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DUE PROCESS REQUIREMENTS FOR EMERGENCY CIVIL COMMITMENTS: SAFEGUARDING PATIENTS' LIBERTY WITHOUT JEOPARDIZING HEALTH AND SAFETY

INTRODUCTION

Upset about a dying friend, Susan Rockwell was anxious and a bit disheveled when she arrived at a Massachusetts hospital to attend a support group meeting.¹ The dirty coat she wore belied her achievements as a law school graduate and former librarian.² Based on her appearance and a brief conversation, an emergency room doctor ordered attendants to put Rockwell in a four-point restraint, inject her with drugs and place her in a locked room in the hospital's psychiatric ward.³ Throughout this ordeal, the hospital refused Rockwell's pleas to call her psychiatrist, who later said that she would have argued against admission.⁴ The hospital released Rockwell two-and-a-half days later.⁵ According to her psychiatrist, Rockwell suffers nightmares and flashbacks—symptoms of post-traumatic stress disorder—as a result of this experience.⁶

The emergency room physician admitted Susan Rockwell pursuant to Massachusetts' emergency involuntary commitment statute.⁷ The statute authorizes a qualified physician to admit a person for ten days of psychiatric care if the physician believes that failure to admit would create a likelihood of serious harm to the person or to others.⁸ A physician's decision to admit a person pursuant to the emergency involuntary commitment statute is not subject to judicial review.⁹ Rather, a hospital must seek judicial authorization for commitment only if it desires to keep a patient longer than the ten-day emergency

¹ See Mitchell Zuckoff, *Flawed Law Turns Patients to Prisoners: 'Section 12' Admissions Fuel a Booming Hospital Business*, BOSTON GLOBE, May 12, 1997, at A1.

² See *id.*

³ See *id.*

⁴ See *id.*

⁵ See *id.*

⁶ See Zuckoff, *supra* note 1, at A1.

⁷ See *id.*

⁸ See MASS. GEN. LAWS ANN. ch. 123, § 12 (West 1997).

⁹ See *id.*

period.¹⁰ Since the Massachusetts statute allows courts fourteen days to schedule a hearing on a hospital's commitment petition, a person may be involuntarily confined in a psychiatric ward for up to twenty-four days without judicial review.¹¹

Susan Rockwell's experience illustrates the need for persons subject to emergency commitment to have a means of challenging physicians' decisions to admit them.¹² The emergency commitment process deprives persons of their liberty, yet contains significantly fewer procedural due process safeguards than does the justice system at large.¹³ At the same time, however, the emergency commitment process exists to provide care in a timely manner for persons whose mental illnesses, physicians believe, pose a likelihood of serious harm to themselves or others.¹⁴ The consequences of failing to commit when emergency commitment is warranted can be fatal. Therefore, an effective emergency commitment statute must contain both procedural safeguards to protect persons wrongly committed and provide immediate care for those who need it.

This Note explores what the goals of procedural due process should be in the context of emergency commitment.¹⁵ Part I defines procedural due process and describes the constitutional status of the law on due process in the emergency commitment context.¹⁶ Part I then discusses different perspectives on what procedural safeguards should be provided in the emergency commitment process.¹⁷ Part II describes Massachusetts' review of its emergency commitment statute and one of the proposed procedural schemes resulting from that review.¹⁸ Part III analyzes this proposal as a means of addressing the general policy issues involved.¹⁹ Part III concludes that the proposal should be adopted because it protects patients' liberty without compromising clinical interests.²⁰ Specifically, Part III argues that providing judicial review for all persons within forty-eight hours of emergency admission is harmful to the clinical interests of most patients and, in many cases, does not provide meaningful protection of liberty inter-

¹⁰ See *id.*

¹¹ See *id.* § 7(c).

¹² See Zuckoff, *supra* note 1, at A1.

¹³ See MASS. GEN. LAWS ANN. ch. 123, § 12 (West 1997).

¹⁴ See *id.*

¹⁵ See *infra* Parts I, II and III.

¹⁶ See *infra* notes 26-78 and accompanying text.

¹⁷ See *infra* notes 79-119 and accompanying text.

¹⁸ See *infra* notes 120-87 and accompanying text.

¹⁹ See *infra* notes 188-218 and accompanying text.

²⁰ See *infra* notes 188-218 and accompanying text.

ests.²¹ The best means of protecting patients' rights in practice is instead to appoint counsel immediately upon emergency admission and provide a process for an emergency hearing in cases of inappropriate commitment.²²

I. DUE PROCESS REQUIREMENTS FOR EMERGENCY INVOLUNTARY COMMITMENTS

This section is divided into three subsections. Subsection A defines procedural due process and describes how the Supreme Court determines what procedural safeguards due process requires.²³ Subsection B discusses the status of the law on due process requirements for emergency commitment.²⁴ Subsection C explores three perspectives on the emergency commitment process.²⁵

A. Procedural Due Process Defined

The Fourteenth Amendment of the United States Constitution prohibits state governments from depriving a person of "life, liberty, or property, without due process of law."²⁶ This amendment is rooted in the notion that personal freedom requires an institutional check on arbitrary government action.²⁷ Procedural due process consists of procedural safeguards that accord a person the right to be heard before being deprived of life, liberty or property as a result of government action.²⁸

Two competing approaches to procedural due process shape discussions of what procedural safeguards are constitutionally required—or even desirable.²⁹ The first approach focuses on the intrinsic value of due process as an opportunity for people to participate in government decisions that affect them and thereby express their dignity as persons.³⁰ Justice Frankfurter supported this approach by writing that there is no better way "for generating the feeling, so important to

²¹ See *infra* notes 188–218 and accompanying text.

²² See *infra* notes 188–218 and accompanying text.

²³ See *infra* notes 26–38 and accompanying text.

²⁴ See *infra* notes 39–78 and accompanying text.

²⁵ See *infra* notes 79–119 and accompanying text.

²⁶ U.S. CONST. amend. XIV, § 1. The Fourteenth Amendment states in relevant part: "nor shall any State deprive any person of life, liberty, or property, without due process of law"
Id.

