacitation of not just petty violators but serious ones who should not be walking free.

This phenomenon, we argue, is driven by key changes Less Is More wrought: its importation of bail reform's "least restrictive" means standard for pretrial detention, heightening of evidentiary standards, and other changes to revocation procedure, as well as limitations on detaining parolees when public safety is implicated. If—as both activists and legislators have represented—the goal of Less Is More was simply to reduce the consequences of technical violations, without imperiling public safety, it has not succeeded. Rather, it has released potentially hundreds of violent parolees while imposing a new, significant emotional burden on many victims of their crimes. We therefore propose solutions meant to minimize the release of serious, criminal violators while also preserving the original spirit of the reform. These include:

- Permitting judges to remand supervisees pending revocation if they find them to be a threat to public safety;
- Restoring old evidentiary standards for certain serious criminal violators;
- Allowing victims' sworn, written statements to be used as witness testimony;
- Fully funding lawyers, paralegals, and victim advocates focused on prosecuting parole revocations, to give DOCCS equal footing with supervisees' counsel;
- Creating a safety valve that allows a technical violation to lead to revocation if the violation puts the supervisee or someone else in danger.

Parole Before Less Is More

New York State was the first in the union to implement a system of parole, first at the Elmira Reformatory in 1876 and then statewide in 1907. Initially aimed at both reducing the prison population and readying inmates for reintegration, the system spread, in some form, to every state in America.⁸

Prior to Less Is More, the parole system in New York State followed the process detailed below.

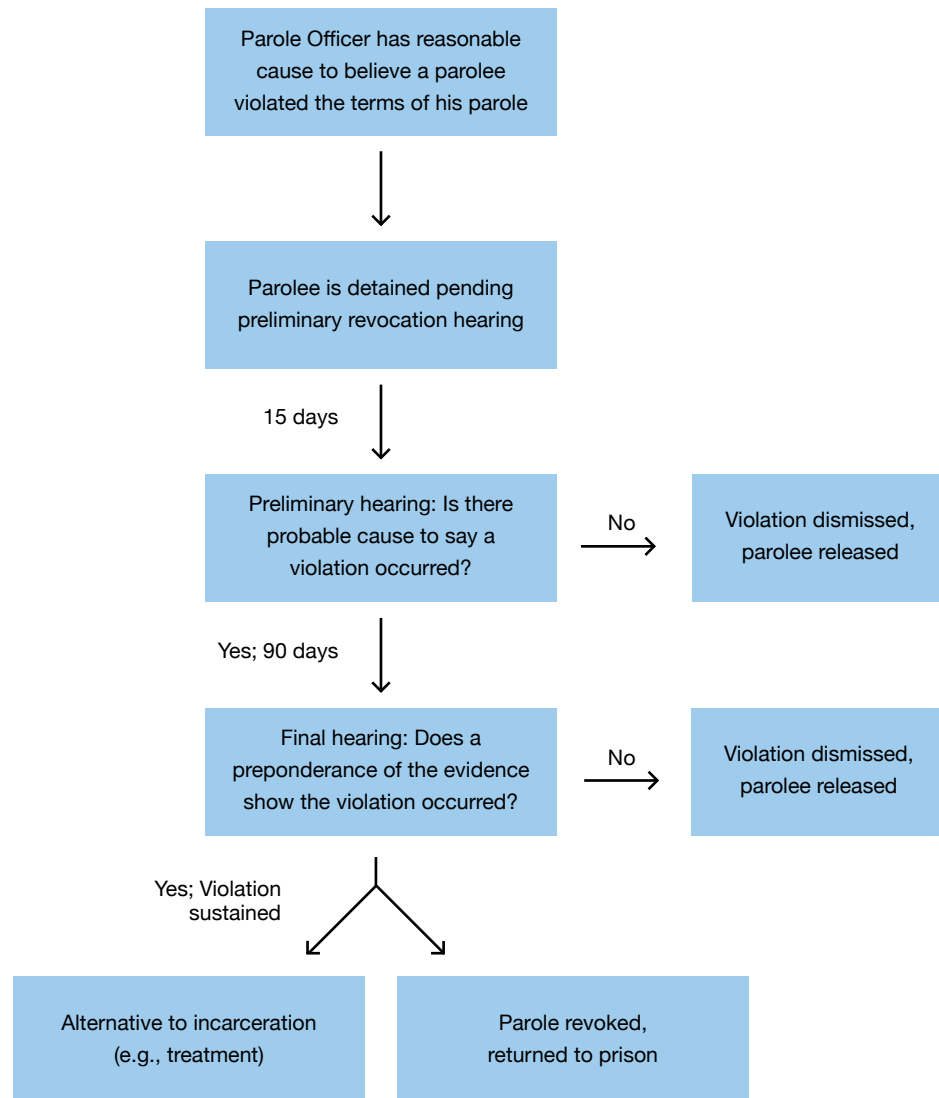
Monitoring Reentering Felons with Community Supervision

- *Sentencing.* Individuals convicted of certain felony-level offenses are often given “indeterminate” prison sentences, which entail a minimum and maximum amount of time the individual can be incarcerated. Once that lower limit is reached, these individuals become eligible for parole—the opportunity to serve the remainder of their sentence in the community.
- *Interview.* To be granted parole, however, prisoners must undergo an interview and review process conducted by the New York State Board of Parole. After a thorough examination of the individual’s “criminal activity, custodial record, program participation, future goals and release plans,” the board either denies or grants parole. If parole is granted and the recipient is released, however, he or she still remains under state custody; his or her release is contingent on adherence to the board’s delineated conditions.
- *Release.* If released from a state facility, parolees are still subject to many rules. In addition to following all state and federal criminal laws, conditions can include reporting to a parole officer, participating in rehabilitation or counseling programs, refraining from drugs and alcohol, and obtaining gainful employment. Violations of these terms are classified as technical—breaking supervision-specific conditions—and nontechnical—criminal behavior or absconding. Once violated, supervision can be revoked.⁹

Revoking Community Supervision

- *Warrant and Detention.* If a parole officer has reasonable cause to believe that a violation has occurred, a warrant is issued for the supervisee. At that point, the supervisee is temporarily detained—for, at most, 15 days—pending an investigation into the suspected violation.
- *Preliminary Revocation Hearing.* After his or her temporary detention, the supervisee would sit for a preliminary revocation hearing. If the hearing officer determines there exists probable cause that a violation occurred, the parolee is detained—for, at most, 90 days—pending a final revocation hearing.
- *Final Revocation Hearing.* At this last stage, the presiding officer determines whether there is a preponderance of the evidence that the supervisee violated the conditions of his supervision. If that burden of proof is met, the violation is “sustained.” The supervisee would then face penalties.
- *Penalty.* If the supervisee is found to have violated the strictures of their release, then a variety of penalties may be imposed, the most severe being reincarceration for the balance of the unserved criminal sentence. However, sanctions were intended to be “graduated”; parole boards were instructed, when appropriate, to suggest “alternatives to incarceration.”¹⁰

Figure 1

The New York State Parole Revocation Process Before Less Is More**Does Community Supervision Work?**

Although criminal justice reform advocates now push to limit it, historically, the parole system has been regarded as a progressive alternative to offenders serving out their full sentences.¹¹ In principle, community supervision both reduces the burden on the carceral system by lessening overcrowding and saving the taxpayer money, and it reduces reoffense risk by creating an incentive for offenders to be on their best behavior lest they be incarcerated again.

