NOT SO CIVIL COMMITMENT: A PROPOSAL FOR STATUTORY REFORM GROUNDED IN PROCEDURAL JUSTICE

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ABSTRACT

Every year, millions of Americans struggle with serious mental illness. Of them, thousands experience civil, or involuntary, commitment—that is, hospitals invoke the coercive power of the state to force these individuals into psychiatric hospitals against their will. Whether someone requires hospitalization is a complex question of psychology, medicine, and substantive law.

But the process of civil commitment itself is troubling. Across the board, states fail to afford those facing civil commitment meaningful procedural protections. Current state laws subject individuals facing commitment to extended periods of confinement with little to no judicial intervention. Indeed, individuals facing commitment may wait weeks or more for a judicial hearing. And when hearings do occur, they start and end in a matter of minutes. Within those few minutes, little advocacy occurs: lawyers are often passive, judges are often impatient, and respondents rarely have the chance to speak. Worse, some states fail to provide hearings at all. In sum, civil commitment occurs in "pitch darkness."

Civil commitment procedure should limit, not compound, these harms. Applying fundamentals of procedural justice, this Note proposes three statutory reforms to increase fairness to those experiencing civil commitment. First, this Note calls for states to hold probable cause hearings within seventy-two hours of confinement. Second, states should explicitly define the duties and role of counsel within commitment proceedings. Third, states should task community

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mental health boards with monitoring the commitment process to increase compliance with the law and bring visibility to these proceedings. Ultimately, this Note aims to promote procedural justice for those facing civil commitment and rekindle a conversation about how states treat those experiencing serious mental illness.

INTRODUCTION

"Did I need to be committed? Maybe. But I was not committed because someone made that determination fairly and considerately. I was committed because I had started a chain reaction that swallows people."[1]

On one September day, a Baltimore police officer saw Mallory Green wandering barefoot into traffic.[2] To the officer, Mallory seemed confused and unaware of her surroundings.[3] Within moments, Mallory was nearly hit by a car.[4] The officer brought Mallory to the emergency room of a local hospital.[5] When she arrived, doctors found her agitated.[6] She needed emergency medication to calm down.[7] Hospital psychiatrists then evaluated her and determined that she needed inpatient psychiatric care.[8] However, Mallory disagreed.[9] And so the hospital began the paperwork to involuntarily commit Mallory—to use the coercive power of the state to force her to stay in the hospital against her will.[10]

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1. Nick Keppler, *What It's Like To Be Held in a Psych Ward Against Your Will*, VICE (Nov. 30, 2017, 6:41 PM), https://www.vice.com/en/article/vb3web/held-in-psych-ward-against-my-will [https://perma.cc/72FS-UN7U].

2. J.H. v. Prince George's Hosp. Ctr., 165 A.3d 664, 671 (Md. Ct. Spec. App. 2017). The court refers to the respondent only by her initials, M.G. *Id.* at 671–74. This Note instead uses a pseudonym, Mallory Green.

3. *Id.* at 671.

4. *Id.*

5. *Id.*

6. *Id.* at 672.

7. *Id.*

8. *Id.*

9. *See id.* (noting that Mallory "did not agree to voluntarily admit herself").

10. *See* CHRISTOPHER SLOBOGIN, ARTI RAI & RALPH REISNER, LAW AND THE MENTAL HEALTH SYSTEM: CIVIL AND CRIMINAL ASPECTS 704–05 (5th ed. 2009) (defining involuntary commitment). This Note uses the terms "involuntary commitment" and "civil commitment" interchangeably.

While the hospital worked to find an available bed, Mallory waited in the emergency department.[11] Ultimately, it took forty-one hours, well over Maryland's statutory limit of thirty hours,[12] to move Mallory out of the emergency department and into an appropriate psychiatric facility.[13] There, in a locked psychiatric unit, Mallory waited for a chance to legally challenge her confinement.[14] Under Maryland law, Mallory could wait up to ten days for that chance.[15]

Finally, Mallory received a hearing on the merits of her confinement.[16] To keep Mallory in the hospital, the state needed to show by clear and convincing evidence that Mallory had a mental disorder, needed inpatient care, presented a danger to herself or others, refused to admit herself voluntarily, and that no less restrictive alternative to inpatient care existed.[17] To meet that burden, the hospital called the doctor who had been treating Mallory as its sole witness.[18] The doctor testified that Mallory suffered from substance-induced psychosis and psychotic chronic mental illness.[19] The doctor explained that Mallory was a "threat to her own safety because [she was found]

11. *See J.H.*, 165 A.3d at 673 (discussing the hospital admission process). Unfortunately, psychiatric boarding—the practice of housing psychiatric patients in emergency departments or even hospital hallways as they wait for beds to become available—is common. DAVID BENDER, NALINI PANDE & MICHAEL LUDWIG, A LITERATURE REVIEW: PSYCHIATRIC BOARDING 1 (2008), https://aspe.hhs.gov/sites/default/files/private/pdf/75751/PsyBdLR.pdf [https://perma.cc/WZ22-U9T6]. For a discussion of some of the harms of psychiatric boarding, see generally Kimberly Nordstrom, Jon S. Berlin, Sara Siris Nash, Sejal B. Shah, Naomi A. Schmelzer & Linda L.M. Worley, *Boarding of Mentally Ill Patients in Emergency Departments: American Psychiatric Association Resource Document*, 20 W.J. EMERGENCY MED. 690 (2019) and AM. COLL. EMERGENCY PHYSICIANS, THE IMPACT OF BOARDING PSYCHIATRIC PATIENTS ON THE EMERGENCY DEPARTMENT: SCOPE, IMPACT AND PROPOSED SOLUTIONS (2019), https://www.acep.org/globalassets/new-pdfs/information-and-resource-papers/the-impact-of-psychiatric-boarders-on-the-emergency-department.pdf [https://perma.cc/28Y8-MDMB].

12. MD. CODE ANN., HEALTH–GEN. § 10-624(b)(4) (West 2022).

13. The amount of time Mallory spent in the emergency department was not clear at the hearing. *J.H.*, 165 A.3d at 673. However, the presiding judge made clear that the result would be no different "even if [Mallory] was in [the emergency] unit for 41 hours." *Id.*

14. *See id.* (noting that Mallory was admitted to the psychiatric unit).

15. The date of Mallory's admission is not clear from the record on appeal. *Id.* at 672 n.5. However, Maryland law permits the state to wait up to ten days before providing Mallory with a hearing. MD. CODE ANN., HEALTH–GEN. § 10-632(b) (West 2022).

16. *J.H.*, 165 A.3d at 672.

17. *Id.* at 674; MD. CODE ANN., HEALTH–GEN. § 10-632(e)(2) (West 2022).

18. *J.H.*, 165 A.3d at 672.

19. *Id.*

incoherent, walking in the street" and that inpatient care was necessary to stabilize her condition.[20]

On her side, Mallory was represented by an attorney, likely a local public defender.[21] Her attorney did not call any witnesses, and Mallory did not testify.[22] In fact, her attorney did not challenge any of the doctor's testimony.[23] Instead, her attorney moved to have her released on procedural grounds, noting that she had remained in the emergency department well beyond the statutorily prescribed time limit.[24] Further, her attorney argued, there was no evidence that she was given the required notice of her status as an involuntary patient or of this hearing.[25] The presiding judge agreed, acknowledging that the "necessary procedures ha[d] not been shown to have been followed" and, as a result, Mallory was "entitled to be discharged."[26]

But Mallory was not discharged.[27] The judge "[did not] think it would be good for either the patient or the hospital to discharge her."[28] And so the judge ordered Mallory to be involuntarily committed to a psychiatric hospital,[29] where Mallory could remain for as long as six months.[30]

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20. *Id.* Little more is known about Mallory. The appellate record does not reveal whether Mallory had a family or support system outside the hospital. *See id.* at 671–74 (discussing only Mallory's psychiatric symptoms).

21. *Id.* at 672; *see* MD. DEP'T OF HEALTH, BEHAV. HEALTH ADMIN., INVOLUNTARY COMMITMENT STAKEHOLDERS' WORKGROUP REPORT 6 (2021) [hereinafter WORKGROUP REPORT], https://health.maryland.gov/bha/Documents/Involuntary%20Commitment%20Stakeholders.Final%20report%208.11.21.docx.pdf [https://perma.cc/BB9Z-HVZ2] (noting that of the 9,612 total involuntary commitment proceedings in Maryland in 2020, only one person retained private counsel).

22. *J.H.*, 165 A.3d at 672.

23. *See id.* (noting that Mallory's attorney attacked only the procedural failures).

24. *Id.*

25. *Id.*

26. *Id.* at 672–73.

27. *Id.* at 673.

28. *Id.*

29. Before doing so, the hospital warned that Mallory "clearly [was] not in any condition to leave the hospital at this time." *Id.* In response, the presiding judge determined that the "only remedy that [the judge] could grant would be to allow the Hospital to reopen their case and present [additional] evidence." *Id.* That additional testimony failed to clarify exactly how long Mallory had spent in the emergency department. *Id.* Nevertheless, the judge held that these procedural violations were not prejudicial and did not require release. *Id.*

30. Maryland law does not specify how long a commitment order may last, but advocacy groups warn involuntary commitment in Maryland may last as long as six months. NAT'L ALL. ON MENTAL ILLNESS MD., WHAT TO DO IN A PSYCHIATRIC CRISIS IN MARYLAND 4 (2010)

Mallory's story is troubling, but not necessarily because of its outcome. Whether or not Mallory required hospitalization is a complex question of psychology and substantive law. Rather, Mallory's story is troubling because of the lack of procedural justice she received. Mallory spent as many as ten days confined in a locked psychiatric unit, waiting for an opportunity to legally challenge her confinement. And when that opportunity came, Mallory sat, silently, as she heard the presiding judge acknowledge that the state failed to follow the procedural process she was owed.

Mallory is not alone. She is one of the millions of Americans who struggle with serious mental illness.[31] And she is one of the thousands who experience civil commitment each year.[32] Still more troublesome, Mallory received more procedural process than most. Unfortunately, the majority of individuals facing civil commitment receive hearings that last only minutes.[33] Within those precious minutes, little advocacy occurs: lawyers are often passive, judges are often impatient, and respondents like Mallory rarely have the chance to speak.[34] Indeed, commitment hearings "tend to be brief and non-adversarial episodes in which judges appear to 'rubber stamp' the recommendations of

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[hereinafter MARYLAND PSYCHIATRIC CRISIS], http://namimd.org/uploaded_files/3/What_to_do_in_a_Psychiatric_Crisis_PDF_for_Web.pdf [https://perma.cc/HND8-ZXGW].

31. *Mental Health by the Numbers*, NAT'L ALL. ON MENTAL ILLNESS, https://www.nami.org/mhstats [https://perma.cc/3LX3-A3RL], (last updated June 2022). The National Institute of Mental Health defines a serious mental illness as one that results in "serious functional impairment, which substantially interferes with or limits one or more major life activities." *Mental Illness*, NAT'L INST. OF MENTAL HEALTH, https://www.nimh.nih.gov/health/statistics/mental-illness [https://perma.cc/8FKG-G97U], (last updated Jan. 2022).

32. *See* Nathaniel P. Morris, *Detention Without Data: Public Tracking of Civil Commitment*, 71 PSYCHIATRIC SERVS. 741, 741 (2020) (highlighting the lack of data on the frequency of civil commitment in the United States but noting that researchers estimated that "more than one million emergency psychiatric detentions" took place annually between 2013 and 2015). In Maryland alone, nearly ten thousand civil commitment hearings took place in 2020. WORKGROUP REPORT, *supra* note 21.

33. Richard J. Bonnie, *Reforming Civil Commitment: Serving Consumers' Needs While Protecting Their Rights*, 25 DEV. MENTAL HEALTH L. 3, 4 (2006); *see also* Parham v. J.R., 442 U.S. 584, 609 n.17 (1979) (referencing three studies that calculated the average length of a commitment hearing to be between three and ten minutes); Michael L. Perlin, *'Who Will Judge the Many When the Game Is Through?': Considering the Profound Differences Between Mental Health Courts and 'Traditional' Involuntary Civil Commitment Courts*, 41 SEATTLE U. L. REV. 937, 938–39 (2018) [hereinafter Perlin, *Who Will Judge the Many*] (noting that hearings continue to be conducted in a matter of minutes).