²⁷ See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 664 (2d ed. 1988).

²⁸ See *Mathews v. Eldridge*, 424 U.S. 319, 332–33 (1976); TRIBE, *supra* note 27, at 664.

²⁹ See TRIBE, *supra* note 27, at 666.

³⁰ See *id.*

popular government, that justice has been done."³¹ The United States Supreme Court, however, has adopted an "instrumental" approach, which views due process as a means of assuring accuracy, reasoning that the Constitution requires process "to prevent unfair and mistaken deprivations."³²

Pursuant to the instrumental approach, the Supreme Court balances competing interests when determining the required form of procedural due process.³³ Thus, in 1976, in *Mathews v. Eldridge*, the Court noted that "[d]ue process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances."³⁴ In *Eldridge*, the Court held that an evidentiary hearing was not required prior to termination of social security disability benefits.³⁵ A person brought an action challenging the constitutional validity of the administrative procedures used to terminate her disability benefits because the procedures did not include an evidentiary hearing prior to termination.³⁶ In concluding that due process did not require an evidentiary hearing prior to termination, the Court identified three factors that must be weighed to determine what procedural due process requires: (1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of the private interest through the procedures used and the probative value, if any, of additional or substitute procedural safeguards and (3) the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.³⁷ Thus, the Court concluded that due process is flexible and the procedural protections it requires vary according to the facts and interests of particular situations.³⁸

³¹ *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 172 (1951) (Frankfurter, J., concurring).

³² *Fuentes v. Shevin*, 407 U.S. 67, 97 (1972).

³³ See TRIBE, *supra* note 27, at 714-15.

³⁴ *Eldridge*, 424 U.S. at 334 (holding that due process does not require evidentiary hearing prior to termination of disability benefits) (quoting *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895 (1961)).

³⁵ See *id.* at 349.

³⁶ See *id.* at 324-25.

³⁷ See *id.* at 335. For a critique of the *Eldridge* balancing test, see TRIBE, *supra* note 27, at 717-18 (arguing that adequate protection cannot be afforded by "balancing" general interests of majority against those of individual).

³⁸ See *Eldridge*, 424 U.S. at 334.

B. *Status of Law on Due Process Requirements for Emergency Involuntary Commitment*

Over the past four decades, changes in the ways mental illness is treated and perceived have greatly affected civil commitment.³⁹ First, the introduction of psychotropic drugs in the 1950s enabled many previously institutionalized patients to live outside mental hospitals.⁴⁰ Second, during the 1960s and 1970s, revelations of poor living conditions in state hospitals for the mentally retarded sensitized the public to the plight of the institutionalized mentally ill and led to the inclusion of this group in the growing civil rights movement.⁴¹ Legal reforms during the 1970s reduced the broad discretion previously given to psychiatrists by restricting involuntary commitment to persons demonstrably dangerous to themselves or others and applying to the commitment process the due process safeguards of the criminal justice system.⁴² As a result of these clinical, social and legal developments, the average number of persons subject to commitment in state and county mental hospitals per day declined from 560,000 in 1955 to 276,000 in 1972, and to about 138,000 in 1981.⁴³

Despite the attention given to the emergency commitment process in recent decades, the Supreme Court has not clearly defined the due process requirements for emergency civil commitment, and as a result, commitment procedures vary considerably from state to state.⁴⁴ Lower court decisions in the early 1970s held that due process required a probable cause hearing within forty-eight hours after commitment.⁴⁵ Subsequent Supreme Court summary affirmances of other decisions, however, indicate that substantially longer periods of commitment without judicial review are constitutional.⁴⁶ More recent lower federal

³⁹ See Uri Aviram & Robert A. Weyer, *Changing Trends in Mental Health Legislation: Anatomy of Reforming a Civil Commitment Law*, 21 J. HEALTH POL. POL'Y & L. 771, 771-72 (1996); Mary C. McCarron, Comment, *The Right to Refuse Antipsychotic Drugs: Safeguarding the Mentally Incompetent Patient's Right to Procedural Due Process*, 78 MARQ. L. REV. 477, 480-81 (1990); Clifford D. Stromberg & Alan A. Stone, *Statute: A Model State Law on Civil Commitment of the Mentally Ill*, 20 HARV. J. ON LEGIS. 275, 275-78 (1983).

⁴⁰ See McCarron, *supra* note 39, at 480-81. For a discussion of the uses and effects of psychotropic drugs, see Elizabeth Symonds, *Mental Patients' Rights to Refuse Drugs: Involuntary Medication As Cruel and Unusual Punishment*, 7 HASTINGS CONST. L.Q. 701, 704-11 (1980).

⁴¹ See MICHAEL L. PERLIN, *MENTAL DISABILITY LAW: CIVIL AND CRIMINAL* 4 (1989); Aviram & Weyer, *supra* note 39, at 781-84; Stromberg & Stone, *supra* note 39, at 276.

⁴² See Stromberg & Stone, *supra* note 39, at 276.

⁴³ See *id.* at 277.

⁴⁴ See ROBERT M. LEVY & LEONARD S. RUBENSTEIN, *THE RIGHTS OF PEOPLE WITH MENTAL DISABILITIES* 71 (1996).

⁴⁵ See, e.g., *Lessard v. Schmidt*, 349 F. Supp. 1078, 1091 (E.D. Wis. 1972).