In a recent review of the research, criminologists Jennifer Doleac and Michael LaForest found conflicting evidence for this latter effect. Relative to incarceration, the evidence is mixed on whether probation deters or does not deter the marginal offender from further crime—much depends on who that marginal offender is and where he would be incarcerated (e.g., jail vs.

prison). More supportive is evidence from “truth in sentencing” reforms, which reduce the probability of parole for many incarcerated individuals and seem to lead to increased reoffending after release, suggesting that easier parole may reduce that risk (though this is not a given).¹²

It is therefore plausible that community supervision is, at least sometimes, a useful tool for the criminal justice system. Reforms to that system—particularly those that lower the penalties for criminal reoffense—should be approached with caution. While tailored reforms to parole may benefit clients (for instance, Doleac and LaForest find evidence that more intensive supervision, as opposed to less intensive, does not meaningfully reduce recidivism), more sweeping changes can have significant public safety implications.

Passage of the Less Is More Act

In June of 2021, the New York State Legislature passed the Less Is More: Community Supervision Revocation Reform Act. Signed into law by Governor Kathy Hochul in September 2021, the bill’s major provisions took effect in March 2022.¹³ Less Is More is the fourth major criminal justice reform—alongside bail reform, discovery reform, and “Raise the Age”—implemented in the last three years.

Less Is More was advertised to the public as a positive, progressive step toward equality for black and brown communities. Proponents claimed it would make the criminal justice system fairer, save money, and improve public safety, all by reducing consequences for technical offenses by the most sympathetic group of people reentering the community. A dramatic change to the nation’s oldest system of parole was framed as having little possible downside.

It is hard to argue that the *status quo ante* was sustainable. Incarcerating parole offenders is costly, estimated at about \$600 million for all of New York State, including about \$300 million for technical violators.¹⁴ Additionally, as early as 1982, the United States Department of Justice claimed that incarcerating parole violators in New York intensified prison and jail overcrowding in state facilities.¹⁵ In the four decades since that report, that problem has purportedly persisted. Even while the number of incarcerated individuals has shrunk, decreasing capacity in state facilities has resulted in perceptible overcrowding.¹⁶ Both modern opponents and supporters of New York’s parole system agree that crowded prisons are a real problem that should be addressed.¹⁷ Black parolees, who were “12.4 times more likely to be detained for a parole violation than a white person on parole,” were also disproportionately affected by these issues.¹⁸

There is also merit to concerns about the onerousness of parole. Each year between 2012 and 2016, 16 to 17% of parolees saw their parole revoked due to a technical violation, while only 2.5 to 2.7% of parolees had their parole revoked for new criminal offenses.¹⁹ The conditions of parole, violation of which can mean a return to prison, can be burdensome. For example, parolees must regularly notify parole officers about their travel plans and employment status. Advocates argued that these conditions inhibited parolees’ reintegration into regular society. Revocation of parole after a violation is not guaranteed, but it happens with some frequency: in 2016, of all state parolees who violated their parole, 58% of them were sent back to prison.²⁰

Advocates of Less Is More made these points in their case for the bill, but they also went further. Proponents repeatedly put technical violators—the more sympathetic population of parole violators—at the heart of their message. At the bill’s signing, Hochul argued that “reincarcerating parolees for technical violations traps them and doesn’t help our communities.” State Senator Julia Salazar viewed the bill as putting an end to a system that “punished non-criminal technical violators,” and Assemblyman David Weprin celebrated the end to a system where “people

who [were] on parole ... lived in fear that a technical violation, like being late for curfew, would send them back to prison.”²¹ When asked about reforms in Less Is More that affected both technical and nontechnical violators—like many of the procedural changes discussed in the next section—advocates routinely focused only on technical violators.²²

While New York State's criminal justice reforms have come under fire for threatening public safety, supporters of Less Is More routinely argued that the bill would in fact improve it. State Senate Majority Leader Andrea Stewart-Cousins viewed the bill as a deterrent to future criminal behavior, arguing that “when people are treated as valuable members of a community, they are less likely to re-engage in criminal activity.” Former lieutenant governor Brian Benjamin, too, claimed Less Is More would “strengthen public safety.”²³ New Yorkers United for Justice, a proreform lobbying group, predicted that the bill would “reduce incarceration and racial bias in the parole system, save New York taxpayers millions of dollars, and support public safety.”²⁴ The Less Is More coalition, which represents a number of proreform groups, similarly claimed that the bill's reforms “will ease inequities and improve public safety.”²⁵ Asked about the Rivera case, Hochul flatly claimed, “no person who's accused of violent crime will be walking from jails.”²⁶

Are these claims accurate? Before we explore the data, we first detail the actual content of the Less Is More Act to provide a clear picture of how the law changed following its signing and implementation.

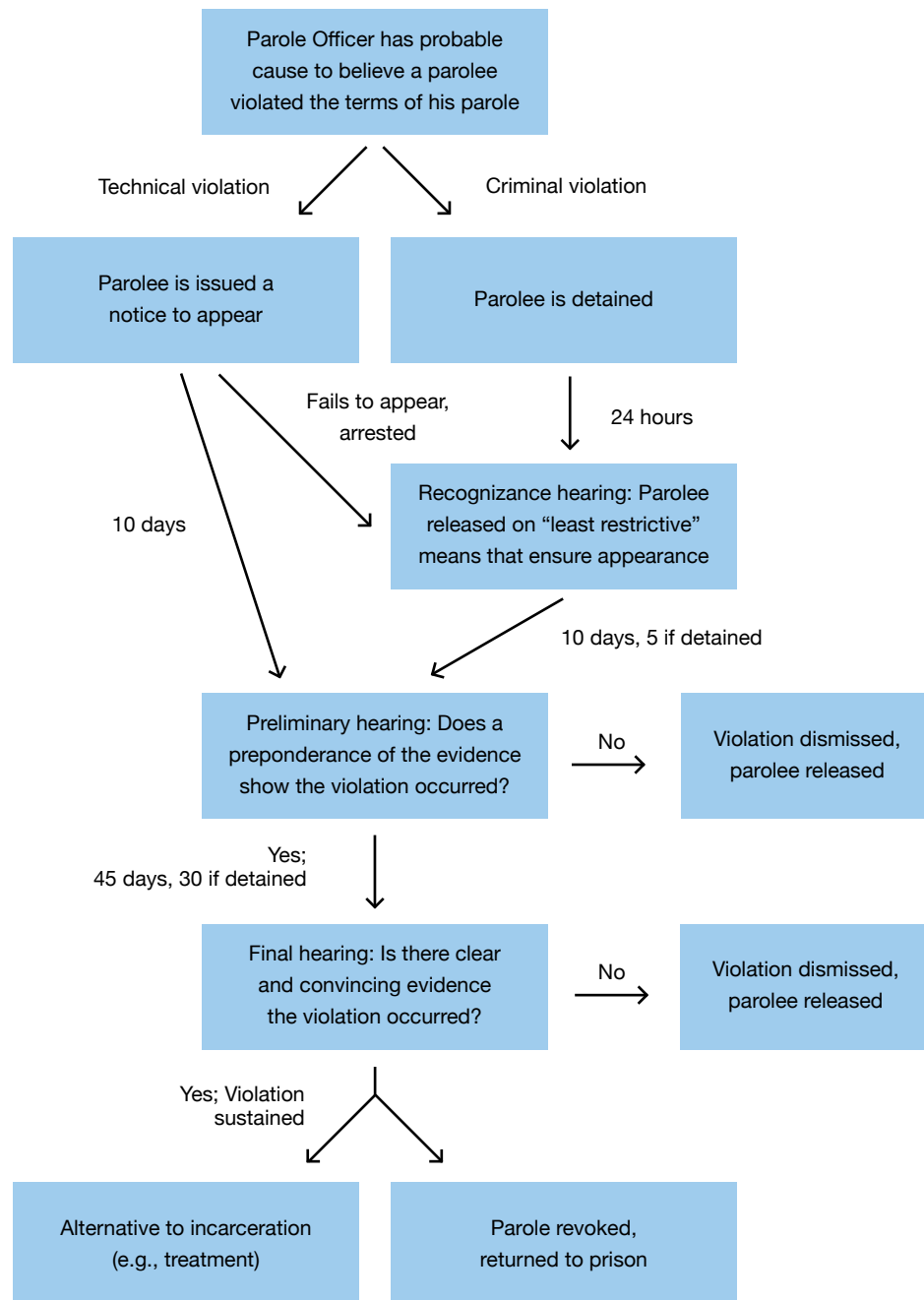
What Less Is More Changed

While advocates of Less Is More emphasized petty, technical violations, the bill had dramatic effects on both the technical and criminal violator populations.²⁷ The core reforms contained in Less Is More did the following:

1. Parolees now receive “**earned time credits**,” which can reduce the total amount of time they spend under supervision:
 - a. For every 30 days a parolee remains in compliance with both technical and nontechnical provisions of his or her parole, he or she earns 30 days of earned time credit that is applied toward the remainder of his or her sentence.
2. Most **technical violations** of parole are unlikely to result in reincarceration.
 - a. For most technical violations, the act outlines a three-strike policy; a parolee's first and second violations will not result in incarceration, but if supervision guidelines are broken a third time, the individual could face incarceration.
 - b. For more minor technical violations, like breaking curfew or failing to notify a parole officer of a change in employment status, incarceration is never permitted.
3. There is no longer a **presumption of detention** pending revocation.
 - a. Technical violators are served a notice of violation but are not detained until after their administrative parole hearing unless they intentionally fail to appear at their hearing.
 - b. Criminal violators or technical violators who intentionally fail to appear may be detained, but within 24 hours, they must receive a new “**recognizance hearing**.” At the hearing, a judge decides if the parolee will be released pending the resolution of their case.

- c. There is a legal presumption that the parolee will be released on recognizance, meaning that the court is required to release the parolee on “the least restrictive non-monetary conditions,”²⁸ unless it can be shown that the parolee demonstrates a “substantial risk” of failing to appear at future hearings. This provision imported all the recent bail reforms into the parole system.
- 4. The burden of proof at **preliminary hearings** is heightened, and the time before they must happen is shortened.
 - a. Before Less Is More, the government needed only *probable cause* of a violation to move forward with revocation. Now, it must prove a violation occurred by a *preponderance of the evidence*—a higher legal standard.
 - b. Before Less Is More, preliminary hearings had to be held within 15 days of a parole officer issuing a parole violation warrant. Following Less Is More, preliminary hearings must be held within 10 days of the warrant if the parolee is released on recognizance, and five days if he is detained.
- 5. The burden of proof at **final revocation hearings** is heightened, and the time before they must happen is shortened.
 - a. Before Less Is More, the government needed only to prove that a violation occurred by a *preponderance of the evidence*. Now, it must prove a violation occurred by *clear and convincing evidence*—a higher legal standard.
 - b. Before Less Is More, final revocation hearings were held within 90 days of the conclusion of the preliminary hearing. Following Less Is More, final hearings must be held within 45 days of preliminary hearings if the supervisee was released on recognizance, and 30 days if he was detained.
- 6. Parole revocation proceedings have more of the trappings of criminal court proceedings.
 - a. Prior to Less Is More, most revocation proceedings were held in a county jail.²⁹ Under Less Is More, proceedings cannot be held in a jail and must be held in a courthouse if one is available.
 - b. Prior to Less Is More, supervisees did not have a right to counsel during the preliminary hearing. Under Less Is More, their right to counsel is absolute during both the preliminary and final hearings.
 - c. If a supervisee is found to have committed a criminal violation, he may appeal that finding to the courts of the state of New York rather than to the parole board.

Figure 2

The Parole Revocation Process After Less Is More

The Effects of Less Is More: Evidence from State Data and Rikers

Advocates presented Less Is More as primarily benefiting nondangerous, minor violators, particularly those whose parole was unfairly revoked for a trivial technical violation. The reforms, it was argued, would both make the system fairer and improve public safety. It would therefore be significant if the bill's effect were to also release criminal violators, that is, those who had been rearrested and were facing (re)incarceration because they had violated the terms of their community supervision by committing another crime. Doing so would endanger public safety.

Advocates of Less Is More have tried to avoid acknowledging this trade-off. The advocacy group New Yorkers United For Justice, for example, in a fact sheet on “myths” about parole reform, responded to the “myth” that “people on parole supervision are more likely to commit new crimes and therefore should be put back in prison” by asserting that most parolees are (re)incarcerated for technical violations.³⁰ But that is a non sequitur: just because parolees are more likely to be reincarcerated for technical violations than for criminal violations does not mean they do not also pose an added risk to public safety.

In reality, we know that the parolees (and the analogous group, probationers) are a definite risk to public safety relative to others walking the streets of New York. A 2011 report from the Center for Courts Innovation found that over a three-year period, 53% of parolees were rearrested, and 42% were reconvicted.³¹ Among individuals on probation for whom more recent data are available, roughly half will be rearrested for a new crime within five years of sentencing, including around 10% rearrested for violent felony offenses. One in three will be reconvicted within five years, with one in four incarcerated following conviction.³²

Similarly, **TABLE 1** summarizes data from the state Office of Courts Administration on individuals who were arraigned between January 2020 and December 2021 and subsequently released on either their own recognizance or under some nonmonetary restrictions (i.e., without bail being set).³³ These data represent not everyone on parole but rather those on parole who were rearrested for a new criminal offense. What they show is that even compared to other people who are arrested but not on parole, parolees are more likely to offend if rereleased without bail following a first new arrest. For example, they were 1.5 times as likely to be rearrested for a non-violent felony and 1.7 times as likely to be rearrested for a violent felony.

Table 1

Rearrest Frequency of Offenders Released After Arraignment by Supervision Status, 2020–2021

Rearrest Type	Supervision Status	
	No Supervision	Supervision
Misdemeanor	12%	13%
Nonviolent Felony	8%	12%
Violent Felony	3%	5%
Not Rearrested	77%	70%

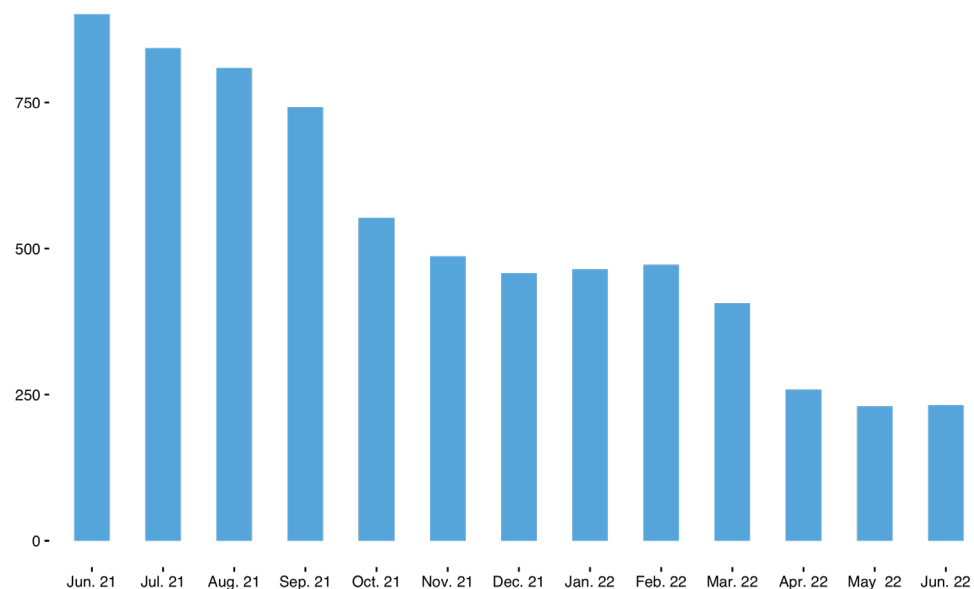
Source: New York State Office of Courts Administration.