34. Perlin, *Who Will Judge the Many*, *supra* note 33; William M. Brooks, *The Tail Still Wags the Dog: The Pervasive and Inappropriate Influence by the Psychiatric Profession on the Civil Commitment Process*, 86 N.D. L. REV. 259, 287 (2010).

clinical expert witnesses."[35] Worse still, some individuals are involuntarily committed without any hearing at all.[36] Taken together, one scholar concluded that civil commitment occurs in "pitch darkness."[37]

Although these hearings—if they occur at all—may only last minutes, their ramifications are striking. The Supreme Court has repeatedly acknowledged that "civil commitment for any purpose constitutes a significant deprivation of liberty."[38] Involuntarily committed individuals are not only "deprived of their physical liberty, they are . . . deprived of friends, family, and community."[39] They are also forced to live in psychiatric hospitals "under the continuous and detailed control of strangers."[40] Beyond the loss of liberty and autonomy, "involuntary commitment to a mental hospital . . . can engender adverse social consequences."[41] Hospitalized individuals "are stigmatized as sick and abnormal during confinement and . . . even after release."[42]

Civil commitment procedure should limit, not compound, these harms. Procedural justice stands for the idea that "people's evaluations of the resolution of a dispute . . . are influenced more by their perception of the fairness of the process employed than by their belief regarding whether the 'right' outcome" was achieved.[43] Accordingly, "when the people affected by a decision-making process perceive the process to be just, they are much more likely to accept the outcomes of

35. BRUCE J. WINICK, CIVIL COMMITMENT: A THERAPEUTIC JURISPRUDENCE MODEL 143 (2005) [hereinafter WINICK, CIVIL COMMITMENT].

36. *See infra* notes 112–115 and accompanying text.

37. Perlin, *Who Will Judge the Many*, *supra* note 33, at 939.

38. Addington v. Texas, 441 U.S. 418, 425 (1979).

39. Parham v. J.R., 442 U.S. 584, 626 (1979) (Brennan, J., concurring in part and dissenting in part).

40. *Id.*

41. *Addington*, 441 U.S. at 425–26.

42. *Parham*, 442 U.S. at 626–27 (Brennan, J., concurring in part and dissenting in part).

43. Thomas L. Hafemeister, Sharon G. Garner & Veronica E. Bath, *Forging Links and Renewing Ties: Applying the Principles of Restorative and Procedural Justice To Better Respond to Criminal Offenders with a Mental Disorder*, 60 BUFF. L. REV. 147, 200 (2012) (citing Professor Tom Tyler's research). *See generally* E. ALLAN LIND & TOM R. TYLER, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE (1988) (presenting "a field of social psychology that . . . views people as more interested in issues of process than issues of outcome" and that "addresses the way in which their evaluations of experiences and relationships are influenced by the form of social interaction" (emphasis omitted)).

the process, even when the outcomes are adverse."[44] Whether someone perceives a process to be just depends on key "process values [such] as participation, dignity, and trust."[45] Like anyone else, individuals with mental illness are affected by these values,[46] and they, too, tend not to believe a procedure was fair when no one heard their voice or took them seriously.[47]

For over forty years, scholars and advocacy groups alike have recognized the problems in the civil commitment system and called for reform.[48] Nevertheless, "the perfunctory nature of civil commitment remains today."[49] This Note proposes three statutory reforms to enhance procedural justice in the commitment process and increase fairness to those experiencing it. First, states should limit the amount of time people like Mallory may wait for judicial intervention by holding a probable cause hearing within seventy-two hours of emergency detention. Second, states should delineate the duties and role of counsel within commitment proceedings, defining the level of preparation and advocacy required. Third, states should task community mental health boards with monitoring the civil

44. Hafemeister et al., *supra* note 43 (quoting Michael M. O'Hear, *Explaining Sentences*, 36 FLA. ST. U. L. REV. 459, 478 (2009)).

45. Perlin, *Who Will Judge the Many*, *supra* note 33, at 955.

46. *Id.*

47. Professors Michele Cascardi, Norman Poythress, and Alicia Hall summarized this research, explaining that psychiatric "patients are sensitive to and able to distinguish procedural as well as distributive justice issues." Michele Cascardi, Norman G. Poythress & Alicia Hall, *Procedural Justice in the Context of Civil Commitment: An Analogue Study*, 18 BEHAV. SCIS. & L. 731, 732 (2000) (quoting Jack Susman, *Resolving Hospital Conflicts: A Study on Therapeutic Jurisprudence*, 22 J. PSYCHIATRY & L. 107, 112 (1994)). In the context of disputes over drug treatment, "patients who felt that their argument had been listened to and given serious consideration were more likely to feel that the procedure was fair than were those who felt that they had not been listened to or taken seriously." *Id.* at 733.

48. *See, e.g.*, John E.B. Myers, *Involuntary Civil Commitment of the Mentally Ill: A System in Need of Change*, 29 VILL. L. REV. 367, 368 (1983) (calling the then-current commitment system "outmoded and unresponsive to the needs of the mentally ill in contemporary society"); Clifford D. Stromberg & Alan A. Stone, *A Model State Law on Civil Commitment of the Mentally Ill*, 20 HARV. J. ON LEGIS. 275, 276–79 (1983) (proposing a model law to address a "second-generation" of problems arising from deinstitutionalization); Agnes B. Hatfield, *The National Alliance for the Mentally Ill: The Meaning of a Movement*, 15 INT'L J. MENTAL HEALTH 79, 79, 88 (1987) (noting that advocating for "changes in involuntary commitment laws" was one of the original goals of NAMI state affiliates at their founding in 1979); Nat'l Ctr. for State Cts., *Guidelines for Involuntary Civil Commitment*, 10 MENTAL & PHYSICAL DISABILITY L. REP. 409, 409 (1986) [hereinafter *State Courts Guidelines*] (proposing "practical measures for improving the civil commitment process within the confines of existing statutory frameworks").

49. Brooks, *supra* note 34, at 285.

commitment process to increase compliance with the law and bring visibility to these proceedings.

This Note does not call for an overhaul of states' statutory schemes or attempt to set forth a comprehensive model act. Rather, it surveys existing state practices to draw inspiration for three targeted statutory reforms. While not a panacea, statutory reform is a first—and necessary—step to improving the process of civil commitment.[50]

This Note will proceed in four parts. Part I summarizes the development of civil commitment within the United States and explains the bare-bones constitutional framework with which states must comply. Part II discusses the procedural mechanics of civil commitment and how that process varies across states. This Part focuses on civil commitment in the emergency context, as it is the "easiest way to get a person hospitalized against his or her will and to forego the procedural safeguards encountered in other commitment routes."[51] Part III identifies three flaws in current commitment procedure: the failure to provide timely hearings, the often inadequate representation of counsel, and the lack of compliance with existing law. Part IV makes the case for reform.

I. THE DEVELOPMENT OF MODERN CIVIL COMMITMENT PRACTICE

While awareness of mental illness has grown in recent years,[52] mental illness is not new. On the contrary, records of mental illness date back over 2,500 years.[53] And for as long as people have struggled

50. *New Report Card of State Psychiatric Treatment Laws Finds Many States Have Outdated or Vague Rules*, TREATMENT ADVOC. CTR. (Sept. 22, 2020) [hereinafter *New Report Card*], https://www.treatmentadvocacycenter.org/fixing-the-system/features-and-news/4323-new-report-card-of-state-psychiatric-treatment-laws-finds-many-states-have-outdated-or-vague-rules [https://perma.cc/75NT-WVVU].

51. Richard Van Duizend, Bradley D. McGraw & Ingo Keilitz, *An Overview of State Involuntary Civil Commitment Statutes*, 8 MENTAL & PHYSICAL DISABILITY L. REP. 328, 329 (1984).

52. *See Mental Health Awareness Month*, NAT'L ALL. ON MENTAL ILLNESS, https://www.nami.org/Get-Involved/Awareness-Events/Mental-Health-Awareness-Month [https://perma.cc/4MXC-7S4B] (recognizing the "national movement to raise awareness about mental health" in part through mental health awareness month); Michele Nealon, *The Pandemic Accelerant: How COVID-19 Advanced Our Mental Health Priorities*, U.N. CHRON. (Oct. 10, 2021), https://www.un.org/en/un-chronicle/pandemic-accelerant-how-covid-19-advanced-our-mental-health-priorities [https://perma.cc/M9N4-G62B] ("COVID-19 . . . accelerated positive momentum in our communities to raise awareness about [mental health] issues . . . .").

53. *See* MICHAEL L. PERLIN & HEATHER ELLIS CUCOLO, MENTAL DISABILITY LAW: CIVIL AND CRIMINAL § 3-2.1 (3d ed. 2019) (noting that "references to the allocation of legal

with mental illness, societies have struggled with how best to care for them.[54] This Part explains how modern civil commitment law reached its current form and outlines its current constitutional framework. Although the U.S. Supreme Court has addressed a handful of cases regarding due process, the Court has not specified the procedural protections to which Mallory and those like her are entitled. As a result, states largely design their own civil commitment systems.

A. The Roots of American Civil Commitment

In the United States, the practice of involuntary commitment dates back to the Founding era.[55] In that period, states classified civil commitment as a medical process, placing the decision to commit in the hands of psychiatrists with little, if any, judicial oversight.[56] Indeed, to involuntarily commit someone, states required little more than "a few words hastily scribbled upon a chance scrap of paper."[57] Doctors were convinced that in order to provide effective treatment, the individual needed to be isolated as rapidly and effectively as possible.[58] As a result, states could commit an individual with "the greatest of ease" and without any "legislative safeguards to protect the personal liberty of the supposedly mentally ill person."[59] Up until the mid-twentieth century, states "largely dispensed with [due process] on the ground that the goal of commitment was therapy, not punishment."[60]

At the same time, the number of state psychiatric institutions—and residents within them—increased.[61] Conditions within each

responsibility for the care and maintenance" of individuals with mental illness extends nearly 2500 years); THE MENTALLY DISABLED AND THE LAW 6 (Frank T. Lindman & Donald M. McIntyre, Jr. eds., 1961) (discussing how "[o]ne of the earliest legal references to the mentally disabled is contained in the Twelve Tables of Rome, which were promulgated in 449 B.C.").

54. PERLIN & CUCOLO, *supra* note 53.

55. *Id.* § 3-2.2 (discussing treatment of individuals with mental illness in colonial America).

56. WINICK, CIVIL COMMITMENT, *supra* note 35, at 4.

57. THOMAS G. MORTON, THE HISTORY OF THE PENNSYLVANIA HOSPITAL, 1751–1895 (Philadelphia, Times Printing House rev. ed. 1897) (1895), *reprinted in* Thomas G. Morton, *The Pennsylvania Hospital: Its Founding and Functions*, *in* THE AGE OF MADNESS: THE HISTORY OF INVOLUNTARY MENTAL HOSPITALIZATION PRESENTED IN SELECTED TEXTS 12, 13 (Thomas S. Szasz ed., 1973).

58. PERLIN & CUCOLO, *supra* note 53, § 3-2.2.

59. *Id.* (quoting ALBERT DEUTSCH, THE MENTALLY ILL IN AMERICA: A HISTORY OF THEIR CARE AND TREATMENT FROM COLONIAL TIMES 419 (2d ed. 1949)).

60. Stromberg & Stone, *supra* note 48, at 275.

61. *See* PERLIN & CUCOLO, *supra* note 53, § 3-2.2 (noting that "institutions proliferated" during the nineteenth century).

institution depended purely on the individual in charge.[62] As the number of institutions continued to grow, institutional neglect "became the rule rather than the exception."[63] Eventually, the media began to expose the "abysmal conditions" in the "overcrowded, underfunded, and understaffed" state psychiatric facilities.[64]

By the 1960s, public perception of mental illness—and specifically psychiatric hospitals—began to change.[65] President John F. Kennedy proclaimed that "abandonment of the mentally ill . . . to the grim mercy of custodial institutions too often inflicts on them . . . a needless cruelty."[66] Congress passed funding bills designed to increase access to community care—treatment on an outpatient basis—rather than institutional care.[67] And perhaps most importantly, the first psychotropic medications became readily available in the United States.[68]

Taken together, these factors led to a mass deinstitutionalization within the United States, where the number of people residing in psychiatric hospitals—voluntarily or otherwise—declined over 75 percent by 1980.[69] As a result, institutions were closed, buildings destroyed, and patient beds eliminated.[70] But deinstitutionalization did not prove to be a panacea: while the daily population of people living in psychiatric facilities decreased, hospital admission rates soared.[71]

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62. Myers, *supra* note 48, at 371.

63. *Id.* at 373.