⁴⁶ See *French v. Blackburn*, 428 F. Supp. 1351, 1356 (M.D.N.C. 1977), *aff'd mem.*, 443 U.S.

court decisions have held that constitutionality depends not on the specific timing of judicial review, but on the totality of the procedural scheme provided by the statute.⁴⁷

One of the first cases to address this issue was *Lessard v. Schmidt*.⁴⁸ In 1972, in *Lessard*, the United States District Court for the Eastern District of Wisconsin struck down a Wisconsin statute permitting confinement for 145 days and held that the maximum period that a person may be detained without a preliminary hearing is forty-eight hours.⁴⁹ The suit was brought as a class action on behalf of the plaintiff and all other persons eighteen years of age or older who were being held involuntarily pursuant to any emergency, temporary or permanent commitment provision of the Wisconsin involuntary commitment statute.⁵⁰ The complaint sought declaratory and injunctive relief against the enforcement of certain portions of the statute.⁵¹ Noting that the interests of those facing involuntary civil commitment are at least as great as those of accused criminals, the court reasoned that emergency civil commitment can be justified only for the length of time necessary to arrange for a probable cause hearing before a neutral judge.⁵² The court, therefore, held that a preliminary hearing must be held within forty-eight hours.⁵³

Subsequent decisions gave greater weight to the clinical needs of the mentally ill.⁵⁴ In the 1970s, the United States Supreme Court summarily affirmed two lower court decisions upholding substantial periods of commitment.⁵⁵ These decisions effectively overruled *Lessard* and indicate that a prompt probable cause hearing is not necessary to satisfy due process requirements.⁵⁶

First, in 1973, the Supreme Court summarily affirmed *Logan v. Arafeh*, in which a three-judge district court panel upheld a Connecti-

901 (1979); *Logan v. Arafeh*, 346 F. Supp. 1265, 1268 (D. Conn. 1972), *aff'd sub nom.* *Briggs v. Arafeh*, 411 U.S. 911 (1973). United States Supreme Court summary decisions are binding on lower courts. See *Hicks v. Miranda*, 422 U.S. 332, 344-45 (1975).

⁴⁷ See *Project Release v. Prevost*, 722 F.2d 960, 975 (2d Cir. 1983).

⁴⁸ See *Lessard*, 349 F. Supp. at 1091.

⁴⁹ See *id.* at 1082, 1091.

⁵⁰ See *id.* at 1082.

⁵¹ See *id.*

⁵² See *id.* at 1090.

⁵³ See *Lessard*, 349 F. Supp. at 1091.

⁵⁴ See PERLIN, *supra* note 41, at 213.

⁵⁵ See *Blackburn*, 428 F. Supp. at 1356; *Arafeh*, 346 F. Supp. at 1268.

⁵⁶ See *Blackburn*, 428 F. Supp. at 1356; *Arafeh*, 346 F. Supp. at 1268; LEVY & RUBENSTEIN, *supra* note 44, at 71. *But see* PERLIN, *supra* note 41, at 214 (sharp split over question of constitutional right to preliminary hearing not settled entirely by Supreme Court's summary affirmance in *Blackburn*).

cut statute providing for emergency commitment for up to forty-five days without judicial review.⁵⁷ In *Arafah*, individuals who were, or at one time had been, involuntary patients at a state mental hospital petitioned the United States District Court for the District of Connecticut for declaratory and injunctive relief against the statute's enforcement.⁵⁸ The statute provided that if a patient is committed involuntarily for more than fifteen days, there must be a judicial determination of the validity of his or her confinement within forty-five days from the date of the initial commitment.⁵⁹ The court reasoned that there was a reasonable connection between the time allowed before judicial review and the objective sought.⁶⁰ The court noted that the purpose of commitment is treatment and care, not penal detention, and that physicians need time to gain knowledge of a patient's mental condition through visual observation and diagnostic tests.⁶¹ This period of observation and treatment, the court observed, also has the positive aspect of allowing the hospital staff to alleviate the symptoms of the patient's mental illness or determine that the patient need not be committed.⁶² In such cases, the court reasoned, the patient avoids the stigma of a court record and the length of confinement is shortened.⁶³ The court also noted that patients may at any time challenge the legality of their confinement through a habeas corpus proceeding in the state courts.⁶⁴ Therefore, the court held that the Connecticut statute satisfied constitutional due process requirements.⁶⁵

Then, in 1979, the Supreme Court summarily affirmed *French v. Blackburn*, in which a three-judge district court panel upheld a North Carolina statute that permitted a ten-day period between emergency detention and a probable cause hearing.⁶⁶ In *Blackburn*, the plaintiff, who had been subjected to an involuntary commitment procedure that led to a hearing resulting in his release, petitioned the United States District Court for the Middle District of North Carolina for declaratory and injunctive relief challenging the validity of the North Carolina statute.⁶⁷ The statute provided for a final hearing on commitment

⁵⁷ See *Arafah*, 346 F. Supp. at 1268.

⁵⁸ See *id.* at 1266-67.

⁵⁹ See *id.* at 1267-68.

⁶⁰ See *id.* at 1268.

⁶¹ See *id.* at 1269.

⁶² See *Arafah*, 346 F. Supp. at 1269.

⁶³ See *id.*

⁶⁴ See *id.*

⁶⁵ See *id.* at 1270.

⁶⁶ See *Blackburn*, 428 F. Supp. at 1356.

⁶⁷ See *id.* at 1353.

within ten days of initial commitment unless the respondent is given a continuance, which may be for up to five days at a time.⁶⁸ The court noted that the purpose of the statute was humanitarian and that during the pre-hearing period of confinement, a patient receives treatment that may aid his or her mental health and be necessary for an adequate and informed commitment hearing.⁶⁹ Moreover, the court reasoned that the statute afforded opportunities for physicians to release a patient prior to the commitment hearing.⁷⁰ Finally, relying on the Supreme Court's summary affirmance of *Arafah* as binding precedent, the court held that the ten-day commitment period prior to a hearing did not violate due process.⁷¹

More recent lower court decisions have also held that a probable cause hearing is not necessary to satisfy due process requirements.⁷² For example, in 1983, in *Project Release v. Prevost*, the United States Court of Appeals for the Second Circuit upheld New York statutes providing for involuntary commitment for up to sixty days and emergency commitment for up to fifteen days without a judicial hearing, unless one is requested.⁷³ Project Release is a not-for-profit corporation that filed a suit seeking a declaratory judgment that the New York involuntary and emergency commitment statutes violated the Fourteenth Amendment.⁷⁴ In rejecting the need for a prompt probable cause hearing, the court considered the layers of professional and judicial review provided by the statutes and found that the totality of the procedural scheme comported with due process.⁷⁵ The court noted that civil commitment is not tantamount to criminal detention and, therefore, does not demand the same procedural safeguards required in the criminal context.⁷⁶ Finally, noting that the substantive standards for civil commitment vary from state to state, the court stressed that the decision by some states to limit pre-hearing confinement to a shorter period does not mean that such a model is needed or is even

⁶⁸ See *id.* at 1355.