What effect, then, has Less Is More had on the incapacitation of supervisees? Much of the data published by the state criminal justice system is not sufficiently up to date at the time of this writing to give a comprehensive picture. Annual data from the Department of Corrections and Community Supervision, however, provide a low-resolution picture of a decline in reincarceration for technical violations. Data on the number of individuals in DOCCS custody at the end of March each year show that as of March 2022, there were just 822 technical parole violators incarcerated in New York State prisons. That represents a 30% reduction from March 2021, 76% from March 2020, and 81% from March 2019.³⁴ The population has likely fallen further, as DOCCS was still in the process of implementing Less Is More at the time the most recent data were published.

More precise figures are available for New York State jails specifically. According to data from the state Division of Criminal Justice Services (**FIGURE 3**), Less Is More has had its promised effect on the jail population of technical parole violators.³⁵ In August of 2021—the month before Hochul signed Less Is More into law—the monthly census counted an average of 901 technical parole violators in state jails, about 5% of average daily population. By October, that figure had fallen to 553, a nearly 40% drop. In April of 2022, the first full month after most of Less Is More was officially implemented, the technical violator average daily population had fallen to 258, a 71% drop. Technical violators then made up just 1.7% of average daily jail population.

Figure 3

Daily Number of Technical Parole Violators in New York State Jails (Monthly Average)



Source: "Jail Population in New York State," New York State Division of Criminal Justice Services (accessed July 2022).

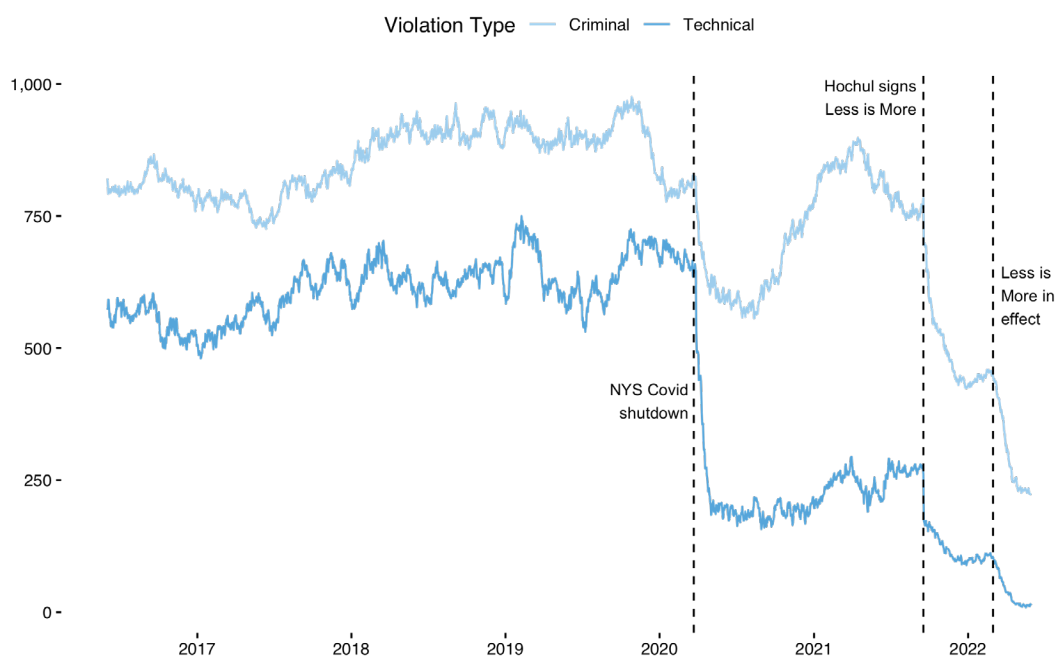
These figures, however, can tell us only part of the story. What about the effects of Less Is More on the criminal violator population? Neither DOCCS nor New York State Division of Criminal Justice Services (DCJS) publish data on the number of those violators alone, instead rolling them into counts of all criminal offenders in custody. We identify, however, one helpful exception. The New York City Department of Correction (DOC) publishes detailed daily data on the

population of its facilities, which account for about a third of New York State's daily jail population.³⁶ Those data separate out not just technical but also criminal parole violators. Thus, they can give us a picture of the effect of Less Is More on the state's biggest jail system.³⁷

FIGURE 4 shows the trend in the population of both technical and criminal violators in DOC custody from June 2016 through July 2022. Both populations are roughly constant through February of 2020, with between 750 and 1,000 criminal violators and 500 and 750 technical violators on an average day.³⁸ In March 2020, the Covid-19 pandemic emptied jails across the country, including in New York City.³⁹ The technical violator population plummeted, while the criminal violator population fell somewhat less sharply.

Figure 4

Less Is More's Effect on NYC Jails' Violator Population, 06/02/2016–05/31/2022



Source: NYC Department of Corrections.

Over the next several months, the technical violator population remained low, while the criminal violator population recovered. In September of 2021, Hochul signed Less Is More, and DOCCS and NYC DOC immediately began to implement its provisions, “in the spirit” of the new legislation.⁴⁰ Both populations dropped, the technical population quite sharply. Further declines came in March of 2022, when Less Is More officially took effect. As of mid-August, there were roughly 200 criminal violators and around 10 technical violators housed in NYC on any given day.⁴¹

In short, Less Is More has dramatically reduced not only the technical but also the criminal violator population. Who was released? **TABLE 2** captures the characteristics of NYC-detained criminal (i.e., nontechnical) violators on three key dates: September 17, 2021, the date of Less Is More’s signing; March 1, 2022, when the bill went fully into effect; and July 1, 2022, toward the end of the available data.

Table 2

Demographics of Criminal Violators in NYC Jails

Date:	9/17/21	3/1/22	7/1/22
Total	784	446	203
Black	491	300	126
Other Race	216	110	58
Brad H.	295	180	96
Security Risk Group	170	103	50
Committed Infraction	275	113	73
Top Charge Type			
Narcotics	82	24	10
Property	142	77	36
Sexual Offense	38	23	9
Vehicle	6	2	0
Violent	299	175	83
Weapons	105	92	25
Other Top Charge	112	53	40

Source: NYC Department of Corrections.

The table captures significant declines across all categories, including those receiving mental health treatment (i.e., with a “Brad H.” designation), those in a Security Risk Group (i.e., prison gang), and those who committed an infraction while incarcerated at Rikers. More alarming is the change in the type of offense for which they were rearrested.⁴² Before *Less Is More* was passed, Rikers housed hundreds of criminal parole violators who had been rearrested on violent, sexual, or weapons charges. Ten months later, that total has fallen to about one hundred. In the same period, the overall number of violent offenders—parolee or not—in NYC jail custody was roughly flat, while the number of weapons offenders rose. The overall population of NYC jails (excluding technical violators) fell only slightly, from about 5,800 in September 2021 to roughly 5,600 in July 2022.⁴³

In other words, the number of criminal parole violators detained in NYC jails, including those detained for serious crimes, has fallen dramatically since the implementation of *Less Is More*. At the same time, the overall jail population, and the jail population of serious offenders, has remained roughly flat, or even risen. Furthermore, the decline in criminal violators occurred at the same time as the decline in technical violators. It's evident, then, that *Less Is More* reduced the number of criminal violators in Rikers. Similar declines are almost certainly happening in other New York jurisdictions, as the governor and DOCCS have both announced significant reductions in the incarcerated violator population statewide.⁴⁴

Contrary to what supporters initially implied, *Less Is More* is not putting just minor, technical violators back on the streets. Parolees who commit new, sometimes serious, crimes are also not being detained, or are being released. Hochul's claim that “no person who's accused of violent crime will be walking from jails,” therefore, is quite simply false.