64. WINICK, CIVIL COMMITMENT, *supra* note 35, at 141; *e.g.*, Albert Q. Maisel, *Bedlam 1946: Most U.S. Mental Hospitals Are a Shame and a Disgrace*, LIFE, May 6, 1946, at 102 (exposing conditions in mental hospitals in the United States).

65. Bernard E. Harcourt, *Reducing Mass Incarceration: Lessons from the Deinstitutionalization of Mental Hospitals in the 1960s*, 9 OHIO ST. J. CRIM. L. 53, 68–71 (2011) (discussing the evolving public perception of mental illness and mental hospitals).

66. Myers, *supra* note 48, at 374 (citing PUBLIC PAPERS OF THE PRESIDENTS: JOHN F. KENNEDY 1963, at 14 (1964)).

67. *Id.* at 391.

68. SLOBOGIN, RAI & REISNER, *supra* note 10, at 706.

69. *See* Myers, *supra* note 48, at 391 ("The number of residents in state and county mental hospitals declined from 559,000 in 1955 to approximately 138,000 in 1980.").

70. PAUL S. APPELBAUM, ALMOST A REVOLUTION: MENTAL HEALTH LAW AND THE LIMITS OF CHANGE 50 (1994). For a descriptive analysis of the deinstitutionalization movement, see generally Christopher J. Smith & Robert Q. Hanham, *Deinstitutionalization of the Mentally Ill: A Time Path Analysis of the American States, 1955–1975*, 15 SOC. SCI. & MED. 361 (1981).

71. SLOBOGIN, RAI & REISNER, *supra* note 10, at 705 (noting that during the period of deinstitutionalization, "the annual admission rate for public mental hospitals almost doubled, from 185,597 to 390,000").

Nevertheless, due in large part to the lack of community resources and adequate public funding for state hospitals,[72] the number of available beds for people like Mallory has continued to shrink.[73]

B. The Constitutional Framework

As public outrage over the conditions in state psychiatric hospitals grew and deinstitutionalization began to gain momentum, legal activists of the civil rights era took note. The civil rights movement had shaped a new generation of lawyers determined to enhance protections for individual and minority rights.[74] By the 1970s, these activists had set their sights on the rights of those with mental illness and specifically the rights of individuals who had been civilly committed.[75]

In response, a flurry of advocacy and litigation regarding the rights of people with mental illness sprouted across the country.[76] A handful of these cases eventually reached the Supreme Court. When first addressing the issue in 1972, the Court reflected that "[c]onsidering the number of persons affected, it is perhaps remarkable that the substantive constitutional limitations on [the commitment] power have not been more frequently litigated."[77] While declining to address "these broad questions," the Court acknowledged that, "[a]t the least, due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed."[78]

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72. Stuart A. Anfang & Paul S. Appelbaum, *Civil Commitment – The American Experience*, 43 ISR. J. PSYCHIATRY & RELATED SCI. 209, 216 (2006).

73. TREATMENT ADVOCACY CTR., GOING, GOING, GONE: TRENDS AND CONSEQUENCES OF ELIMINATING STATE PSYCHIATRIC BEDS, 2016, at 1–2 (2016), https://www.treatmentadvocacycenter.org/storage/documents/going-going-gone.pdf [https://perma.cc/QPX8-8AAJ]. The situation is even more dire "[f]or patients without private insurance or financial resources" because "waiting lists abound for underfunded public mental health resources in the community, as well as for the rare long-term inpatient beds left in the dwindling number of state hospitals." Anfang & Appelbaum, *supra* note 72.

74. WINICK, CIVIL COMMITMENT, *supra* note 35, at 141.

75. *Id.*; *see also State Courts Guidelines*, *supra* note 48, at 415 (noting that the "plight of mental patients became a civil rights issue"); Phyllis Coleman & Ronald A. Shellow, *Ineffective Assistance of Counsel: A Call for a Stricter Test in Civil Commitments*, 27 J. LEGAL PROF. 37, 38 (2003) ("[In] the 1960s, . . . a group of lawyers devoted themselves to championing the civil rights of minority groups including people with mental disabilities.").

76. WINICK, CIVIL COMMITMENT, *supra* note 35, at 141.

77. Jackson v. Indiana, 406 U.S. 715, 737 (1972) (footnote omitted).

78. *Id.* at 737–38.

A few years later, in *O'Connor v. Donaldson*,[79] the Court clarified the substantive standards of commitment.[80] Specifically, states may not detain individuals with mental illness when "they are dangerous to no one and can live safely in freedom."[81] Kenneth Donaldson had spent nearly fifteen years involuntarily confined within a Florida psychiatric hospital.[82] But throughout the entirety of his fifteen-year detention, the state had never demonstrated that Mr. Donaldson posed a danger to others.[83] The Court agreed that Mr. Donaldson's confinement violated his constitutional right to liberty.[84] The Court warned that "[m]ere public intolerance or animosity cannot constitutionally justify the deprivation of a person's physical liberty."[85] Nevertheless, given the narrow issue presented, the Court managed to once again duck the broader constitutional questions of "whether, when, or by what procedures, a mentally ill person may be confined by the State."[86]

In the nearly fifty years since *Donaldson*, the Court has offered little guidance. The Court has only specified the minimum burden of proof that states must meet in a civil commitment hearing.[87] While states are free to require a higher burden, the Court has held that states must show that an individual meets the substantive criteria for commitment by at least clear and convincing evidence.[88] Beyond this, the Court has remained silent on the procedural rights of those facing involuntary commitment.[89]

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79. O'Connor v. Donaldson, 422 U.S. 563 (1975).

80. *Id.* at 576.

81. *Id.* at 575.

82. *Id.* at 564.

83. *Id.* at 568.

84. *Id.* at 576.

85. *Id.* at 575.

86. *See id.* at 573–74 (recognizing that "[the jury's] verdict, based on abundant evidence, makes the issue before the Court a narrow one" and as a result "[w]e need not decide whether, when, or by what procedures, a mentally ill person may be confined by the State on any of the grounds which, under contemporary statutes, are generally advanced to justify involuntary confinement of such a person").

87. Addington v. Texas, 441 U.S. 418, 433 (1979).

88. *Id.*

89. In fact, the Court has not even referenced civil commitment in the body of a majority opinion since 2010. *See generally* United States v. Comstock, 560 U.S. 126 (2010) (evaluating the constitutionality of the civil commitment of sexually dangerous individuals).

II. CHOOSE YOUR OWN ADVENTURE: CIVIL COMMITMENT ACROSS THE STATES

With this silence, the mantle has been passed to the states. As long as states meet the constitutional threshold, each state may set its own civil commitment procedures.[90] As a result, both "[t]he substantive limitations on the exercise of [the commitment] power and the procedures for invoking it vary drastically among the [s]tates."[91] The Court called this feature "the essence of federalism."[92] However, mental health advocates view this variation less favorably, referring to the U.S. strategy for serious mental illness as "effectively running 50 different experiments, with no two states taking the same approach."[93] This Part surveys modern civil commitment procedure to familiarize the reader with the general process of civil commitment and illustrate the statutory diversity across the states.

A. Initiating Commitment

In theory, anyone—a troubled parent, a worried neighbor, a concerned therapist, or even an anxious friend—may initiate civil

90. *See Addington*, 441 U.S. at 433 (noting that "determination of the precise burden equal to or greater than the 'clear and convincing' standard which we hold is required to meet due process guarantees is a matter of state law which we leave to the [state supreme court]"); Anfang & Appelbaum, *supra* note 72, at 210 ("Although federal court decisions and national health and welfare programs have had some impact on commitment practices, civil commitment laws and regulations are devised by each state . . . .").

91. Jackson v. Indiana, 406 U.S. 715, 736–37 (1972).

92. *Addington*, 441 U.S. at 431. To be sure, one of the hallmarks of a federalist system is the ability of states to serve as laboratories of democracy, trying "novel social and economic experiments without risk to the rest of the country." New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1931) (Brandeis, J., dissenting). This Note does not set out to criticize this system. In fact, it reaps the benefits of the statutory diversity that federalism allows. This Note surveys the diversity across the states, highlighting those states that have made changes to enhance procedural justice and urging the others to follow suit. *See generally* ANDREW KARCH, DEMOCRATIC LABORATORIES: POLICY DIFFUSION AMONG THE AMERICAN STATES (2007) (discussing policy diffusion across the states). *But see, e.g.*, Michael Livermore, *The Perils of Experimentation*, 126 YALE L.J. 636, 645 (2017) (arguing that "experimentation and the information it produces cannot be taken as an unmitigated good").

93. TREATMENT ADVOCACY CTR., GRADING THE STATES: AN ANALYSIS OF U.S. PSYCHIATRIC TREATMENT LAWS 4 (2020) [hereinafter GRADING THE STATES], https://www.treatmentadvocacycenter.org/storage/documents/grading-the-states.pdf [https://perma.cc/XXV4-SP5D].

commitment proceedings by filing a petition.[94] In that scenario, the appropriate state court or officer would review the petition for merit while the respondent, the subject of the petition, remains at liberty.[95]

In practice, however, civil commitment is often triggered by an alternate means: emergency detention.[96] Every state allows law enforcement to immediately detain individuals whom they have reason to believe are mentally ill and a danger to either themselves or others.[97] Due to the exigent circumstances, this process lacks many, if not all, of the judicial or administrative review mechanisms that commitment by petition requires.[98] Moreover, emergency detention is the "predominant commitment route in many states, especially in major cities," often employed "even when no emergency actually exists."[99]

In this scenario, commitment tends to begin with a panicked call to a crisis unit or 911, summoning responders to the scene.[100] Upon

94. *See, e.g.*, MD. CODE ANN., HEALTH–GEN. § 10-614(a) (West 2022) (allowing a petition to be filed by "any person who has a legitimate interest in the welfare of the individual"); ALA. CODE § 22-52-1.2(a) (2022) (allowing "any person" to file an involuntary commitment petition).

95. *See* Van Duizend, McGraw & Keilitz, *supra* note 51 (explaining that in non-emergency commitment, the respondent may be detained only after judicial review). The appropriate court differs from state to state. *See infra* notes 107–111 and accompanying text.

96. Van Duizend, McGraw & Keilitz, *supra* note 51; *see also* MICHAEL L. PERLIN, ADVANCED INTRODUCTION TO MENTAL HEALTH LAW § 4.7.4 (2021) (relying on this research to conclude that emergency commitment has become a "standard means of institutionalization"). This Note uses the terms "emergency detention" and "emergency confinement" interchangeably.

97. Leslie C. Hedman, John Petrila, William H. Fisher, Jeffrey W. Swanson, Deirdre A. Dingman & Scott Burris, *State Laws on Emergency Holds for Mental Health Stabilization*, 67 PSYCHIATRIC SERVS. 529, 530 (2016). Five states—Arkansas, Hawaii, Illinois, Maryland, and New York—do not even require that the danger must be due to mental illness. *Id.* at 531, 532 tbl.3; *see also* Van Duizend, McGraw & Keilitz, *supra* note 51 ("Most state statutes specifically allow apprehension and emergency detention of persons for whom delay would be inappropriate." (emphasis omitted)).

98. Van Duizend, McGraw & Keilitz, *supra* note 51.

99. *Id.*; *see also State Courts Guidelines*, *supra* note 48, at 427 ("For the most part, persons become involuntary patients by means of 'emergency' commitments resulting from apprehensions by police or by simply appearing on the doorstep of a mental health facility.").