⁶⁹ See *id.*

⁷⁰ See *id.*

⁷¹ See *Blackburn*, 428 F. Supp. at 1356.

⁷² See *Project Release*, 722 F.2d at 974; *Donahue v. Rhode Island Dep't of Mental Health*, 632 F. Supp. 1456, 1470 (D.R.I. 1986) (upholding constitutionality of statute providing for involuntary commitment of alcoholics for 10 days without judicial hearing); *In re Z.O.*, 484 A.2d 1287, 1291 (N.J. Super. Ct. App. Div. 1984) (upholding constitutionality of 27-day commitment prior to hearing).

⁷³ See *Project Release*, 722 F.2d at 974.

⁷⁴ See *id.* at 963.

⁷⁵ See *id.* at 974, 975.

⁷⁶ See *id.* at 974-75.

adaptable to the needs of all states.⁷⁷ Thus, the court concluded that due process does not require a prompt probable cause hearing.⁷⁸

C. Perspectives on Procedural Requirements for Emergency Commitment

Constitutionality is only the first step in analyzing any procedural scheme. Because the United States Constitution sets only minimum due process requirements, states are free to provide more than the minimum requirements mandated by the Constitution.⁷⁹ Thus, even though a procedural scheme meets due process requirements, the question remains whether additional due process protections should be provided. This subsection will explore this question from the perspectives of the three interests at stake in the emergency commitment process: the liberty, the clinical and the public interests.⁸⁰

1. The Liberty Interest

A civil libertarian approach to procedural due process rejects the idea set forth in *Eldridge* that procedural safeguards should be determined by balancing a person's liberty interest against the government's interest, the risk of erroneous deprivation of liberty and the probative value of additional or substitute procedural safeguards.⁸¹ Under this analysis, for example, the threat of erroneous deprivation of liberty cannot be outweighed by concerns of government and judicial resources.⁸² Thus, where a pre-deprivation hearing is not possible, a prompt post-deprivation hearing should be held as soon as possible.⁸³

With respect to the emergency commitment process, advocates for prompt probable cause hearings often draw an analogy to criminal procedure.⁸⁴ Noting that the law affords accused criminals hearings

⁷⁷ See *id.* at 975 (quoting *Addington v. Texas*, 441 U.S. 418, 431 (1979)).

⁷⁸ See *Project Release*, 722 F.2d at 974.

⁷⁹ See, e.g., *Commonwealth v. Johnson*, 650 N.E.2d 1257, 1260 n.5 (Mass. 1995); ROBERT F. WILLIAMS, *STATE CONSTITUTIONAL LAW: CASES AND MATERIALS* 68 (1988); Mark R. Sullivan, *Due Process*, 27 *RUTGERS L.J.* 1051, 1053, 1055 (1996).

⁸⁰ I was first exposed to many of the ideas in the following sections during meetings of the Massachusetts District Court's ad hoc committee to review section 12, for which I served as a research assistant. See *infra* notes 139-41 and accompanying text.

⁸¹ See *Eldridge*, 424 U.S. at 335.

⁸² See Minority Report of the Ad Hoc Committee to Review G.L. ch. 123, § 12, at 3-4 (Oct. 21, 1997) (unpublished, on file with author) [hereinafter Minority Report] ("The administrative burdens, if any, of this concurrent approach are simply outweighed by the compelling considerations of shorter involuntary admissions, greater protection of individual rights, and closer adherence to the dictates of the Constitution.").

⁸³ See *id.* at 1.

⁸⁴ See *Lessard*, 349 F. Supp. at 1090.

within twenty-four hours, they ask why persons committed involuntarily, who are accused of no crime, should be afforded less due process protection.⁸⁵ Thus, the argument follows that the liberty interest of a person committed involuntarily is at least as high as that of an accused criminal.⁸⁶ In support of this argument, advocates for immediate hearings cite the serious consequences of involuntary commitment, including humiliation, potential loss of employment and the stigma attached to commitment.⁸⁷

Moreover, the absence of prompt judicial review of emergency commitment ignores the intrinsic value of due process.⁸⁸ A prompt judicial hearing on commitment would allow persons to have a voice in the decision to deprive them of their liberty.⁸⁹ Civil libertarians argue that this process is essential to respect the dignity of those committed involuntarily and to generate a sense of justice and fairness in the commitment process.⁹⁰

2. The Clinical Interest

Clinicians emphasize the therapeutic nature of the commitment process, reasoning that they neither seek to have an adversarial relationship with their patients nor to deprive patients of their liberty.⁹¹ They believe, therefore, that it is inappropriate to impose a criminal model on what is essentially a therapeutic process.⁹² Rather, it is imperative that a procedural scheme both safeguard patients' liberty and provide access to clinical care.⁹³

⁸⁵ See Shoshana's Psychiatric Survivors' Guide, (visited Jan. 30, 1998) <<http://www.harbor-side.com/home/e/equinox/glossary/htm>>. A former patient defines involuntary commitment as

[a]n unconstitutional and horrifyingly abused legal process by which—in the absence of any destructive activity, and on nothing more than the word of a single [mental health professional]—a [person] can be stripped of his civil rights and imprisoned in a psychiatric facility, with no form of recourse whatsoever, in most states for a period up to 72 hours.

See *id.*

⁸⁶ See *Lessard*, 349 F. Supp. at 1090.