How Less Is More Defanged Community Supervision

If the goal of Less Is More was to reduce the risk of a given technical violator returning to prison, then a more stringent revocation process is not necessarily bad—assuming, that is, that it applies only to technical violators, particularly petty ones. But by applying certain reforms uniformly to the community supervision population, including violent offenders, Less Is More likely also reduces the incapacitation of serious, including criminal, violators. That poses a serious risk to public safety because community supervision is an important tool for deterring and incapacitating serious offenders. A more streamlined process makes it easier to return criminal violators to prison when they reoffend, taking them off the streets more quickly. In addition, parole holds—that is, detention caused by a charge of parole violation—are particularly important for incapacitating parolees who commit new offenses or are otherwise likely to pose a threat to the public, a reality illustrated by Joseph Rivera's case. Prosecutors with whom the authors spoke confirm that they now struggle far more to secure a parole hold following Less Is More.

In this section, we identify several key components of Less Is More that we believe are plausibly related to the declines in community supervision's incapacitative efficacy, and to which smart reforms, detailed in the next section, could be made. In particular, we identify the bill's presumption of release for technical and indeed most criminal violators; the shift to more “court-like” proceedings; and the blunting of the use of technical violations for deterring unsafe behavior.

Release Under the “Least Restrictive” Means

In 2019, New York reformed its bail system, doing away with the possibility of cash bail for all but a handful of serious offenses. The reforms imposed a general presumption of release under the “least restrictive” means required to ensure that a person will not fail to appear, usually meaning either release on one's own recognizance or subject to some form of monitoring. A criminal defendant's proclivity to abscond is the only substantive factor that judges may consider when they determine detention status. Under the current law, neither public safety considerations nor the interests of victims enter the judicial equation—making New York an outlier in the United States.⁴⁵

However, those changes were not, at the time, applied to the community supervision system. If a parolee was arrested on a new offense, he would often not be detained for the new offense—because of bail reform—but could still be detained pending revocation of his parole. Thus, the community supervision system blunted the impact of bail reform on some of the city's most crime-prone residents.

Less Is More, however, imported the “least restrictive” means standard to the parole revocation process. Under the bill, technical violators are not detained at all unless they fail to appear at proceedings, but even criminal violators and technical violators who fail to appear are entitled to the newly created recognizance hearing, at which the court can detain them only if the alleged violator “presents a substantial risk of willfully failing to appear” and no “non-monetary condition or combination of conditions” will assure their appearance. If the supervisee is not deemed a flight risk, he must be released “on the least restrictive non-monetary conditions that will reasonably assure the releasee's appearance at subsequent preliminary or revocation hearings.” In practice, this means that releasing parolees on their own recognizance becomes the default detention decision. This is true even if he has committed a new, serious criminal offense.

Even supporters have acknowledged this effect. Under the new act, the Less Is More coalition has noted that “all people accused of a nontechnical violation of their parole will now receive a recognizance hearing ... to determine whether they will be detained while their criminal charges and parole violation are processed.” This new feature of the law differed markedly from the “old system under which the person was automatically detained for the parole violation—regardless of the outcome of the bail hearing on the new criminal charges.” The coalition further emphasizes that “if a person is released on their own recognizance ... or pays the bail set on the criminal charges, they cannot be detained for the parole violation alone.”⁴⁶

In short, prior to Less Is More, bail reform’s imposition of presumptive release, particularly presumptive release on recognizance, did not apply to the supervision revocation process. Supervisees were still presumptively detained, as they had been before bail reform. This meant that parole holds could be used to detain individuals who would otherwise be bailed. Following Less Is More, however, this process no longer applies unless the supervisee is judged to be a flight risk.

Revocation Hearings as Full Trials

As noted previously, one of the major impacts of Less Is More is to make the parole revocation process more closely resemble a full trial, rather than an administrative process. Proceedings can no longer be held in jails and must be held in courthouses unless none are available; supervisees are entitled to full representation during both the preliminary and final revocation hearing, instead of just the final; and the standards of evidence necessary for revocation at both stages have been raised.

Some of these formalizations of the process may impact incapacitation, at least at the margins. The parole officers, parole revocation specialists, or other DOCCS employees⁴⁷ presenting the “prosecution’s” case are not necessarily lawyers, while the “defense” by law is.⁴⁸ Indeed, defense lawyers have argued, albeit unsuccessfully, that state law compels DOCCS to appear with legal counsel, which DOCCS employees are not.⁴⁹ Most importantly, the heightening of evidentiary standards used in the revocation process seems likely to have the biggest impact on the chances of incapacitation. By making it harder to sustain the warrant, more people at the margins will walk free.

Proponents of the bill will, of course, insist that these changes are salutary, and we to some extent agree. Faster process is beneficial not just to offenders but to deterrence and the public purse. And taking hearings out of the jailhouse is not an intrinsically objectionable idea. More generally, if DOCCS cannot adequately prove that a supervisee violated their parole, in principle it is good for that supervisee to be released. All we are arguing here is that these changes at the margins also likely mean less detention/revocation, for better or worse.

That said, we would be remiss not to identify the concrete harms associated with these changes. As it will inevitably lead to fewer criminal violations, this tripartite hearing process specifically affects a population largely overlooked by the advocates of Less Is More: victims of violent crime.

Specifically, prosecutors and a parole officer with whom we spoke indicated DOCCS is now often required to obtain live testimony from victims as evidence. Some of this is likely driven by the fact that parolees are now far less likely to waive their preliminary revocation hearing, a common practice before Less Is More. But it is also, we suspect, in part a consequence of the more “court-like” character of revocation hearings, particularly the heightening of evidentiary standards.

Under the status quo ante, our sources told us, a parole officer would routinely report victims’ statements as evidence at the revocation hearing. Because these accounts were related at the hearing by a DOCCS employee, they qualified as hearsay.⁵⁰ While hearsay—usually a less

reliable form of evidence than live testimony—was and still is admissible in parole revocation hearings, it cannot be the only evidence offered to support revocation.⁵¹ By raising the evidentiary burden necessary for preliminary and final revocation, *Less Is More* made victims' hearsay statements and corroborating evidence in many cases no longer sufficient to revoke parole, which therefore required the appearance of victims in person, even if they live far away or do not wish to recount their traumatic experience in front of their purported victimizer.⁵²

More frequent testimony means that victims will now be asked to testify in two parallel proceedings—the parole revocation process and the adjudication of the corresponding criminal case. Prosecutors may resist allowing victims to testify, for fear of imperiling the new criminal case by having victims testify without their aid. In so doing, the revocation becomes harder to obtain.

Even if victims do testify, forcing them to relive their trauma in another public setting is both logistically onerous and gravely insensitive. Victim testimony generally requires both appearance in court and several meetings with prosecutors, counselors, paralegals, investigators, and others. Victims often must travel long distances and are forced to miss work or school. Losing a day's wage is simply not an option for some victims. A parole revocation process that in essence doubles the number of in-person appearances may prove a prohibitive burden, particularly because in a parole hearing a victim may not have the benefit of access to a prosecutor, victim advocate, or similar. As one parole officer told us, victims may not see why testifying is worth all this effort, particularly given the relatively short lengths of revocation now mandatory under *Less Is More*, especially if they fear retaliation—a particular concern, for example, for victims of domestic violence.