100. MARYLAND PSYCHIATRIC CRISIS, *supra* note 30, at 2; NAT'L ALL. ON MENTAL ILLNESS VA., GUIDE TO PSYCHIATRIC CRISIS AND CIVIL COMMITMENT PROCESS IN VIRGINIA 3 (2016), https://namivirginia.org/wp-content/uploads/sites/127/2016/03/GuidetoPsychiatricCrisisandCivilCommitmentProcessforWebGuid-justlawscriteria2016.pdf [https://perma.cc/ZDX3-TS66]; TEX. YOUNG LAWS. ASS'N, COMMITTED TO HEALING: INVOLUNTARY COMMITMENT PROCEDURES 5 (2008), https://www.texasbar.com/AM/Template.cfm?Section=Free_Legal_Information2&Template=/CC/ContentDisplay.cfm&ContentID=30801 [https://perma.cc/K6JD-NM66]; *see also* Leslie Allen, *Short-Term Emergency Commitment Laws Require Police To Assess Symptoms of Mental Illness*, BILL OF HEALTH (Nov. 25, 2014), https://blog.petrieflom.law.harvard.edu/2014/11/25/short-term-emergency-commitment-laws-require-police-to-assess-symptoms-of-mental-illness

arrival, officers observe the individual and decide if a psychiatric evaluation is necessary.[101] If they believe it is, officers will detain the individual and bring them to a local hospital[102]—often using the back of their squad cars as transportation.[103]

At the hospital, treatment staff examine and evaluate the individual.[104] If the examiner concludes that the individual requires hospitalization and they refuse admission, the hospital may detain them for a statutorily specified amount of time.[105] Once this emergency hold has begun, the hospital must make a choice: release the individual or continue to civil commitment proceedings.[106]

B. Judicial Hearings

States vest the authority to preside over civil commitment cases in various bodies. In some states, the probate court has jurisdiction over civil commitment.[107] In others, the general state court hears civil commitment cases.[108] However, a small minority of states has delegated

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[https://perma.cc/H4X9-HVX6] (discussing a dataset demonstrating that "[p]olice officers serve as first responders for mental health crisis treatment by legislation in nearly every state"). Officers may also stumble upon the individual without a call, like the officer who found Mallory wandering into traffic. J.H. v. Prince George's Hosp. Ctr., 165 A.3d 664, 671 (Md. Ct. Spec. App. 2017).

101. TREATMENT ADVOCACY CTR., ROAD RUNNERS: THE ROLE AND IMPACT OF LAW ENFORCEMENT IN TRANSPORTING INDIVIDUALS WITH SEVERE MENTAL ILLNESS, A NATIONAL SURVEY 4 (2019) [hereinafter ROAD RUNNERS], https://www.treatmentadvocacycenter.org/storage/documents/Road-Runners.pdf [https://perma.cc/P9YJ-4NKZ].

102. MARYLAND PSYCHIATRIC CRISIS, *supra* note 30, at 2; ROAD RUNNERS, *supra* note 101.

103. *See* ROAD RUNNERS, *supra* note 101, at 19 ("[P]eople experiencing a psychiatric crisis are frequently transported in the same manner as individuals who have committed a crime.").

104. *Id.* at 4; *see also* Van Duizend, McGraw & Keilitz, *supra* note 51, at 332 (discussing prehearing examination procedures).

105. ROAD RUNNERS, *supra* note 101. The length of an emergency hold varies by state. Hedman et al., *supra* note 97, at 528 tbl.1. However, most states cap their holds at seventy-two hours. *Id.*

106. At any point during hospitalization, an individual may consent to inpatient treatment. In that case, there is no longer a need for civil commitment. Similarly, the treatment team may decide that the respondent no longer requires involuntarily commitment and release the individual.

107. *E.g.*, CONN. GEN. STAT. § 17a-497(a) (2021) ("The jurisdiction of the commitment of a person with psychiatric disabilities shall be vested in the . . . court of probate . . . ."); MO. REV. STAT. § 632.410 (2022) ("Venue . . . shall be in the court having probate jurisdiction . . . ."); OHIO REV. CODE ANN. § 5122.15(A) (West 2022) ("[H]earings shall be conducted by a judge of the probate court . . . .").

108. *See, e.g.*, DEL. CODE ANN. tit. 16, § 5008(a) (2022) (instructing hospitals to file petitions for commitment with the superior court or family court); KAN. STAT. ANN. § 59-2954(a) (2022) (empowering district courts to issue *ex parte* emergency custody orders); VT. STAT. ANN. tit. 18, § 7612(b) (West 2022) (assigning jurisdiction to the family division of the local superior court).

this responsibility to nonjudicial bodies.[109] For example, the judge in Mallory's case was actually an administrative law judge appointed to hear a range of administrative hearings.[110] As another example, West Virginia authorizes the chief judge to "appoint a competent attorney . . . to serve as mental hygiene commissioner[] to preside over involuntary hospitalization hearings."[111]

No matter who hears the case, every state provides individuals like Mallory *the opportunity for* a hearing. But not all states provide hearings automatically. On the contrary, some states require the respondent to submit a request in writing.[112] For example, New York provides hearings only to those individuals who ask for them—or those with attorneys or family members who ask for them.[113] Otherwise, confinement continues unchallenged and without judicial oversight. Likewise, in Colorado, an individual cannot obtain a hearing unless they or their attorney request one.[114] Absent a request, Colorado may detain an individual without a hearing for up to six months.[115] Only at that point must the respondent receive a hearing.[116]

Fortunately, the vast majority of states provide hearings as of right.[117] That is, absent any waiver or extension, the individual must

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109. *E.g.*, NEB. REV. STAT. § 71-924 (2022) (requiring commitment hearings to be held by a mental health board); 50 PA. STAT. AND CONS. STAT. § 7109(a) (West 2022) (allowing proceedings to be conducted by a "mental health review officer").

110. *See* J.H. v. Prince George's Hosp. Ctr., 165 A.3d 664, 666 (Md. Ct. Spec. App. 2017) ("Appellant was afforded a hearing before an administrative law judge . . . .").

111. W. VA. CODE § 27-5-10(a) (2022).

112. COLO. REV. STAT. § 27-65-107(6) (2022); CONN. GEN. STAT. § 17a-498(g) (2021); N.Y. MENTAL HYG. LAW § 9.39(a)(2) (McKinney 1985); OKLA. STAT. ANN. tit. 43A, § 5-415(B) (West 2022).

113. N.Y. MENTAL HYG. LAW § 9.39(a)(2) (McKinney 1985).

114. COLO. REV. STAT. § 27-65-107(6) (2022) (allowing respondent to "file a written request" for judicial intervention).

115. *See id.* § 27-65-109(5) (requiring a hearing should the state seek to extend detention beyond six months).

116. *Id.*

117. ALA. CODE § 22-52-8 (2022); ALASKA STAT. § 47.30.735(a) (2022); ARIZ. REV. STAT. ANN. § 36-535 (2022); ARK. CODE ANN. § 20-47-210 (2022); CAL. WELF. & INST. CODE § 5256 (West 2022); CONN. GEN. STAT. § 17a-498 (2021); DEL. CODE ANN. tit. 16, § 5009 (2022); D.C. CODE § 21-545 (2022); FLA. STAT. § 394.467 (2022); GA. CODE ANN. § 37-3-62 (2022); HAW. REV. STAT. § 334-60.5 (2021); IDAHO CODE § 66-326 (2022); 405 ILL. COMP. STAT. 5/3-611 (2014); IND. CODE § 12-26-5-9 (2022); IOWA CODE § 229.11 (2018); KAN. STAT. ANN. § 59-2959(b) (2022); KY. REV. STAT. ANN. § 202A.051 (West 2022); LA. STAT. ANN. § 28:55(A) (2022); ME. STAT. tit. 34-B, § 3864 (2022); MD. CODE ANN., HEALTH–GEN. § 10-632 (West 2022); MASS. GEN. LAWS ch. 123, § 7(c) (2022); MICH. COMP. LAWS § 330.1452 (2022); MINN. STAT. § 253B.08 (2022); MISS.

receive a hearing within a statutorily set period. But the amount of time individuals wait for these hearings varies dramatically. If someone is detained in an emergency situation in, for example, Minnesota, the state must hold a hearing within seventy-two hours, excluding weekends and holidays.[118] But were the same series of events to occur in Mississippi, the state may wait seven days to hold a hearing.[119] Many states fall near Mississippi, requiring a hearing within five to seven days of detention, excluding weekends and holidays.[120] But some states lag behind even a seven day hearing requirement. In Maryland, people like Mallory may have to wait up to ten days.[121] And in both Rhode Island[122] and South Carolina,[123] they can wait up to fifteen days—over two weeks.

Some states have increased judicial involvement in the civil commitment process by holding two hearings: first, a preliminary or

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CODE ANN. § 41-21-71 (2022); MO. REV. STAT. § 632.335(1) (2022); MONT. CODE ANN. § 53-21-120 (2021); NEB. REV. STAT. § 71-923 (2022); NEV. REV. STAT. § 433A.220 (2021); N.H. REV. STAT. ANN. § 135-C:31 (2010); N.J. STAT. ANN. § 30:4-27.12 (West 2010); N.M. STAT. ANN. § 43-1-11 (West 2009); N.C. GEN. STAT. § 122C-268(a) (2021); N.D. CENT. CODE § 25-03.1-26(2) (2021); OHIO REV. § 5122.141 (West 2022); OR. REV. STAT. §426.237(4)(b) (2021); 50 PA. STAT. AND CONS. STAT. § 7303(b) (West 2022); CODE ANN. 40.1 R.I. GEN. LAWS § 40.1-5-8(d) (2022); S.C. CODE ANN. § 44-17-410 (2022); S.D. CODIFIED LAWS § 27A-10-5 (2021); TENN. CODE ANN. § 33-6-413 (2021); TEX. HEALTH & SAFETY CODE § 574.005 (2022); UTAH CODE ANN. § 62A-15-631 (West 2021); VT. STAT. ANN. tit. 18, § 7615 (West 2022); VA. CODE ANN. § 37.2-814 (2022); WASH. REV. CODE § 71.05.170 (2022); W. VA. CODE § 27-5-2(f) (2022); WIS. STAT. § 51.20 (2022); WYO. STAT. ANN. § 25-10-109.

118. MINN. STAT. § 253B.07(7)(a) (2022). Other states that hold hearings within seventy-two hours include Alaska (ALASKA § 47.30.715 (2022)), Arkansas (ARK. CODE ANN. § 20-47-210(a)(3) (2022)), New Hampshire (N.H. REV. STAT. ANN. § 135-C:31 (2010)), Texas (TEX. HEALTH & SAFETY CODE § 574.005(b) (2022)), Virginia (VA. CODE ANN. § 37.2-814(A) (2022)), Wisconsin (WIS. STAT. § 51.20(7)(a) (2022)), and Wyoming (WYO. STAT. ANN. § 25-10-109(c) (2022)).

119. MISS. CODE ANN. § 41-21-71 (2022).

120. *See, e.g.*, OR. REV. STAT. § 426.095(2) (2021) (requiring a hearing within five judicial days of initial detention); OHIO REV. CODE ANN. § 5122.141(B) (West 2022) (same); IOWA CODE § 229.11 (2018) (same); ALA. CODE § 22-52-8 (2022) (requiring a probable cause hearing within seven days); MISS. CODE ANN. § 41-21-71 (2022) (requiring a hearing within seven days after a petition is filed); *see also* Stromberg & Stone, *supra* note 48, at 323 (recognizing a trend among states of providing a hearing within five to seven days after admission).

121. MD. CODE ANN., HEALTH–GEN. § 10-632(b) (West 2022).

122. *See* 40.1 R.I. GEN. LAWS § 40.1-5-7(f)–(g) (2022) (allowing up to ten days before patient must be certified); *id.* § 40.1-5-8(d)(1) (2022) (allowing up to five days between certification and preliminary hearing).

123. *See* S.C. CODE ANN. § 44-17-410 (2022) (requiring a hearing to be held within fifteen days of admission).

probable cause hearing and second, a full hearing on the merits.[124] In a preliminary hearing, the presiding official assesses whether the petition demonstrates sufficient probable cause to continue commitment until a full hearing can be held. Wisconsin is one such example. In Wisconsin, the court must hold a probable cause hearing within seventy-two hours after detention begins.[125] At this hearing, the detained individual still receives procedural protections such as the assistance of counsel, but the state need only show probable cause to continue detention.[126] If the state meets its burden, the court will then schedule a full hearing to be held within fourteen days from the date of initial confinement.[127] At this second hearing, the state must then establish that the individual meets the criteria for commitment by a higher burden of proof—at minimum, by clear and convincing evidence.[128]

Some states do not go as far as holding two distinct hearings, like Wisconsin does. Instead of a probable cause *hearing*, some states require only a probable cause *review*.[129] For example, New Jersey requires that hospitals submit to the court a clinical certificate that explains the basis for detention.[130] Upon receipt, the court reviews for probable cause.[131] If the court finds probable cause, the court may authorize temporary detention until a hearing is held.[132] In New Jersey, someone in Mallory's shoes may wait up to twenty days for a hearing.[133]

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124. *E.g.*, ALA. CODE § 22-52-8 (2022); DEL. CODE ANN. tit. 16, § 5009 (2022); IND. CODE § 12-26-5-9 (2022); KY. REV. STAT. ANN. § 202A.051 (West 2022); 50 PA. STAT. AND CONS. STAT. § 7303 (West 2022); TENN. CODE ANN. § 33-6-413 (2021); WIS. STAT. § 51.20 (2022).