⁸⁷ See *id.* at 1089; Minority Report, *supra* note 82, at 3; JUDI CHAMBERLIN, ON OUR OWN: PATIENT-CONTROLLED ALTERNATIVES TO THE MENTAL HEALTH SYSTEM 70, 75, 83 (1978).

⁸⁸ See *TRIBE*, *supra* note 27, at 666.

⁸⁹ See *id.*

⁹⁰ See *id.*

⁹¹ See *Blackburn*, 428 F. Supp. at 1355; *Arafah*, 346 F. Supp. at 1269; Donald H. J. Hermann, *Barriers to Providing Effective Treatment: A Critique of Revisions in Procedural, Substantive, and Dispositional Criteria in Involuntary Civil Commitment*, 39 VAND. L. REV. 83, 94-95 (1986).

⁹² See *Project Release*, 722 F.2d at 974-75; Hermann, *supra* note 91, at 94.

⁹³ See Hermann, *supra* note 91, at 93-95, 106.

In addition to expressing concerns that using a criminal model in the commitment process needlessly antagonizes the doctor-patient relationship, many fear that too many procedural safeguards may serve as a barrier to treatment.⁹⁴ Too much judicial scrutiny may make it difficult to commit many persons in need of treatment, i.e., the very persons whom the emergency commitment process was designed to protect.⁹⁵ Thus, while a prompt probable cause hearing may be the best means of protecting patients' liberty interests, it may jeopardize their clinical interests.⁹⁶

Clinicians also express concern about the burdens that hearings place on the clinical process. In addition to the harm that hearings cause to the doctor-patient relationship, they place large demands on clinicians' time.⁹⁷ It is not in the best interest of all patients to have clinicians devoting large amounts of time to commitment procedures—time that could be spent attending to the clinical needs of patients.⁹⁸

3. The Public Interest

Concern about the impact of the emergency commitment procedures on the public leads others to ask whether layers of judicial review—providing only minimal protection—consume too many limited judicial resources.⁹⁹ According to this perspective, society cannot

⁹⁴ See *id.*

⁹⁵ See *id.*

⁹⁶ See *id.*

⁹⁷ See *Thompson v. Commonwealth*, 438 N.E.2d 33, 37 (Mass. 1982). In *Thompson*, the Supreme Judicial Court of Massachusetts upheld chapter 123, section 9(b) of the Massachusetts General Laws, which authorized persons who have been found guilty of a criminal charge and committed to the state psychiatric hospital to apply for discharge. See *id.* at 34. The statute provided for a prompt judicial hearing. See *id.* at 35. The trial court granted the Commonwealth's motion for summary judgment of the plaintiff's application filed pursuant to section 9(b). See *id.* On appeal, the plaintiff argued that due process required the burden to rest on the Commonwealth in section 9(b) proceedings. See *id.* In concluding that allocating the burden of proof to the applicant was constitutional, the court reasoned, in part, that placing the burden on the Commonwealth would result in intolerable fiscal and administrative burdens because there would be no effective means of disposing of or discouraging the filing of frivolous applications by litigious patients. See *id.* at 37. The court further reasoned that psychiatrists would be forced to spend substantially more time preparing for and attending judicial hearings instead of caring for patients, and that funds that could be spent for treatment and care of patients would be spent in conducting numerous adversary hearings. See *id.* The court, concluded, therefore, that placing the burden of proof on the applicant in section 9(b) proceedings did not violate due process. See *id.*

⁹⁸ See *id.*

⁹⁹ See *Eldridge*, 424 U.S. at 348; *Thompson*, 438 N.E.2d at 37; Report of the Ad Hoc Committee to Review G.L. ch. 123, § 12, at 6 (Oct. 21, 1997) (unpublished, on file with author) [hereinafter Majority Report].

focus exclusively on the interests of the individual whose liberty is deprived.¹⁰⁰ Rather, the individual's liberty interest must be considered in a larger context—one that includes consideration of the costs and time demands that hearings place on the court system.¹⁰¹ Thus, although the cost of providing a post-deprivation hearing cannot justify totally denying an opportunity to be heard, such considerations may factor into a determination of what type of hearing should be held and when.¹⁰²

4. The Liberty, Clinical and Public Interests Compared

Strict advocacy of any one of the interests involved in the emergency commitment process presents problems. Critics of the civil libertarian perspective argue that because the purpose of emergency commitment is therapeutic, it may be detrimental to the patient to impose a criminal construct on the process.¹⁰³ While a prompt probable cause hearing may protect a patient's liberty interest, it may also harm the patient's clinical interest because it transforms the doctor-patient relationship from a therapeutic to an adversarial one. Thus, in the first days of a patient's emergency commitment, the doctor must both treat the patient and oppose him or her in a commitment hearing. Moreover, too much process may serve as a barrier to treatment because it may discourage or impede commitment of persons in need of treatment.¹⁰⁴

Some commentators believe that a patient's liberty is better protected by a probable cause hearing held a few days after commitment than one held immediately upon commitment.¹⁰⁵ Noting that many acute psychiatric episodes subside within one to four days, they reason that if hearings were required immediately, many patients whose conditions would have improved sufficiently for discharge in a few days would be retained unnecessarily for long commitment periods.¹⁰⁶ If, however, hearings were scheduled a few days after commitment, then many patients would improve sufficiently to be discharged by the hospital prior to the hearing.¹⁰⁷ Moreover, in cases of improper com-

¹⁰⁰ See *Eldridge*, 424 U.S. at 348; *Thompson*, 438 N.E.2d at 37; *TRIBE*, *supra* note 27, at 715.

¹⁰¹ See *Eldridge*, 424 U.S. at 348; *Thompson*, 438 N.E.2d at 37; *TRIBE*, *supra* note 27, at 715.

¹⁰² See *Eldridge*, 424 U.S. at 348; *Thompson*, 438 N.E.2d at 37; *TRIBE*, *supra* note 27, at 715.

¹⁰³ See *Hermann*, *supra* note 91, at 94-95.

¹⁰⁴ See *id.*

¹⁰⁵ See *Stromberg & Stone*, *supra* note 39, at 324.