More disturbing still is the way this new hearing process can retraumatize victims. Victims are already asked to face both a grand jury and a trial-court jury. Insisting they attend and testify at revocation proceedings—now often held in courthouses—requires victims to yet again publicly relive their trauma to yet another group of strangers, or to their victimizers' friends and families, who may be unhappy with their testimony.

Loss of Technical Violations as Public Safety Tool

One of the basic premises we have granted thus far is that technical and criminal violations are different things, but they are not actually unrelated. Technical violations represent breaking any of the stipulations of an individual's community supervision other than the prohibition on committing new crimes, but many of the common stipulations of community supervision are themselves meant to reduce the chances that a parolee will reoffend. Prior to *Less Is More*, for example, a condition of parole was prohibiting fraternization with others with a criminal record, because association with delinquent peers is one of the few reliable risk factors for joining a gang.⁵³ Parolees can be prohibited from consuming alcohol, a practice supported by the mountains of evidence showing that alcohol use causes crime.⁵⁴ The imposition of curfews relates to the higher prevalence of crime at night.⁵⁵ And so on.

In theory, at least, this is because the whole edifice of community supervision is meant to provide guardrails and support to those reentering normal society. Parole officers critical of *Less Is More* have argued that by limiting the use of technical violations, the bill has curtailed this function and therefore increased the risk that their clients reoffend. In an interview, one said she feared seeing “a parolee get charged with a new violent felony when I knew that I could maybe address certain behaviors before he's now back in the system.”⁵⁶ We know, in fact, that parolees have committed serious offenses in the wake of *Less Is More*; some of these likely could have been forestalled by the intervention of their parole officer.⁵⁷ At the same time, these guardrails serve the interests of many parolees, helping ensure they remain out of prison and reintegrate into their communities. Randy Cimino, a 30-year parolee and president of a drug treatment organization, credits parole with his continuing success.⁵⁸

In other words, technical conditions of parole, while sometimes onerous, served a legitimate purpose. However, we recognize that they also contributed to the problem that *Less Is More* was meant to address: the arbitrary or excessive use of the technical violation system, resulting in unnecessary, harmful, and needlessly punitive incarceration. Technical conditions should help facilitate parolee reintegration; they should not shoulder parolees with a morass of burdens, rules, and regulations.

Our point, therefore, is not that aggressive use of technical violation is good *per se*. Rather, it is that alongside prohibiting illegitimate uses of those violations, *Less Is More* also proscribed a legitimate public safety function. A well-designed system—as we discuss below—would explicitly let technical violations play a narrowly defined role in preventing harm without letting them be used too easily or freely.

Prioritizing Public Safety in Community Supervision Reform

Supervisees are, from a legal perspective, different from nonsupervisees in an important way. Individuals arrested and detained for a crime are *accused* of criminal offenses but have not yet been found guilty in a court of law. Parolees, on the other hand, are convicts; they were found guilty of criminal offenses, sentenced to state prison, but were given the chance to serve the remainder of their sentence in civil society. Although they are not or no longer detained in a state facility, parolees remain under state custody and supervision.

Even proponents of *Less Is More* agree that when it comes to revocation, parolees are not entitled to the same due process rights as everyday citizens. Under *Less Is More*, revocation only requires clear and convincing evidence of an offense, not the beyond-a-reasonable-doubt standard that governs normal criminal trials. As such, even the architects of this reform concede parolees' unique criminal status.

Less Is More can be understood as an effort to reduce this distinction between supervisees and nonsupervisees. It grants supervisees many of the same rights for pretrial detention and conviction as nonsupervisees. In so doing, it improves protection for technical violators, but it also gives criminal violators far more protection than they used to enjoy. We think it is possible, however, to preserve *Less Is More*'s goal of better protecting supervisees from unreasonable violations—the spirit of the bill—while still minimizing the public safety harms that may come from its implementation.

Specifically, we propose a series of reforms (detailed in **TABLE 3**) to *Less Is More* designed to enhance safety while preserving the law's basic agenda with regard to fairness, particularly its attempt to minimize the consequences of petty technical violations. We propose to alter the law to limit its effects on the most serious offenders—those who committed or commit offenses otherwise eligible for bail—while preserving them for everyone else. Specifically, we endorse (a) allowing judges to remand violators on the basis of their danger to the community, not just flight risk, (b) restoring the old evidentiary standards for revocation for serious offenders, (c) giving DOCCS the tools it needs to participate in a more professionalized revocation process, and (d) creating a “safety valve” for any technical violations that could lead to harm to others or the parolee himself. These changes, we believe, would preserve the spirit of *Less Is More* while also ensuring that its unintended consequences do not negatively affect public safety.

Table 3

Parole Before Less Is More, After Less Is More, and Reforming Less Is More

Before Less Is More	Less Is More	Our Reforms
Parole violators are remanded pending revocation.	Most technical violators are never detained; absconding technical violators and criminal violators are given a recognizance hearing and must be released under the least restrictive means necessary to ensure they appear at subsequent hearings.	Many technical violators are never detained; criminal violators and technical violators who either abscond or who committed a serious (i.e., bail-eligible) crime are given a recognizance hearing and must be released unless they either are likely to fail to appear or are a substantial risk to public safety.
Preliminary revocation of parole must be supported by probable cause, while final revocation must be supported by a preponderance of the evidence.	Preliminary revocation of parole must be supported by a preponderance of the evidence, while final revocation must be supported by clear and convincing evidence.	Criminal violators who commit a serious (i.e., bail-eligible) offense and technical or criminal violators serving a sentence for a serious offense are subject to the old evidentiary standards; all other violators are subject to the new evidentiary standards.
Parole officers often reported victim testimony as hearsay.	Heightened evidentiary standards make hearsay insufficient, requiring many victims to testify in open court.	Victims' sworn, written testimony is legislatively defined as not hearsay.
DOCCS is represented by its employees, while parolees are represented by lawyers in some phases of the process, conducted under lessened evidentiary standards and often in jails.	DOCCS is represented by its employees, while parolees are represented by lawyers in all phases of the process, conducted under heightened evidentiary standards and in courtrooms whenever possible.	Both DOCCS and parolees are represented by lawyers in all phases of the process, conducted under heightened evidentiary standards (except as above) and in courtrooms whenever possible.
Technical violations can, and often do, lead to parole revocation.	Technical violations are much less likely to lead to parole revocation.	Technical violations are much less likely to lead to parole revocation, but if a technical violation implicates the safety of the supervisee or someone else, it is treated as a criminal violation.

Adding a “Dangerousness” Standard at Revocation

Manhattan Institute scholars and colleagues have extensively criticized the excesses of bail reform.⁵⁹ We will not recapitulate those arguments here, except to reiterate that (1) bail reform dramatically curtailed judges’ discretion, including in many serious cases, and (2) New York State remains the only state in the union where judges are prohibited from weighing a pretrial detainee’s risk to public safety in addition to his risk of subsequent failure to appear.

Advocates of the “least restrictive” standard routinely appeal to the presumption of innocence, which they say entitles detainees to release in almost all cases. People who have been arrested have not been convicted, they argue, and so they should be deprived of their liberty only when absolutely necessary.⁶⁰ But as we’ve established, there is a population of jail detainees to whom this argument does not apply: those subject to the community supervision system. Parolees are, however, as already emphasized, already in the custody of the state and are out walking the streets only from its largesse. While prisoners and parolees do enjoy some due process rights, they are not afforded the same constitutional protections as everyday citizens.⁶¹

Given this, one approach would be to simply undo Less Is More’s incorporation of bail reform to the revocation process. This would likely conflict, however, with the goal of reducing the onerousness of pretrial detention on technical violators. Rather, we see the parole system as an effective place to begin incorporating public safety concerns into pretrial/prerevocation detention. Doing so requires two changes. The first would be to incorporate dangerousness into the recognizance hearing, specifically by amending the new subparagraph vi introduced in section 4 of Less Is More to include “substantial risk to public safety” alongside “substantial risk of willfully failing to appear at the preliminary or final revocation hearings.”⁶² That change would mean that criminal violators and absconding technical violators could be detained on the basis of dangerousness.