125. WIS. STAT. § 51.20(7)(a) (2022). At the request of the individual facing commitment or counsel, the hearing may be postponed for a maximum of seven days beyond the date of initial confinement. *Id.* The state, however, may not request a postponement. *See id.* (providing for postponement only by respondent).

126. *Id.* § 51.20(7)(c).

127. *Id.*

128. *Id.* § 51.20(13)(e); Addington v. Texas, 441 U.S. 418, 433 (1979).

129. S.C. CODE ANN. § 44-17-410(3) (requiring probate court review "to determine if probable cause exists to continue emergency detention"); N.J. STAT. ANN. § 30:4-27.10(f) (West 2014) (demanding probable cause review); IOWA CODE § 229.22(b) (2022) (instructing magistrate to review for probable cause); GA. CODE ANN. § 37-3-62(a) (2022) (instructing court to review petitions for "reasonable cause").

130. N.J. STAT. ANN. § 30:4-27.10(a)(1) (West 2014).

131. *Id.* § 30:4-27.10(f).

132. *Id.* § 30:4-27.10(g).

133. *Id.* § 30:4-27.12.

For both preliminary and full merits hearings, states enjoy broad power to set their own procedural rules. As a result, hearings operate differently in each state. For instance, the fact finder at civil commitment hearings varies. While many states leave the fact-finding to the presiding judge or officer, at least fourteen states allow respondents to elect a jury trial.[134] In addition, while some states allow for a public hearing should the respondent desire one, many default to a closed hearing, allowing only parties and witnesses.[135] Similarly, many states encourage flexibility with hearing location, often allowing the hearing to be held at the detaining facility or another place "not likely to have a harmful effect on the individual's health or well-being."[136]

Once a full hearing has been held, the fact-finder must decide whether the individual meets the state's criteria for involuntary commitment.[137] If the state has met its burden, the court will then order a period of commitment. These periods vary, from as little as thirty days[138] to as long as six months.[139]

134. COLO. REV. STAT. § 27-65-111(1) (2022); D.C. CODE § 21-544 (2022); 405 ILL. COMP. STAT. 5/3-802 (2010); KAN. STAT. ANN. § 59-2960(a)(1) (2022); KY. REV. STAT. ANN. § 202A.076(2) (West 2022); MICH. COMP. LAWS § 330.1458 (2022); MO. REV. STAT. § 632.350 (2022); MONT. CODE ANN. § 53-21-125 (2021); N.M. STAT. ANN. § 43-1-12(B) (West 2009); OKLA. STAT. tit. 43A, § 5-411(3) (West 2022); TEX. HEALTH & SAFETY CODE § 574.032 (2022); WASH. REV. CODE § 71.05.240(6) (2022); WIS. STAT. § 51.20(2)(b) (2022); WYO. STAT. ANN. § 25-10-110(g) (2022).

135. *E.g.*, IOWA CODE § 229.12(2) (2018) ("All persons not necessary for the conduct of the proceeding shall be excluded . . . ."); KAN. STAT. ANN. § 59-2959(c) (2022) ("All persons not necessary for the conduct of the proceedings may be excluded."); KY. REV. STAT. ANN. § 202A.076(1) (West 2022) ("The court may exclude all persons not necessary for the conduct of the hearing."); LA. STAT. ANN. § 28:55(D) (2022) (noting the hearing will be closed); N.C. GEN. STAT. § 122C-268(h) (2021) ("The hearing shall be closed to the public unless the respondent requests otherwise."); WYO. STAT. ANN. § 25-10-110(h) (2022) ("All persons not necessary to protect the rights of the parties shall be excluded from the hearing.").

136. IND. CODE § 12-26-6-5 (2022); 405 ILL. COMP. STAT. § 5/3-800(a) (2015) ("[H]earings shall be held in the mental health facility where the respondent is hospitalized."); MICH. COMP. LAWS § 330.1456 (2022) ("[T]he court shall convene hearings in a hospital."); KY. REV. STAT. ANN. § 202A.076(2) (West 2022) ("The hearing may be held by the court . . . at a hospital."); OR. REV. STAT. § 426.095(1) (2021) (same); 40.1 R.I. GEN. LAWS § 40.1-5-8 (2022) (same).

137. *See supra* note 17 and accompanying text.

138. VA. CODE ANN. § 37.2-817(C)(1) (2022).

139. MASS. GEN. LAWS ch. 123, § 8(d) (2022). These periods can be even longer if the state is seeking to *renew* a commitment order rather than initiate commitment. *See id.* (allowing the state to request a one year commitment at renewal hearing).

C. Appointment of Counsel

While hearing requirements may differ, every state provides for the assistance of counsel in civil commitment hearings.[140] But that assistance takes different forms in different states. While respondents are free to retain their own attorneys, frequently they rely on the assistance of the state's appointed counsel.[141] Many states delegate this work to the local public defender's office.[142] But some states are careful to appoint attorneys with experience representing people with mental illness.[143] For example, Rhode Island provides respondents with "mental health advocates" to act as their counsel.[144] Others, while not going so far as to require the court to appoint attorneys from a specific organization, explicitly require attorneys of requisite competency.[145] For example, Oregon requires that the court appoint "suitable legal counsel possessing skills and experience commensurate with the nature of the allegations and complexity of the case."[146] However, many states take less care, stating only that the court shall appoint an attorney,[147]

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140. Michael Perlin, *Fatal Assumption: A Critical Evaluation of the Role of Counsel in Mental Disability Cases*, 16 LAW & HUM. BEHAV. 39, 44 (1992) [hereinafter Perlin, *Fatal Assumption*].

141. *See supra* note 21.

142. *E.g.*, WIS. STAT. ANN. § 51.20(3); N.H. REV. STAT. ANN. § 135-C:23 (1998); MONT. CODE ANN. § 53-21-116 (2021); FLA. STAT. § 394.467(4) (2022).

143. *E.g.*, MD. CODE ANN., HEALTH–GEN. § 10-625(c)(1) (West 2022) (requiring notice of involuntary admission to the Mental Health Division of the local public defender); N.C. GEN. STAT. § 122C-270(a) (2006) (appointing special mental health counsel from the Office of Indigent Defense Services); N.Y. MENTAL HYG. LAW § 9.39 (McKinney 1985) (requiring notice of involuntary admission to the Mental Hygiene Legal Service); N.M. STAT. ANN. § 43-1-4-B (West 2007) ("When appointing counsel, the court shall give preference to nonprofit organizations offering representation to persons with a mental illness . . . ."); LA. STAT. ANN. § 28:55(B) (2022) (requiring court to appoint counsel from the mental health advocacy service); 405 ILL. COMP. STAT. 5/3-805(1) (2010) (giving preference to attorneys from the Guardianship and Mental Health Advocacy Commission). The work of these attorneys cannot be overstated: on the whole, they provide "top-flight legal representation to persons with mental disabilities in civil commitment hearings." Perlin, *Who Will Judge the Many*, *supra* note 33, at 941. Unfortunately, as discussed *infra*, these attorneys represent but a fraction of those facing commitment. *Id.*

144. 40.1 R.I. GEN. LAWS § 40.1-5-22(6) (2022).

145. OR. REV. STAT. § 426.100(3) (2021); W. VA. CODE § 27-5-4(h)(2) (2022) (requiring the court to "appoint a competent attorney").

146. OR. REV. STAT. § 426.100(3) (2021).

147. *See, e.g.*, NEV. REV. STAT. § 433A.270(1) (2021) (not specifying qualifications of appointed counsel); WASH. REV. CODE § 71.05.230(6) (2022) (same); VA. CODE ANN. § 37.2-814(C) (2022) (same); S.C. CODE ANN. § 44-17-530 (2022) (same); ME. STAT. tit. 34-B, § 3864(5)(D) (2022) (same); ARK. CODE ANN. § 20-47-212 (2022) (same); Perlin, *Fatal Assumption*, *supra* note 140 (noting that the "the vast majority of lawyers who represent the disabled on individual matters are appointed on individual bases" and not from specialized defender services).

leaving courts unencumbered to appoint any available attorney.[148] Those appointed attorneys "almost never measure up to the appropriate ethical or constitutional standards for such representation."[149]

Second, states vary significantly in terms of *when* counsel must be appointed. Most states require that an attorney be appointed at the time—or shortly after—the hospital files a commitment petition.[150] Other states require counsel be appointed only at the preliminary hearing stage.[151] And still others do not specify when the appointment must be made.[152] For example, Utah requires only that "an opportunity to be represented by counsel" be provided at some point "[b]efore the hearing."[153] Similarly, Maryland merely requires that individuals in Mallory's position be advised of "[t]he availability of the services of the legal aid bureaus, lawyer referral services, and other agencies that exist for the referral of individuals who need legal counsel."[154] While Maryland requires the hospital to notify the local public defender, the statute is silent as to when representation begins.[155] And while Indiana acknowledges the right to counsel, the statute fails to explain how or when someone may exercise that right.[156] Thus, while states universally recognize a respondent's right to counsel, states often fail to enshrine that right with sufficient procedural protections.

Finally, states diverge in the duties they assign to appointed counsel. Most civil commitment statutes require only that the state

148. *See* Perlin, *Fatal Assumption*, *supra* note 140.

149. *Id.*

150. *E.g.*, IDAHO CODE § 66-329(7) (2022) ("[T]he court shall appoint counsel . . . no later than the time the application [for commitment] is received by the court."); MINN. STAT. § 253B.07(2c) (2022) (same); COLO. REV. STAT. § 27-65-107(5) (2022) (same); WASH. REV. CODE § 71.05.230(6) (2022) (same); N.D. CENT. CODE § 25-03.1-13(2) (2003) (requiring appointment within twenty-four hours from time petition was filed); TEX. HEALTH & SAFETY CODE § 574.003(a) (2022) (same).

151. *E.g.*, 40.1 R.I. GEN. LAWS § 40.1.5-8(d) (2022).

152. *E.g.*, HAW. REV. STAT. § 334-60.4 (2021); NEV. REV. STAT. § 433A.270(1) (2021); UTAH CODE ANN. § 62A-15-631(14)(a) (West 2021); MD. CODE ANN., HEALTH–GEN. § 10-631(a)(3) (West 2022).

153. UTAH CODE ANN. § 62A-15-631(14)(a) (West 2021).

154. MD. CODE ANN., HEALTH–GEN. § 10-631(a)(3) (West 2022).

155. *Id.* § 10-631(a)(5).

156. *See* IND. CODE § 12-26-2-2 (2022).

appoint counsel, without more.[157] Outside of the context of civil commitment, this makes sense: in most cases, attorneys need not be told how to prepare and advocate for their clients. Moreover, attorneys are bound by ethical rules to meet with their clients and zealously advocate on their behalf.[158] But in the unique context of civil commitment, attorneys commonly assume that their clients are "presumptively incompetent to enter into autonomous decision-making."[159] In this sense, an attorney may feel that they are better equipped to decide what is in their client's best interests, often preventing the required zealous advocacy.[160] Accordingly, a handful of states set ground rules for any attorney preparing for and participating in the civil commitment system.[161] For example, Arizona requires that appointed counsel meet with their clients within twenty-four hours of appointment.[162] And Minnesota demands that attorneys representing those facing civil commitment serve as "vigorous advocate[s] on behalf of the person."[163] With this language, Minnesota makes clear that an attorney's ethical obligation to zealously advocate applies even in civil commitment proceedings.[164]

Ultimately, while all states acknowledge that individuals in civil commitment proceedings are entitled to counsel, who counsel is, when counsel is appointed, and the duties of representation vary significantly.

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157. *See, e.g.*, NEV. REV. STAT. § 433A.270(1) (2021) (not specifying duties of counsel); WASH. REV. CODE § 71.05.230(6) (2022) (same); VA. CODE § 37.2-814(C) (2022) (same); S.C. CODE ANN. § 44-17-530 (2022) (same); ME. STAT. tit. 34-B, § 3864(5)(D) (2022) (same); ARK. CODE ANN. § 20-47-212 (2022) (same).

158. *See, e.g.*, MODEL RULES OF PRO. CONDUCT r. 1.3 cmt. (AM. BAR ASS'N 1983). Every state has adopted a version of the ABA Model Rules. *See, e.g.*, *Alphabetical List of Jurisdictions Adopting Model Rules*, AM. BAR ASS'N, https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/alpha_list_state_adopting_model_rules [https://perma.cc/5KE6-VQVZ], (last updated Mar. 28, 2018).