¹⁰⁶ See *id.*

¹⁰⁷ See *id.* This argument is consistent with a study of commitment hearings scheduled in the Cambridge District Court. See *infra* notes 115-18 and accompanying text.

mitment, a delay of a few days may also afford a patient's counsel needed time to marshal the facts of the case before representing his or her client at a commitment hearing.¹⁰⁸

Critics of the clinical perspective note that it presumes the need for a clinical relationship.¹⁰⁹ Where commitment is improper, there is no need for a clinical relationship, and the doctor-patient relationship is, by definition, adversarial.¹¹⁰ In such cases, concern for a clinical interest that does not exist jeopardizes the "patient's" liberty interest.¹¹¹

With respect to the public perspective, civil libertarians argue that liberty interests should not be balanced against—much less outweighed by—concerns about judicial resources.¹¹² Under this analysis, the emergency commitment process should be designed to safeguard against cases of improper commitment and, therefore, must include prompt judicial review.¹¹³ Thus, because the individual's liberty is of primary importance, it cannot be adequately protected by balancing it against society's concerns about judicial resources.¹¹⁴

The results of a study of commitment petitions filed in the Cambridge Division of the Massachusetts District Court, however, offer support for the public perspective. The study revealed that more than sixty-seven percent of emergency commitment hearings scheduled in the court during an eighteen-month period were canceled.¹¹⁵ Of the cases that did not go to a hearing, more than half of the patients were

¹⁰⁸ See Letter from Hon. Jonathan Brant, Justice, Cambridge District Court, to Hon. Maurice Richardson, Dedham District Court 2 (July 21, 1997) (on file with author) [hereinafter Brant].

¹⁰⁹ See CHAMBERLIN, *supra* note 87, at xiv.

¹¹⁰ In Susan Rockwell's case, for example, improper commitment deprived her of her liberty unjustifiably and proved detrimental to her mental health. See *supra* notes 1-6 and accompanying text.

¹¹¹ See *supra* notes 1-6 and accompanying text.

¹¹² See TRIBE, *supra* note 27, at 718.

¹¹³ See Minority Report, *supra* note 82, at 1.

¹¹⁴ See TRIBE, *supra* note 27, at 718.

¹¹⁵ See Minority Report, *supra* note 82, at 3 n.4. The referenced study was conducted by Hon. Jonathan Brant, Justice, Cambridge District Court and member of the Committee. See Brant, *supra* note 108, at 1. Judge Brant reviewed all petitions for commitment filed under sections 7 and 8 in Cambridge District Court during the period from January 1, 1996 to July 15, 1997—a total of 289 cases. See *id.* Slightly fewer than one-third of these petitions actually reached a hearing. See *id.* Of the cases that did not reach a hearing, more than half of the patients were discharged. See *id.* Thus, approximately 38% of patients were discharged between the first and 24th day after their admission. See *id.* Adding the roughly five percent of patients who were discharged as a result of petitions for commitment being denied, it appears that 43% of patients were discharged on or before the 24th day after admission. See Brant, *supra* note 108, at 1. Judge Brant noted that these data reflect only the percentage of persons released after a petition for commitment has been filed and that a significant percentage of persons admitted under section 12 would have been released without any petition ever having been filed. See *id.*

discharged by the hospital.¹¹⁶ Approximately five percent of patients were discharged as a result of petitions for commitment being denied.¹¹⁷ This data indicates that involuntary commitment most likely terminates when the hospital decides to discharge the patient or when the patient opts to change his or her commitment status.¹¹⁸ In light of such data, those concerned with the effect on the public argue that it is reasonable to consider the amount of practical protection the commitment hearing process provides relative to the burdens it places on the judicial system.¹¹⁹

II. MASSACHUSETTS REVIEWS ITS EMERGENCY COMMITMENT STATUTE

In 1997, an article in the *Boston Globe* (the "Globe") chronicling abuses of the Massachusetts emergency commitment statute prompted the Commonwealth to review its emergency commitment procedures.¹²⁰ This section describes that review and the proposed changes resulting from it. Subsection A describes the Massachusetts emergency commitment statute and subsection B describes the Globe article that examined it.¹²¹ Subsection C discusses the responses to the Globe article, including the proposed changes to the emergency commitment statute.¹²²

A. *The Massachusetts Emergency Commitment Statute*

In 1970, Massachusetts enacted a statute providing for the emergency commitment of the mentally ill.¹²³ Under this statute, commonly

¹¹⁶ See *id.*

¹¹⁷ See *id.*

¹¹⁸ See *id.*

¹¹⁹ See *Thompson*, 438 N.E.2d at 37.

¹²⁰ See Zuckoff, *supra* note 1, at A1.

¹²¹ See *infra* notes 123-38 and accompanying text.

¹²² See *infra* notes 139-87 and accompanying text.

¹²³ See MASS. GEN. LAWS ANN. ch. 123, § 12 (West 1997). Section 12 states in relevant part:

(a) Any [qualified] physician . . . who after examining a person has reason to believe that failure to hospitalize such person would create a likelihood of serious harm by reason of mental illness may restrain or authorize the restraint of such person and apply for the hospitalization of such person for a ten day period at a public facility or at a private facility authorized for such purposes. . . . If an examination is not possible because of the emergency nature of the case and because of the refusal of the person to consent to such examination, the physician, qualified psychologist or qualified psychiatric nurse mental health clinical specialist on the basis of the facts and circumstances may determine that hospitalization is necessary and may apply therefore. In an emergency situation, if a physician, qualified psychologist or qualified psychiatric nurse mental health clinical specialist is not available, a police officer, who believes that failure to hospitalize a person would

referred to as section 12, a qualified physician may admit a person to a hospital for a ten-day period "[i]f the physician determines that failure to hospitalize such person would create a likelihood of serious harm by reason of mental illness."¹²⁴ If someone other than a qualified physician makes an application for admission, the person may be admitted only after a qualified physician gives the person a psychiatric examination and determines that failure to hospitalize would create a likelihood of serious harm by reason of mental illness.¹²⁵ The person must then be discharged at the end of the ten-day period unless the hospital files a petition for further commitment with the district court.¹²⁶ The law permits a maximum of fourteen days between the filing of a petition for commitment by the hospital and the time of the judicial hearing on commitment.¹²⁷ Thus, a person may be committed involuntarily without judicial review for a maximum of twenty-four days.¹²⁸

Section 12 contrasts sharply with the statutes of other states, most of which require, or permit a patient to request, that a hearing be held within five days after emergency involuntary commitment.¹²⁹ Because emergency commitment processes vary greatly from state to state with

create a likelihood of serious harm by reason of mental illness may restrain such person and apply for the hospitalization of such person for a ten day period. . . .