What about technical violators who are otherwise dangerous? Resolving this question requires carefully balancing Less Is More’s enhanced rights for technical violators against the interest of public safety. Under the bill, technical violators are not detained unless they fail to appear, but are instead served with a notice to appear. We suggest revising this provision such that technical violators are not detained unless they (a) abscond or (b) are serving a sentence for a serious criminal offense. By “serious,” we mean those crimes that would still qualify an individual for cash bail even following bail reform, including many violent felonies, sex crimes, and weapons offenses.⁶³ If they commit a technical violation, these serious offenders would be detained. They would still be entitled to a recognizance hearing within 24 hours of release, just like other violators, but they could be detained at that hearing on the basis of their substantial risk to public safety.

This approach, we think, would allow judges to restrain the most dangerous offenders while still preserving Less Is More’s protections for petty technical violators. If a hardened criminal commits a technical or criminal violation, a judge should be able to weigh whether or not his liberty imperils the community, but it is possible to allow that while also making sure petty offenders are not unduly incarcerated for minor violations.

Different Evidentiary Standards for Different Violations

While heightened standards are not *de facto* problematic in the case of Less Is More, they have resulted in unintended consequences—consequences that have hurt victims and imperiled public safety. While in the case of the petty technical violator these heightened standards may be a desirable outcome, in the case of the serious criminal violator, the interest of public safety seems better served by preserving old norms for revocation.

Accordingly, we propose a two-tiered system of revocation. For many violators, the reforms of Less Is More would remain in effect. For either (a) serious criminal violators or (b) parolees serving a sentence for a prior serious crime, however, the old rules would still obtain (where “serious” has the same meaning as in the prior section, i.e., crimes eligible for bail). These criminal offenders would still be entitled to the tripartite revocation process that Less Is More delineates, but during their preliminary hearings, DOCCS would only have to demonstrate probable cause of a criminal violation. In final revocation hearings, the current “clear and convincing” standard would return to the “preponderance of the evidence” standard.

Some may object that this approach unjustly deprives criminal violators of due process, but nobody seriously contended that the status quo before Less Is More constituted a due process violation. In point of fact, the use of “rules of evidence” in parole revocation hearings—which remain administrative, not judicial, proceedings—is a matter for the legislature and governor’s discretion. The New York State Code pertaining to parole hearings explicitly stipulates that, “The formal rules of evidence observed by courts need not be followed, except that the rules of privilege recognized by law shall be observed.”⁶⁴ To create differing evidentiary standards for different offenses is therefore well within the bounds of permissible rules for revocation hearings.

It makes sense to think of our approach as preserving Less Is More’s heightened protections specifically for those individuals Less Is More was ostensibly meant to protect. We are proposing a framework in which technical violators and many criminal violators receive special privileges, namely a higher evidentiary standard necessary for revocation. Serious violators, however—those who are, we reiterate, still in the custody of the state—would remain as easy to remand as they were prior to Less Is More. This is analogous to the current system by which technical violators are presumptively released on recognizance, while criminal violators must go through a recognizance hearing: different treatment for different offenders.

Incorporate Victims’ Sworn, Written Testimony as Not Hearsay Evidence⁶⁵

As noted previously, Less Is More has for several reasons made it more likely that victims are called to testify in revocation hearings. In particular, we understand that part of the problem is that heightened standards of evidence make the second-hand reporting of victim testimony by DOCCS employees, which is hearsay, less likely to satisfy the new burdens of proof for revocation. More frequent testimony may be to the benefit of supervisees, who are afforded more opportunities to challenge their accusers, but it also can imperil parallel criminal investigations by putting victims on the stand before they are ready. And it puts enormous stress on victims, adding to the time and emotional toll associated with obtaining retribution for the crime perpetrated against them.

The Supreme Court has invited states to develop “creative solutions to the practical difficulties” associated with supervisees’ due process protections.⁶⁶ We take up that invitation by suggesting a simple way to resolve this issue: establish by law that where good cause exists not to allow confrontation, sworn, written victim testimony is not hearsay for purposes of evidence in a revocation hearing.⁶⁷ Again, hearsay evidence is already admissible during revocation hearings, so our proposal would simply treat written, sworn victim statements as though they were offered via live testimony.

Doing so would allow victims to contribute to the evidentiary record for revocation, while not asking them to do even more to get the justice they are owed. At the same time, our proposed narrow rule respects supervisees’ due process protections: written, sworn statements bear substantial indicia of reliability and would be afforded nonhearsay status only after a hearing officer finds good cause not to allow confrontation.⁶⁸ And it would otherwise preserve Less Is More’s heightened standards of evidence, thereby better balancing the interests of victims and defendants.

Fund Representation for Both Sides of the Parole Process

Some defense attorneys routinely argue that DOCCS employees are ill-equipped and unqualified to litigate revocation hearings. Under *Less Is More*, revocation proceedings are no longer permitted to be held in jails or prisons and instead are housed in courthouses or suitable community buildings, usually open to the public. Criminal revocation is appealable into the full appellate system, not just to the Board of Parole, and the burden of proof on DOCCS employees has been substantially enhanced.

All together, these procedural changes create a far more complex and legalistic revocation system. What was once a purely administrative proceeding has taken on many of the trappings of a full court hearing. While DOCCS remains represented by employees without law degrees, however, the parole defense bar is fully equipped to pursue cases in a more court-like setting. The Legal Aid Society, for example, has had a parole revocation defense unit in operation for half a century.⁶⁹

As such, to ensure the integrity of the revocation process, a new, fully funded parole apparatus staffed with experienced lawyers and support staff is needed. New York State should endeavor to hire a range of prosecutors, paralegals, counselors, and victims' advocates. These individuals would be fully integrated and embedded within DOCCS, and they would become the actors primarily responsible for handling revocation hearings.

A robust system of career parole professionals would redound to the benefit of all involved in parole revocation. Accused violators would receive first-class representation from advocates specialized in parole revocation. The government could rest assured that cases are now being handled by attorneys familiar with the realities of our adversarial trial system, and, of course, victims could now be protected by advocates familiar with the rules of evidence and cross-examination. DOCCS would also be able to offer victims access to counselors trained in supporting victims of violent crime.

Although a major change to the current paradigm, funding representation on both sides of the parole process would recognize the new complexities of the post-*Less Is More* landscape. The new act created a wholly unique revocation process. As such, the interests of justice are best served by hiring a new cohort of parole professionals, specially trained in the nuances and contours of the new system.

A Technical Violation Safety Valve

As mentioned previously, technical violations can sometimes be used to deter serious offending or incapacitate those at risk of reoffense. *Less Is More*'s blanket approach to technical violations, prohibiting or dramatically curtailing their use, limited the public safety function they used to serve. However, the change also curtailed the misuse of technical violations for petty offenses—a central goal of the bill.

How, then, can we maintain the spirit of *Less Is More* while also keeping an eye toward public safety? We think a reasonable way to square this circle is the approach floated by Democratic state lawmakers Sen. Joseph Addabbo, Jr., and Asm. Monica Wallace in their respective bills, S.9266 and A.9500.⁷⁰ Their proposals would amend the text of *Less Is More* to add a public safety component. Specifically, any technical violation that “may result in serious harm to the releasee or others” is treated as a criminal rather than technical violation.