159. Michael L. Perlin & Naomi M. Weinstein, *Said I, but You Have No Choice: Why a Lawyer Must Ethically Honor a Client's Decision About Mental Health Treatment Even if It Is Not What S/He Would Have Chosen*, 15 CARDOZO PUB. L. POL'Y & ETHICS J. 73, 95 (2016).

160. *See infra* notes 193–196 and accompanying text.

161. MO. REV. STAT. § 632.450 (2022); ARIZ. REV. STAT. ANN. § 36-537 (2022); MICH. COMP. LAWS § 330.1454 (2022).

162. ARIZ. REV. STAT. ANN. § 36-537 (2022).

163. MINN. STAT. § 253B.07(2c)(4) (2022).

164. Eric S. Janus & Richard M. Wolfson, *The Minnesota Commitment Act of 1982 Summary and Analysis*, 6 HAMLINE L. REV. 41, 57 (1983) ("The Act makes clear that, as in other proceedings, counsel should take his instructions from his client, and advocate vigorously within ethical bounds for that position.").

III. THE FLAWS IN CIVIL COMMITMENT PROCEDURE

Building on the discussion of commitment procedure across the states in Part II, this Part focuses on three specific flaws: states' failure to provide a prompt hearing for those facing civil commitment, the absence of clear statutory standards for the role of counsel in commitment hearings, and the lack of compliance with the law in the commitment system. Taken together, these flaws explain how commitment proceedings often take place in "pitch darkness"[165] and inform the need for the statutory reforms proposed in Part IV.

A. Time to Hearing

Nearly fifty years ago, scholars believed the primary procedural issue in emergency detention was "the length of time the individual may justifiably be detained before the state's emergency power expires" and a hearing must be held.[166] Little has changed: many of the laws that authorize prolonged periods of emergency detention have been on the books for decades. For example, New York does not require a hearing as of right[167] and has not altered its procedures for emergency civil commitment since 1986.[168] Maryland's law—the law that allowed Mallory to wait ten days for a hearing—was last modified in 1990.[169] Likewise, South Carolina's law letting respondents wait fifteen days has been on the books since 1991.[170]

But since these laws were enacted, doctors have greatly improved their understanding of serious mental illnesses and how to treat them. As a result, the average length of inpatient hospitalization has declined substantially.[171] In 1990, a patient experiencing serious mental illness would spend weeks or even months receiving inpatient treatment.[172]

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165. Perlin, *Who Will Judge the Many*, *supra* note 33, at 939.

166. Note, *Developments in the Law: Civil Commitment of the Mentally Ill*, 87 HARV. L. REV. 1190, 1265–66 (1974) [hereinafter *Developments*].

167. N.Y. MENTAL HYG. LAW § 9.39(a) (McKinney 1985).

168. *See* 1985 N.Y. Laws 3115 (showing the most recent changes to New York's commitment scheme).

169. *See* 1990 Md. Laws 490 (amending the statute to its current ten-day limit).

170. *See* 1991 S.C. Acts 30 (enacting current fifteen-day hearing regime).

171. Richard C. Boldt, *Emergency Detention and Involuntary Hospitalization: Assessing the Front End of the Civil Commitment Process*, 10 DREXEL L. REV. 1, 19 (2017).

172. Mark L. Ruffalo, *The Dire State of Inpatient Mental Health*, PSYCH. TODAY (June 25, 2019), https://www.psychologytoday.com/us/blog/freud-fluoxetine/201906/the-dire-state-inpatient-mental-health [https://perma.cc/YZ8H-2Z5Y]; *see also* Olufemi Babalola, Vahdet Gormez,

Today, that same patient is rarely hospitalized for more than a week.[173] Nevertheless, laws that allow states to wait weeks before any judicial intervention remain stagnant.

For its part, the U.S. Supreme Court has provided little reason for change. The Court has failed to specify a "clear constitutional rule either requiring the preliminary judicial review of emergency psychiatric detentions or setting an absolute time limit on the period between the commencement of custody and a full adjudicatory hearing."[174] In fact, the Court summarily affirmed a civil commitment scheme that tolerated a forty-five day wait for a hearing.[175]

But for those facing civil commitment, prompt hearings are crucial.[176] As Professor Tom Tyler explains, procedural justice requires participation: "People value the opportunity to present their arguments and state their views even when they indicate that what they say is having little or no influence over the third-party authority."[177] Individuals with mental illness are no different. Research indicates that people experiencing serious mental illness, like anyone else, value participation and can recognize its absence.[178] A judicial hearing is, perhaps, respondents' only chance to have their voices heard on the issue of their liberty. The American Psychiatric Association emphasizes that these hearings should occur promptly.[179] Similarly, the National Center for State Courts calls on states to "involve respondents in commitment proceedings *to the greatest extent and as*

Nisreen A. Alwan, Paul Johnstone & Stephanie Sampson, *Length of Hospitalisation for People with Severe Mental Illness*, 1 COCHRANE DATABASE SYSTEMATIC REVS., art. no. CD000384, 2014, at 1 ("In high-income countries, over the last three decades, the length of hospital stays for people with serious mental illness has reduced drastically.").

173. Ruffalo, *supra* note 172.

174. Boldt, *supra* note 171, at 18.

175. Briggs v. Arafeh, 411 U.S. 911, 911 (1973), *aff'g* Logan v. Arafeh, 346 F. Supp. 1265 (D. Conn. 1972).

176. *State Courts Guidelines*, *supra* note 48, at 478.

177. Tom R. Tyler, *The Psychological Consequences of Judicial Procedures: Implications for Civil Commitment Hearings*, 46 SMU L. REV. 433, 440 (1992).

178. Cascardi, Poythress & Hall, *supra* note 47, at 738.

179. AM. PSYCH. ASS'N, POSITION STATEMENT ON VOLUNTARY AND INVOLUNTARY HOSPITALIZATION OF ADULTS WITH MENTAL ILLNESS 1 (2020) ("Persons subject to involuntary hospitalization are entitled to representation by an attorney and a prompt hearing before an administrative law or judicial officer."); *see also* Rebecca Hollander-Blumoff, *The Psychology of Procedural Justice in the Federal Courts*, 63 HASTINGS L.J. 127, 169 (2011) (noting that litigation delays "may be interpreted as frustrating the voice of the individual litigants").

early as possible."[180] States may lessen some of the harms inherent in involuntary commitment by providing a meaningful, prompt hearing.

B. Attorney Representation

While all states provide for the assistance of counsel in civil commitment hearings, this guarantee is often hollow in practice. As explained in Part II.C, states often fail to ensure that attorneys in civil commitment proceedings have sufficient knowledge and experience in mental health and disability law.[181] And beyond substantive knowledge, attorneys often lack the training to know how best to interact with their clients—individuals suffering from serious mental illness.[182] Further, many states do not specify at what point in a civil commitment proceeding an attorney must be appointed.[183] And states have largely failed to clarify the role that attorneys must take within the hearing itself,[184] paving the way for attorneys to refrain from the zealous advocacy associated with adversarial proceedings.

Building on Part II.C, this Section highlights the reality of attorney performance in commitment hearings to reveal deep procedural problems. At hearings, attorneys often act in a "passive, nonadversarial, or perfunctory manner[]."[185] While there are attorneys who take their work seriously,[186] attorneys often come to hearings unprepared and ready to "accept at face value the conclusions of psychiatric experts without even the slightest degree of skepticism."[187] Attorneys frequently call no witnesses[188] and do not seek an independent psychiatric evaluation.[189] Still more troublesome, some

180. *State Courts Guidelines*, *supra* note 48, at 479 (emphasis added).

181. *State Courts Guidelines*, *supra* note 48, at 465 ("[A]dequate representation of respondents [in commitment proceedings] requires access to information and expertise that most attorneys do not have.").

182. *Id.*

183. *See supra* notes 152–156 and accompanying text.

184. *See supra* note 157 and accompanying text; *Developments*, *supra* note 166, at 1288 ("[S]tatutes generally do not clarify the function which defending counsel is to perform.").

185. Brooks, *supra* note 34, at 287.

186. John Q. La Fond & Mary L. Durham, *Cognitive Dissonance: Have Insanity Defense and Civil*

Commitment Reforms Made a Difference, 39 VILL. L. REV. 71, 113 (1994); *see also supra* note 143.

187. Brooks, *supra* note 34.

188. *Id.* at 288.

189. *Id.* at 289.

judges may encourage this behavior.[190] Judges have been known to "discourage zealous advocacy,"[191] forcing the few attorneys willing to advocate to limit themselves only to the arguments "they believe[d] judges [would] tolerate."[192]

Even if statutes demand it, attorneys struggle to adopt the role of a zealous advocate.[193] Attorneys often act paternalistically towards their clients, "assum[ing] their mentally ill clients do not know what is best for them."[194] Even when clients unequivocally express a desire for continued liberty, their attorneys still may not believe them.[195] Rather, the attorney may believe that "relaxed advocacy will best serve [the] client's interests."[196] In those cases, attorneys function less like advocates and more like clerks, simply reviewing "the paperwork to make sure it is in order, thus giv[ing] the false impression that the client has had the benefit of legal representation."[197] As a result, hearings often start and end in a matter of minutes.[198]

From a procedural justice perspective, respondents have an interest in an adversarial proceeding where their attorneys represent

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190. *Id.* at 288 (noting "instances of vigorous cross-examination often generate hostility from . . . judges").

191. *Id.*; *see also* Bruce J. Winick, *Therapeutic Jurisprudence and the Civil Commitment Hearing*, 10 J. CONTEMP. LEGAL ISSUES 37, 42 (1999) [hereinafter Winick, *Therapeutic Jurisprudence*] ("Judges often discourage attorneys from taking an active part in the hearing or themselves take over the role of questioning witnesses."); Perlin, *Who Will Judge the Many*, *supra* note 33, at 942 n.27 (recounting one attorney's recent experience with "judges who would give more time to petitioner's side and less time to [respondent]," reaching the point where this attorney "would start timing how long petitioner's attorney got to ask questions so that [the attorney] could say [their] cross should be allowed to be at least that long").

192. Brooks, *supra* note 34, at 288.

193. La Fond & Durham, *supra* note 186.

194. *Id.* at 114; *see also* Perlin & Weinstein, *supra* note 159, at 76–77 (2016) ("A model of 'paternalism/best interests' is regularly substituted for a traditional legal advocacy position, and this substitution is rarely questioned."). Crucially, appointed attorneys do not (and should not) act as guardian ad litems. *E.g.*, TENN. CODE ANN. § 33-6-419 (2021). Appointed by the court, a guardian ad litem acts as "an independent advocate who promotes the best interests of minors, elders, and legally incompetent persons." Marcia M. Boumil, Cristina F. Freitas & Debbie F. Freitas, *Legal and Ethical Issues Confronting Guardian ad Litem Practice*, 13 J.L. & FAM. STUD. 43, 43 (2011).

195. *Developments*, *supra* note 166, at 1290.

196. *Id.*

197. Winick, *Therapeutic Jurisprudence*, *supra* note 191, at 43.

198. Professor Michael Perlin suggests a connection between adequate representation and hearing time, noting that "where there is a dedicated state-wide program to provide representation," commitment hearings take substantially longer. Perlin, *Who Will Judge the Many*, *supra* note 33, at 939 n.9.

their desire for continued liberty and advocate zealously on their behalf. Fundamentally, individuals perceive an adversarial process to be more fair than an inquisitorial one[199] and are more likely to be satisfied with and accepting of the outcome.[200] A minutes-long hearing "give[s] many patients the impression that the hearing is an empty ritual rather than a serious attempt to achieve accuracy and fairness."[201] Attorneys are the mouthpieces through which their clients speak; if attorneys simply "roll over" during commitment hearings, their clients are effectively silenced.[202] In essence, respondents are robbed of their ability to participate meaningfully in their hearings.

C. Noncompliance

Even in the few states with stronger procedural protections, "a large gulf exists between the law on the books and the law in action."[203] Several studies have suggested that past statutory reforms have failed "largely because the new statutory language is still broad enough to be flexibly applied."[204] Indeed, "[t]he failure of civil commitment procedures to meet statutory requirements is one of the more reliable findings in the applied social sciences."[205] At bottom, any improvements to states' procedural protections have hardly made these proceedings more accurate or fair.[206]

As a result, commitment proceedings are still happening in the dark, with cases disposed of in a matter of minutes behind closed

199. Douglas S. Stransky, *Civil Commitment and the Right To Refuse Treatment: Resolving Disputes from a Due Process Perspective*, 50 U. MIA. L. REV. 413, 441 (1996).