(b) Only if the application for hospitalization under the provisions of this section is made by a physician specifically designated to have the authority to admit to a facility in accordance with the regulations of the department, shall such person be admitted to the facility immediately after his reception. If the application is made by someone other than a designated physician, such person shall be given a psychiatric examination by a designated physician immediately after his reception at such facility. If the physician determines that failure to hospitalize such person would create a likelihood of serious harm by reason of mental illness he may admit such person to the facility for care and treatment.

. . . .

(d) A person shall be discharged at the end of the ten-day period unless the superintendent applies for a commitment under the provisions of sections seven and eight of this chapter or the person remains on a voluntary status.

See id.

¹²⁴ *Id.* § 12(a).

¹²⁵ *See id.* § 12(b).

¹²⁶ *See id.* § 12(d).

¹²⁷ *See id.* §§ 7(c), 12(d).

¹²⁸ *See id.* §§ 7(c), 12(d). When enacted in 1970, section 12 required that hospitals notify district courts of all emergency commitments and provide evidence that hospitalization was needed to avoid serious harm. *See Zuckoff, supra* note 1, at A1. If the evidence was "shaky," an immediate hearing was required. *See id.* In 1971, this provision was deleted from the statute. *See id.*

¹²⁹ *See id.* *See generally* CONN. GEN. STAT. ANN. § 17a-502(d) (West 1998) (person detained has right to request hearing that shall be held within 72 hours, excluding weekends and holidays); LA. REV. STAT. ANN. tit. 28 § 53.D. (West 1998) (person confined has right to demand hearing

respect to the standard for commitment, length of commitment and timing of judicial review, it is difficult to draw broad conclusions based on any one aspect of a state's procedural scheme.¹³⁰ A state that requires judicial review within twenty-four hours of commitment may appear to provide more due process protection than a state that allows commitment for a longer period. If the state requiring immediate judicial review, however, has a low standard for commitment, the due process protection it provides is diminished. Nevertheless, according to a study conducted by the Globe and the American Bar Association's Commission on Mental and Physical Disability Law, the twenty-four-day period of commitment without judicial review permissible in Massachusetts is the longest period of commitment without judicial review in the country.¹³¹

B. Boston Globe Article Draws Attention to Section 12

On May 12, 1997, a front-page article in the Globe on the emergency commitment process drew public attention to section 12.¹³² The article described several cases of apparently improper emergency commitments under section 12, including Susan Rockwell's case, discussed in the Introduction.¹³³ The Globe report cited such abuses of section 12 to illustrate the need for reform of the emergency commitment process.¹³⁴ The Globe investigation revealed that Massachusetts law permits the longest period of emergency commitment without judicial review in the nation.¹³⁵ Specifically, the study conducted by the Globe and the American Bar Association's Commission on Mental and Physical Disability Law found that twenty-five states and the District of Columbia require court involvement within seventy-two hours of emergency involuntary commitment.¹³⁶ Fourteen other states require court involvement within five days of commitment.¹³⁷ The laws of the remaining states vary, with most requiring court involvement within six to eight days.¹³⁸

that shall be held within five days); N.Y. MENTAL HYG. LAW § 9.39(a) (McKinney 1998) (patient may request hearing that shall be held not more than five days after such request is received).

¹³⁰ See LEVY & RUBENSTEIN, *supra* note 44, at 68-72; Herimann, *supra* note 91, at 92.

¹³¹ See Don Aucoin & Mitchell Zuckoff, *Reform of Emergency Commitments Urged Lawmakers Push for Patient's Rights After Series Exposes Abuses of Law*, BOSTON GLOBE, May 13, 1997, at B1.

¹³² See Zuckoff, *supra* note 1, at A1.

¹³³ See *id.*

¹³⁴ See *id.*

¹³⁵ See *id.*

¹³⁶ See *id.*

¹³⁷ See Zuckoff, *supra* note 1, at A1.

¹³⁸ See *id.*

C. Responses to the Boston Globe Series

The Globe series encouraged the Massachusetts District Court Committee on Mental Health and Retardation to form an ad hoc committee ("Ad Hoc Committee") to take an in-depth look at section 12.¹³⁹ The Ad Hoc Committee was comprised of judges, clinicians, hospital administrators and attorneys representing both hospital and patient interests.¹⁴⁰ The Ad Hoc Committee sought to determine the most efficient and effective time lines to accomplish the purposes of section 12, while minimizing the length of any involuntary hospitalization periods for the patients involved.¹⁴¹ On October 21, 1997, the Ad Hoc Committee presented a report ("Majority Report") containing recommendations for revisions to section 12 to the Massachusetts legislature's Joint Committee on Human Services and Elderly Affairs.¹⁴² Because the patient advocates on the Ad Hoc Committee disagreed with some of these recommendations, they chose to present their own report ("Minority Report") to the Joint Committee.¹⁴³

1. The Majority Report of the Ad Hoc Committee

The Majority Report adopted four proposals relating to the section 12 emergency commitment process.¹⁴⁴ First, it recognized the need for patients admitted through the emergency commitment process to have immediate access to counsel to address the many concerns that arise with involuntary hospitalization.¹⁴⁵ Accordingly, the report proposed that the Committee for Public Counsel Services ("CPCS"), which

¹³⁹ See Majority Report, *supra* note 99, at 1.