In effect, adding the Addabbo/Wallace carve-out would mean that parole officers would now possess a potent tool to incapacitate relevant violators under specific and narrow circumstances. If, for example, a parolee was out after curfew in order to pursue a gang beef, detention or temporary reincarceration would now be on the table, too.

In effect, such a safety valve would allow both parole officers and assistant district attorneys to check the behavior of clients who were on an obvious path to dangerous behavior, while also preserving the protections afforded for genuinely minor technical violations. Alongside the reforms proposed above, this would reintroduce the deterrent and incapacitative use of the noncriminal violation without losing the basic reform agenda of Less Is More.

Conclusion

This past August, 55-year-old Van Phu Bui allegedly assaulted 52-year-old Jesus Cortes, sucker-punching him in the back of the head and putting Cortes in a coma. Bui was initially charged with attempted murder, but after those charges were reduced to be ineligible for bail, he was released under supervision pending trial.⁷¹ That ruling sparked outrage from the *New York Post*, which splashed Bui on its front page. Bui, as it turns out, was on lifetime parole for sexually abusing a minor. Responding to the *Post's* attention, Hochul ordered Bui arrested for a criminal violation of his parole, and he was finally detained pending revocation (and prosecution for the new crime) at the parole recognizance hearing.⁷²

In one sense, this is a story about the parole system working when the bail system did not. But one wonders: if the *Post* hadn't covered Bui's story, would it have worked out the same way? After all, if he was released at arraignment for the new crime, absent outside intervention, he likely would have been released at the recognizance hearing for his parole revocation. For every offender like Bui whom the parole system catches, we have shown that there are potentially hundreds now walking free. The *Post* alone is not a sufficient check on this system: more systematic revisions are needed.

New Yorkers want a better criminal justice system. That means they want one that's fairer—one that sends fewer people away for petty offenses, but they also want one that keeps them safe and doesn't put serious criminals back on the streets. Less Is More was presented to the public as adhering to these ideals, both improving fairness for technical violators and preserving, or even improving, public safety.

In reality, Less Is More's systematic alterations to the community supervision system almost certainly have unnecessarily released serious, sometimes violent offenders, some of whom go on to commit serious, sometimes violent offenses. By making changes to the procedure of parole revocation, it put a weight on the scales not just for the most sympathetic parolees but also for hardened criminals whom the parole system would otherwise be deterring or incapacitating. In the name of fairness, it sacrificed public safety.

That sacrifice, however, was unnecessary. Common sense reforms to Less Is More could reduce unnecessary and unjustified releases while still preserving the spirit of the bill. Doing so would allow New Yorkers to have the criminal justice reform that they want, without the added cost of decreasing the public safety they also desire.

About the Authors



Charles Fain Lehman

Charles Fain Lehman is a fellow at the Manhattan Institute for Policy Research, working primarily on the Policing and Public Safety Initiative, and a contributing editor of City Journal. He has addressed public safety policy before the House of Representatives, at universities including Cornell and Carnegie Mellon, and in the Wall Street Journal, Dallas Morning News, New York Post, National Review, and elsewhere. He was previously a staff writer with the Washington Free Beacon, where he covered domestic policy from a data-driven perspective. Lehman graduated from Yale in 2016 with a BA in history.



Elias Neibart

Elias Neibart is a JD candidate at Harvard Law School. He received his MPhil in Political Thought and Intellectual History at the University of Cambridge. Neibart is also a Krauthammer Fellow with the Tikvah Fund. A 2020 graduate of Emory University, Neibart earned his undergraduate degree in political theory and philosophy, graduating Phi Beta Kappa and summa cum laude. He previously worked in the New York County District Attorney's Office.

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filed a FOIL request. The resulting files, going back to June of 2016, are now publicly available through a Github repository, updated daily with each new file (<https://github.com/CharlesFainLehman/Rikers-DIC>).

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- 56 Wendy Wright, “NY Parole Officers Discuss Impact of ‘Less Is More’ Act,” *Spectrum News* 1, March 31, 2022.
- 57 See, e.g., Tamar Lapin, “Man Who Allegedly Shot 14-Year-Old Girl Was out on Bond in Gang Assault Case,” *New York Post*, Feb. 2, 2022; Kenneth Garger and Amanda Woods, “Parolee Charged with Hurling Slur at Asian Man, Shoving Him on Subway,” *New York Post*, Jan. 21, 2022; Tina Moore et al., “Suspect in Shooting of 13-Year-Old in Bronx Was out on Parole—and Bail,” *New York Post*, Nov. 24, 2021; Amanda Woods, Larry Celona, and Bruce Golding, “Paroled Ex-Con Charged with Murder in Stray-Bullet Shooting of NYC Mom,” *New York Post*, Nov. 16, 2021.
- 58 “‘Less Is More’: Less Resources, Less Services, Less Funding,” New York State Public Employees Federation, Nov. 23, 2021.
- 59 See, e.g., Rafael A. Mangual, “Reforming New York’s Bail Reform”; Jim Quinn, “More Criminals, More Crime: Measuring the Public Safety Impact of New York’s 2019 Bail Law,” Manhattan Institute, July 28, 2022.
- 60 The Supreme Court has ruled that pretrial detainees can be detained on the basis of dangerousness, *U.S. v. Salerno*, 481 U.S. 739 (1987).
- 61 *Morrissey v. Brewer*, 408 U.S. 471, 482 (1972); *Wolff v. McDonnell*, 418 U.S. 539, 94 S. Ct. 2963 (1974); *Moore v. Vega*, 371 F.3d 110 (2d Cir. 2004); *Pennsylvania Bd. of Probation and Parole v. Scott*, 524 U.S. 357, 118 S. Ct. 2014 (1998).
- 62 Senate Bill S1144A.
- 63 For a full list, see N.Y. CPL Ch. 11-A(3)(P) §530.40.
- 64 N.Y. Comp. Codes R. & Regs. tit. 9 § 8005.2
- 65 We thank John Ketcham, MI fellow, for assistance with this section.
- 66 *Gagnon v. Scarpelli*, 411 U.S. 778, 782 n.5 (1973): “While in some cases there is simply no adequate alternative to live testimony, we emphasize that we did not in *Morrissey* intend to prohibit use where appropriate of the conventional substitutes for live testimony, including affidavits, depositions, and documentary evidence. Nor did we intend to foreclose the States from holding both the preliminary and the final hearings at the place of violation or from developing other creative solutions to the practical difficulties of the *Morrissey* requirements.”
- 67 This has some parallel in Rule 801(d) of the Federal Rules of Evidence, in which categories of evidence are defined as not hearsay, even though they would otherwise qualify as such.

- ⁶⁸ See, e.g., *Matter of Edwin L.*, 88 N.Y.2d 593, 612 (N.Y. 1996).
- ⁶⁹ “Parole Revocation Defense Unit,” The Legal Aid Society, accessed Aug. 31, 2022.
- ⁷⁰ Joseph P. Addabbo, Jr., “Senate Bill S9266” 2021–2022 Legislative Session; Monica Wallace, “Assembly Bill A9500,” 2021–2022 Legislative Session.
- ⁷¹ Ben Feuerherd, “Sex Fiend Who Nearly Killed NYC Man with Sucker Punch Freed without Bail,” *New York Post*, Aug. 18, 2022.
- ⁷² Zach Williams et al., “Going to Do This Each Time, Gov? Hochul Orders Arrest of Released Sex Fiend Sucker Punch Attacker,” *New York Post*, Aug. 19, 2022; Griffin Kelly, Melissa Klein, and Georgett Roberts, “Sex Fiend Who Sucker Punched Stranger Described as ‘Imminent Threat’ at Hearing,” *New York Post*, Aug. 20, 2022.