200. *Id.*

201. Winick, *Therapeutic Jurisprudence*, *supra* note 191, at 42. Professor Bruce Winick goes on to explain that "from the patient's perspective, the hearing may resemble the one presided over by the Queen of Hearts in *Alice in Wonderland*, 'Sentence first—verdict afterward.'" *Id.* at 43 (quoting LEWIS CARROLL, ALICE'S ADVENTURES IN WONDERLAND AND THROUGH THE LOOKING-GLASS 113 (n.p., Hartsdale House 1865)).

202. *See id.* at 54 ("By effectuating, rather than compromising, the client's participatory interests in the commitment process, the attorney can contribute to the client's sense that he or she was treated fairly . . . .").

203. *Id.* at 40.

204. SLOBOGIN, RAI & REISNER, *supra* note 10, at 706 & n.d (summarizing results of studies).

205. Eric Turkheimer & Charles D.H. Parry, *Why the Gap? Practice and Policy in Civil Commitment Hearings*, 47 AM. PSYCH. 646, 646 (1992).

206. La Fond & Durham, *supra* note 186; *see also* Paul S. Appelbaum, *A History of Civil Commitment and Related Reforms in the United States: Lessons for Today*, 25 DEV. MENTAL HEALTH L. 13, 19 (2006) (noting that "everybody involved in [the commitment] process has a great deal more discretion than . . . it looks like on paper").

doors.[207] The proceedings are often held at the detaining facility itself[208] and limited to only necessary parties: attorneys, witnesses, and perhaps a family member.[209] To be sure, a closed hearing in the treating facility offers certain benefits, such as privacy, familiarity, and avoiding transport. But that privacy has a cost. The broader legal community—and the public—have little insight into what happens at these proceedings. No one is watching.

In sum, even when states provide procedural protections, they often fail to meaningfully monitor these systems. Any proposal for reform must be twofold: states must enhance their procedural protections, and they must ensure compliance. Reform will only be successful—that is, those going through civil commitment will only see the benefits—if it changes how the law is applied in practice. Part IV proposes three statutory reforms aimed at solving both problems.

IV. REFORMING THE LAW AND THE PROBLEM OF COMPLIANCE

Part III highlighted three flaws in states' current civil commitment processes. This Part proposes some solutions, drawing inspiration from states that provide procedural justice most effectively. First, Part IV.A makes the case for holding probable cause hearings within seventy-two hours of emergency detention, as New Hampshire does. Part IV.B contends that states should explicitly define the role and duties of counsel in their statutory schemes, drawing inspiration from Wyoming, Arizona, and Minnesota. Then, Part IV.C tackles the issue of compliance by proposing a statutorily mandated mental health board to monitor commitment proceedings.

At the outset, it bears explaining why this Note advocates for statutory reform. In 1984, when the National Center for State Courts published its Guidelines for Involuntary Civil Commitment, the authors agreed that they need not resort to statutory reform: "Much good can be accomplished through less controversial changes in practice that require no new laws."[210] Statutory reform can be cumbersome and clunky.[211] Reform often requires enormous efforts from politicians, advocacy groups, and concerned citizens. To see

207. Perlin, *Who Will Judge the Many*, *supra* note 33, at 939.

208. *See supra* note 136.

209. *See supra* note 135.

210. *State Courts Guidelines*, *supra* note 48, at 416.

211. *Id.* at 409.

nationwide change, this process must be repeated in each state. And as discussed above, statutory reform to commitment procedure often fails to produce its desired result.[212] Why, then, is statutory reform the solution when it might not even change the status quo? Put simply, statutory reform is necessary but not sufficient to reform the civil commitment process. As one advocacy group explained, "the right laws provide a necessary foundation that states can use to build systems that promote a successful continuum of care and better outcomes."[213] While "fixing civil commitment laws represent[s] only a first step, . . . it is an essential one."[214]

This Note advances three specific, targeted statutory reforms. In doing so, this Note seeks to shine a renewed light on commitment procedure in the hopes of enhancing procedural justice for those experiencing civil commitment and rekindling a conversation about how states treat those experiencing serious mental illness.

A. A Probable Cause Hearing Within Seventy-Two Hours

To increase procedural justice, states should provide those facing civil commitment with a timely hearing. Specifically, states should hold a probable cause hearing within seventy-two hours of an individual's initial confinement. New Hampshire's law offers a model. New Hampshire provides that "[w]ithin 3 days after an involuntary emergency admission, . . . there shall be a probable cause hearing . . . to determine if there was probable cause for involuntary emergency admission."[215] At the hearing, the state bears the burden of showing that the commitment had probable cause.[216] That is, the state must show there is probable cause to believe the respondent meets the state's criteria for involuntary commitment.[217] Should the court find probable cause, the detention continues for a maximum of ten days.[218]

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212. *See supra* notes 203–206 and accompanying text.

213. *New Report Card*, *supra* note 50.

214. GRADING THE STATES, *supra* note 93, at 8.

215. N.H. REV. STAT. ANN. § 135-C:31(I) (2010).

216. *Id.*

217. *Id.*; *see also Developments*, *supra* note 166, at 1276 ("[T]he court in a preliminary hearing would quickly determine [if there was] probable cause to believe the individual falls within the statutory standards for commitment.").

218. N.H. REV. STAT. ANN. § 135-C:32 (2010).

To continue detention beyond those ten days, the state must petition the court for a full hearing on the merits of the commitment.[219]

In a dual hearing regime like New Hampshire's, a probable cause hearing need not provide individuals with the array of rights that a full hearing entails. Certainly, an individual should be present and represented by counsel. But the hearing may be informal; as long as the presiding officer "engage[s] in dialogue with the parties,"[220] procedural justice will be increased.[221] Individuals must be afforded the chance to interact with and participate in the system that detains them. This way, at a minimum, as the court weighs the possibility of temporarily stripping them of their liberty, respondents may feel the process was fair.[222]

Seventy-two hours is an appropriate amount of time to allow doctors to provide emergency treatment and attorneys to prepare. The Treatment Advocacy Center, a mental health advocacy group dedicated to increasing access to treatment, recognizes that seventy-two hours is "the shortest amount of time realistically needed to stabilize the patient and, if the individual is not admitted, to discharge them with a long-term care plan."[223] Likewise, the National Center for State Courts agrees that a three-day period provides "a good balance between the need to curtail unwarranted actions taken against the respondent and the need for sufficient time to permit the parties to prepare themselves and present their cases."[224] A seventy-two hour window properly balances the divergent interests of respondents and the state. On the one hand, respondents generally desire immediate judicial intervention. But in an emergency context, a pre-detention or

219. *Id.*

220. *See* Stromberg & Stone, *supra* note 48, at 324 (advocating for probable cause hearing within five days of patient's admission to allow the court to "engage in dialogue with the parties").

221. *See* Tom R. Tyler, *Procedural Justice and the Courts*, 44 J. AM. JUDGES ASS'N 26, 28 (2007) [hereinafter Tyler, *Procedural Justice*] (noting research suggests that "disputants view[] adversary procedures as fair because they allow[] people the opportunity to tell their side of the story before decisions [are] made").

222. Of course, respondents may waive their right to this hearing should they wish. New Hampshire continues to serve as a model. N.H. REV. STAT. ANN. § 135-C:31(III) (2010). But absent waiver, the hearing should be held as scheduled.

223. GRADING THE STATES, *supra* note 93, at 15. *Accord* Nathaniel P. Morris, *Reasonable or Random: 72-Hour Limits to Psychiatric Holds*, 72 PSYCHIATRIC SERVS. 210, 211 (2021) (recognizing that "many patients with psychiatric needs can be evaluated, stabilized, and discharged within 72 hours, although some relevant studies are outdated or have methodological limitations").

224. *State Courts Guidelines*, *supra* note 48, at 480.

immediate hearing is not feasible; individuals like Mallory often require immediate treatment. On the other hand, the state has various interests in a delayed hearing.

Generally, states argue that hospitals need time to gather evidence and build a factual record to show that commitment is necessary.[225] However, a probable cause hearing poses a lower hurdle than the clear-and-convincing standard that states must meet at the full merits hearing.[226] Going further, some may suggest that a delay *benefits* the respondent.[227] Specifically, a delayed hearing may provide a longer window for treatment, thus obviating the need for commitment. But this argument assumes the conclusion to be drawn at the hearing.[228] At this point, the state has not made any showing that continued treatment is warranted. In any event, a respondent, through counsel, may request a continuance or waive the hearing altogether. Finally, states may object that providing a hearing within seventy-two hours is costly and unduly burdensome. To be sure, judicial systems across the country desperately need additional funding.[229] But a lack of funding should not be the reason that those facing civil commitment are denied the procedural justice they deserve. And tellingly, several states *do* require hearings within a seventy-two-hour window.[230]

States that hold hearings merely upon request—or only after a significant delay—do not realize these procedural benefits. By forcing respondents to request hearings, states inherently place an obstacle between the respondent and the court. For example, in Colorado, an individual may only receive a hearing if their attorney files a request.[231] To accomplish this, the respondent must identify and locate their

225. *Developments*, *supra* note 166, at 1275–76.

226. *See id.* (comparing probable cause hearings in commitment proceedings to those held in the criminal context). In 1986, the National Center for State Courts also suggested states hold a hearing within seventy-two hours. *State Courts Guidelines*, *supra* note 48, at 480. However, the Center called for a *full* hearing on the merits within three days, rather than a probable cause hearing. *Id.* By contrast, this Note recommends only that states hold a probable cause hearing within three days, thus alleviating the fact-finding pressure on the state to build a case so soon.

227. *Developments*, *supra* note 166, at 1277.

228. *Id.* at 1278 ("Unless the state shows that the standards are met, it is not justified in assuming that [commitment] is conferring a benefit.").

229. *See generally, e.g.*, Michael J. Graetz, *Trusting the Courts: Redressing the State Court Funding Crisis*, 143 DÆDALUS 96, 96 (2014) (evaluating various proposals to address the "serious funding reductions" state courts face).

230. *See supra* note 118 and accompanying text (listing states that provide for hearings within seventy-two hours).

231. COLO. REV. STAT. § 27-65-107(6) (2022).

appointed counsel and then coordinate the submission of a written request, all while confined in a psychiatric unit. Even if a respondent manages to jump through these hoops, Colorado merely promises a hearing within *ten days* of the request.[232] As discussed in Part III.A, it is "of paramount importance to the individual" to receive a "prompt disposition" of their case.[233]

Similarly, states that simply review for probable cause without holding a hearing do not increase procedural justice. To be sure, this is a positive step: this layer of judicial review can help ensure that those filing commitment applications are not abusing the system. But this structure lacks the procedural benefits of a probable cause hearing. When a judge or officer simply reviews a petition for probable cause, the respondent has no opportunity to participate in the process that seeks to detain them. In this scenario, respondents have no reason to believe a judicial authority has heard their case, let alone their voice. In sum, states should require probable cause hearings within seventy-two hours of confinement to balance any state interest with the respondent's interest in procedural justice.

B. Attorneys' Duties Should Be Defined by Statute

Over the last fifty years, scholars have repeatedly identified the failings of attorneys in commitment practice[234] and made calls for reform.[235] Unfortunately, little has changed.[236] This Note echoes these calls and proposes that states statutorily enumerate the role and duties of counsel. Individuals in civil commitment proceedings, like any other litigant, participate through their attorneys. Indeed, "attorney[s]

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232. *Id.*

233. *Developments*, *supra* note 166, at 1275–76.

234. *See* Perlin, *Fatal Assumption*, *supra* note 140, at 39 (identifying myriad problems with the role of counsel); Thomas R. Litwack, *The Role of Counsel in Civil Commitment Proceedings: Emerging Problems*, 62 CALIF. L. REV. 816, 817 (1974) (calling the right to counsel in commitment proceedings "an empty one"); DAVID B. WEXLER, MENTAL HEALTH LAW: MAJOR ISSUES 98 (1981) (noting counsel's failure to investigate "even the most elementary legal questions"); Virginia Aldigé Hiday, *The Attorney's Role in Involuntary Civil Commitment*, 60 N.C. L. REV. 1027, 1030 (1982) (summarizing studies showing poor attorney performance).

235. *See* Coleman & Shellow, *supra* note 75, at 60–65 (proposing a new model to evaluate ineffective assistance of counsel claims in the civil commitment context); *State Courts Guidelines*, *supra* note 48, at 464–77 (suggesting guidelines to define the role of counsel and their duties).

236. *See* Perlin, *Who Will Judge the Many*, *supra* note 33 (noting that critiques of the commitment system have gone uncontradicted); Perlin, *Fatal Assumption*, *supra* note 140, at 42 ("While there has been some episodic evidence of bar development . . . the overall picture is little better than it was in 1978 . . . .").

stand[] up for someone who has no one else to stand up for him or her, and who may be ill equipped to do so personally."[237] Individuals with mental illness and with little access to the outside world are perhaps more reliant on their attorneys than any other client.[238] If attorneys fail to advocate, these individuals are effectively silenced. By clarifying the role of counsel in the following four ways, states can increase the procedural justice afforded to those experiencing civil commitment.

First, states should specify when counsel must be appointed in the timeline of commitment proceedings, particularly those proceedings that arise in the emergency context. Courts should appoint counsel as soon as a probable cause hearing is scheduled so that the attorney may diligently prepare. Wyoming serves as a guide. In Wyoming, the court must appoint an attorney as soon as "continued detention is sought" for anyone detained under emergency circumstances.[239] That is, Wyoming requires an attorney be appointed when the period of emergency detention is running out but the state has filed a petition for continued confinement.

Early appointment is crucial so that attorneys may effectively prepare for a hearing. When lawyers have little more than hours to prepare for a hearing—a hearing that may "sever or infringe upon the individual's relations with family, friends, physicians, and employment for three months or longer"—the legal system "has seemingly lost its way."[240] Notably, Wyoming is one of the few states to require a preliminary hearing within three days,[241] demonstrating that it is possible to both hold probable cause hearings within seventy-two hours and appoint counsel in time for these hearings.

Second, states should require counsel to perform basic preparatory work before any hearing, as Arizona does. Arizona assigns attorneys certain "minimal duties" as they prepare for commitment hearings.[242] Most importantly, these duties include meeting with the client within twenty-four hours of appointment.[243] From a procedural

237. *State Courts Guidelines*, *supra* note 48, at 466.

238. *See* Litwack, *supra* note 234, at 830 (noting clients are sometimes "too passive, frightened, or heavily medicated to articulate their wishes forcefully").

239. WYO. STAT. § 25-10-109(h) (2022).

240. Coleman & Shellow, *supra* note 75, at 52 (quoting *In re* Mental Health of K.G.F., 29 P.3d 485, 492–93 (Mont. 2001)).

241. WYO. STAT. § 25-10-109(h) (2022).

242. ARIZ. REV. STAT. ANN. § 36-537(B) (2022).

243. *Id.*

justice perspective, this meeting is key as it involves the respondent in the commitment process before the hearing itself. Procedural justice is not confined to direct interaction with the judicial system.[244] Rather, individuals associate even peripheral interactions with their perceptions of procedural fairness—including their out-of-court interactions with their own lawyers.[245] Without any prehearing meeting, "the respondent's brief time in court becomes the practical beginning and end of any safeguarding of his or her interests by the legal system."[246]

Specificity will help resolve ambiguity regarding the expectations of counsel—for attorneys, judges, and any monitoring body.[247] Arizona continues to serve as a model here, requiring attorneys to complete certain preparatory work. Specifically, Arizona tasks attorneys with reviewing the client's records at least twenty-four hours before a hearing, interviewing relevant medical personnel, and investigating any alternatives to involuntary inpatient treatment.[248] Compared to statutes written only in broad terms, statutes that explicitly enumerate key duties will help monitoring boards to identify situations where attorneys fail to adequately represent their clients.

Third, states should adopt statutory language that clarifies the role respondents' counsel should play during commitment hearings, as Minnesota has. Minnesota's civil commitment law requires counsel to act as "vigorous advocate[s]" on behalf of their clients.[249] By including this language in the statute, attorneys can no longer question whether the zealous advocate standard required by ethical rules applies in the civil commitment setting.[250] To be sure, attorney-client communication

244. Tyler, *Procedural Justice*, *supra* note 221, at 30 ("Studies suggest that people are influenced by their treatment at all stages of their experience, and by all the authorities whom they encounter.").

245. *Id.*

246. *State Courts Guidelines*, *supra* note 48, at 504–05.

247. *See* Note, *The Role of Counsel in the Civil Commitment Process: A Theoretical Framework*, 84 YALE L.J. 1540, 1543 (1975) (noting statutes that merely call for counsel's appointment do not provide guidance on their role).

248. ARIZ. REV. STAT. ANN. § 36-537(B) (2022).

249. MINN. STAT. § 253B.07(2c)(4) (2022).

250. Coleman & Shellow, *supra* note 75, at 55 ("[T]he job of these particular attorneys sometimes seems ambiguous."); Jennifer L. Wright, *Protecting Who from What, and Why, and How?: A Proposal for an Integrative Approach to Adult Protective Proceedings*, 12 ELDER L.J. 53, 96 (2004) ("[R]ole definition would serve to resolve the confusion between the role of attorney as advocate for respondent's position, and as guardian ad litem, advocating for the best interests of respondent as perceived by the attorney.").

may be strained and client reasoning may not be clear or logical. But while they may be experiencing mental illness, clients—and not their attorneys—are entitled to decide what is in their own best interests.[251]

Ultimately, unambiguous statutory language may help alleviate the pressure some attorneys feel to act paternalistically towards their clients and limit their advocacy. And codifying this duty elevates it from a mere ethical precept to a statutory requirement, hopefully drawing increased recognition and respect from practitioners. In sum, states should clearly set out the role and duties of counsel so that attorneys understand what is expected of them and allow the state to monitor compliance.

Finally, states should amend their statutes to give explicit preference to attorneys with experience and training in representing and advocating for individuals with mental illness. With only seventy-two hours before a probable cause hearing, attorneys without prior experience would have little time to become comfortable serving clients who are experiencing serious mental illness.[252] At a minimum, attorneys must learn how best to communicate with their clients. Training sessions and materials can give attorneys tools to overcome these barriers and better navigate working with clients whose illnesses might impede their ability to communicate.[253] By preferencing experienced attorneys, states would increase the procedural justice that respondents receive in the commitment process.

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251. *See* Coleman & Shellow, *supra* note 75, at 55–56 (discussing how attorneys may act paternalistically, assuming erroneously that the client is not competent to make decisions for themself).

252. Imposing this duty is simply the first step. States should go further and provide the education necessary to allow attorneys to meet these statutory standards. Of course, providing education and resources (like continuing legal education classes) requires increased funding and attention to the mental health system. Both the public defender and the mental health systems are chronically underfunded. *See* NAT'L ALL. ON MENTAL ILLNESS, STATE MENTAL HEALTH CUTS: A NATIONAL CRISIS 1 (2011) (detailing cuts to the mental healthcare system); Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases: Still a National Crisis?*, 86 GEO. WASH. L. REV. 1564, 1574–75 (2018) (discussing the effects of underfunding public defense). This Note is not blind to these barriers. Rather, this Note highlights the flawed commitment system in the hope of drawing increased attention from students, scholars, and state legislators alike.

253. Judith L. Kornegay, *Working with Clients*, *in* NORTH CAROLINA CIVIL COMMITMENT MANUAL app. c at 6–8 (2d ed. 2011).

C. Mental Health Boards as Monitors

Empirical research has "virtually unanimous[ly] . . . demonstrate[ed] that attorneys, judges, and clinical examiners do not perform in a manner consistent with revised commitment standards and procedures."[254] In short, reforms without a compliance mechanism are often empty promises. This Note aims to ameliorate the compliance problem by proposing that states use preexisting community-based mental health boards to oversee the commitment process. Indeed, every state already has a mental health board in place.[255] Thus, states need only expand the boards' duties to include a monitoring function. Is the state holding hearings within the required period of time? Are attorneys meeting with their clients as they prepare for hearings? How are attorneys advocating within the hearings? With a board in place, states—and the public—may begin to monitor these systems.

The board should be a tool to involve stakeholders from the mental health community in the civil commitment process. Specifically, the board should include representatives from the state agencies that oversee the public mental health system as well as members of mental health advocacy groups. Perhaps most importantly, the board should include those who have experienced commitment themselves or family members who have experienced the civil commitment of a loved one. Fundamentally, "improvement of the involuntary civil commitment process is not just a professional concern."[256] Rather, it should concern the average citizen, as part of the "broad public debate about the most appropriate response to the needs of people with mental illness."[257]

The board need not impose substantial burdens on its members. Every board member does not need to receive real-time updates every time someone is detained within the state. Instead, the board should construct a monitoring system that provides insight into commitment proceedings in practice, with the goal of conforming practice to law. As one example, the board could send one member to observe a small number of commitment proceedings across the state every month, at random and unannounced times. Then, this member can present their

254. Turkheimer & Parry, *supra* note 205 (citation omitted).

255. *Substance Abuse and Mental Health Block Grants*, SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., https://www.samhsa.gov/grants/block-grants [https://perma.cc/5ZVV-CYNW], (last updated June 14, 2022).

256. *State Courts Guidelines*, *supra* note 48, at 417.

257. *Id.*

findings to the rest of the board at a quarterly meeting. This would provide valuable insight for the board, and the presence of an observer alone could increase compliance with statutory requirements.[258]

Importantly, this proposal is not out of reach, and states need not start from scratch. Indeed, the federal government has long insisted on mental health review boards. For example, to receive a federal grant for community mental health services, the receiving state must create and maintain a state mental health board of stakeholders and interested community members.[259] Specifically, the board must "monitor, review, and evaluate . . . the allocation and adequacy of mental health services within the [s]tate."[260]

Some states have assigned these boards additional duties above and beyond what the federal government requires.[261] For example, Wisconsin's Council on Mental Health explains that its mission includes "creat[ing] partnerships that develop, coordinate, and provide a full range of mental health resources" and "eradicat[ing] stigma and discrimination" in mental health services within the state.[262] States should use these boards as an opportunity to monitor the state's compliance with civil commitment procedure. States should specifically codify this duty as part of the board's overall evaluation of the state's mental health services. Hopefully, this increased monitoring will bring civil commitment hearings into compliance with the laws that govern them.

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258. Turkheimer & Parry, *supra* note 205, at 651 ("Encouraging attendance of hospital staff, patient advocates, CMHC representatives, and members of patients' families would be one way to enhance accountability and public confidence.").

259. 42 U.S.C. § 300x-3(a), (c)(1).

260. *Id.* § 300x-3(b)(3).

261. *See, e.g.*, *WCMH: About the Wisconsin Council on Mental Health*, WIS. DEP'T OF HEALTH SERVS. (Dec. 22, 2020), https://www.dhs.wisconsin.gov/wcmh/aboutus.htm#background [https://perma.cc/VS9F-SPCU] (listing duties of the council); *Behavioral Health Advisory Council*, MD. MANUAL ON-LINE (Mar. 30, 2022), https://msa.maryland.gov/msa/mdmanual/26excom/html/04behav.html [https://perma.cc/KE4U-DTYA] (same); *Idaho Behavioral Health Planning Council (BHPC)*, IDAHO DEP'T OF HEALTH & WELFARE, https://healthandwelfare.idaho.gov/about-dhw/boards-councils-committees/idaho-behavioral-health-planning-council-bhpc [https://perma.cc/T5ZA-XQ7B] (same); *Governor's Behavioral Health Servs. Planning Council: Expectations for All Council and Subcommittee Members*, KAN. DEP'T FOR AGING & DISABILITY SERVS., https://kdads.ks.gov/docs/librariesprovider17/csp/bhs-documents/gbhspc/expectations-for-council-and-subcommittee-members.pdf?sfvrsn=49a629ee_0 [https://perma.cc/X4PC-YLFD] (same); *State Advisory Council*, MO. DEP'T OF MENTAL HEALTH, https://dmh.mo.gov/alcohol-drug/state-advisory-council [https://perma.cc/5AR5-Z33L] (same).

262. *See WCMH: About the Wisconsin Council on Mental Health*, *supra* note 261 (listing the mission statement of the council).

CONCLUSION

This Note surveys existing civil commitment procedure across the United States to call attention to its flaws. Current statutory regimes subject individuals like Mallory to protracted periods of confinement with little to no judicial intervention. And when hearings do take place, they often happen behind closed doors in a matter of minutes, compounding the harms of an already stigmatizing process. This Note proposes three statutory reforms to increase procedural justice for those facing civil commitment. First, states should hold probable cause hearings within seventy-two hours of any confinement period. Second, states should clearly delineate the role and duties of counsel in commitment hearings. Third, states should use preexisting mental health boards to monitor the civil commitment system and increase compliance with statutory requirements. For the last fifty years, civil commitment has been litigated in pitch darkness. It is time to move these proceedings into the light.