¹⁴⁰ See *id.* The members of the Committee were: Paul Barreira, M.D., Deputy Commissioner for Clinical & Professional Services, Department of Mental Health; Hon. Jonathan Brant, Justice, Cambridge District Court; Doris Carreiro, Esq., Assistant General Counsel, Department of Mental Health; Robert Fleischner, Esq., Center for Public Representation; Stan Goldman, Esq., Director of Mental Health Litigation, Committee for Public Counsel Services; Hon. Timothy Hillman, First Justice, Worcester District Court; Jennifer Honig, Esq., Mental Health Legal Advisors' Committee; Catherine Mahoney, Esq., Deputy General Counsel, Beth Israel-Deaconess Medical Center; Michael C. Miller, M.D., Director of Ambulatory Services, Department of Psychiatry, Beth Israel-Deaconess Medical Center, East Campus; Thomas O'Hare, Esq., Legal Counsel, Newton-Wellesley Hospital; Hon. Maurice H. Richardson, First Justice, Dedham District Court (Chair); Linda Sahovey, R.N., M.S.N., Clinical Director, Boston Emergency Services Team; Steven Schwartz, Esq., Center for Public Representation; Paul Summergrad, M.D., Chief of Inpatient Psychiatry, Massachusetts General Hospital. See *id.* at attachment. Liaison, District Court Department was John C. Connors, Esq., Deputy Court Administrator and the Staff Liaison was Marilyn Wellington, Esq., Director of Forensic Legal Services, Department of Mental Health. See *id.*

¹⁴¹ See *id.* at 2.

¹⁴² See *id.* at 1.

¹⁴³ See *id.* at 2.

¹⁴⁴ See Majority Report, *supra* note 99, at 5.

¹⁴⁵ See *id.* at 2-3.

provides representation for indigent persons, appoint counsel immediately upon admission of a patient and that the counsel meet with the patient within twenty-four hours of appointment.¹⁴⁶ The Majority Report stated that immediate appointment of counsel was the single most effective method of protecting a patient's rights.¹⁴⁷

Second, the Majority Report addressed the need for an emergency commitment procedure to deal with inappropriate cases of involuntary hospitalization, such as those highlighted in the Globe series.¹⁴⁸ The Majority Report proposed that patient's counsel be able to petition the local district court for an emergency hearing on the issue of appropriateness of commitment when counsel or the patient feels that the circumstances of admission constituted a misuse of the involuntary commitment procedures.¹⁴⁹ The district court would hold emergency hearings in such cases on the day that the petition is filed in court or, at the latest, on the next business day.¹⁵⁰

Next, the Majority Report proposed that hospitals be required to file a petition for commitment no later than the close of the third business day following a patient's emergency admission pursuant to section 12.¹⁵¹ The clinical representatives on the Ad Hoc Committee stated that, in their professional judgment, this three-business-day period is the minimum amount of time needed to evaluate a patient appropriately and to make a determination of the need for continued involuntary hospitalization.¹⁵²

Finally, the Majority Report recommended that a judicial commitment hearing on the petition filed by the hospital be held no later than the close of the fifth business day from the receipt of the petition.¹⁵³ This would reduce the twenty-four-day period in which a patient can be involuntarily held under current law without judicial review to a maximum of eight to twelve days.¹⁵⁴ All of the representatives of the judiciary on the Ad Hoc Committee stated that a minimum of five

¹⁴⁶ See *id.* at 3.

¹⁴⁷ See *id.* The Committee also proposed that section 12(c) be amended to require immediate appointment of counsel. See *id.* Section 12(c) provides that a district court judge—after a hearing on a petition and the issuance of a warrant of apprehension, if necessary—may order the 10-day involuntary hospitalization of a person who represents a likelihood of serious harm as a result of mental illness. See MASS. GEN. LAWS ANN. ch. 123, § 12(c).

¹⁴⁸ See Majority Report, *supra* note 99, at 3.

¹⁴⁹ See *id.* at 3-4.

¹⁵⁰ See *id.*

¹⁵¹ See *id.* at 4.

¹⁵² See *id.*

¹⁵³ See Majority Report, *supra* note 99, at 4.

¹⁵⁴ See *id.* at 5.

business days between the filing of the petition and the hearing was necessary for the courts to process the petition, prepare the case file and schedule a judge and other staff to travel to the petitioning hospital to hold a hearing.¹⁵⁵

2. The Minority Report of the Ad Hoc Committee

Three members of the Ad Hoc Committee, all of whom were representatives of and advocates for persons with mental disabilities, opposed the majority proposal for two reasons.¹⁵⁶ First, the majority proposal did not call for a prompt probable cause hearing in every case of emergency commitment to determine whether the initial detention was appropriate.¹⁵⁷ Second, the majority proposal did not provide a prompt judicial hearing on the need for extended commitment.¹⁵⁸

a. *Probable Cause Hearing*

The Minority Report advocated a probable cause hearing that would require the Commonwealth, or its designee (the psychiatrist and/or the hospital), to prove to a court in every case that the statutory standard for involuntary commitment was met.¹⁵⁹ Relying principally on *Lessard v. Schmidt*, the Minority Report stated that due process mandates a probable cause hearing as soon as possible after the patient is deprived of his or her liberty.¹⁶⁰ Therefore, the Minority Report rejected the emergency hearing procedure proposed by the majority because its purpose was restricted to correcting obvious abuses of the emergency commitment process, rather than providing a judicial forum for the determination of probable cause in every case of emergency commitment.¹⁶¹ Moreover, the Minority Report noted that the emergency hearing process proposed by the majority requires that the patient request the emergency hearing and, therefore, bear the burden of proof.¹⁶²

The Minority Report noted that even though the dissenting members believed that a prompt probable cause hearing was constitution-

¹⁵⁵ See *id.* at 4.

¹⁵⁶ See Minority Report, *supra* note 82, at 1.

¹⁵⁷ See *id.*

¹⁵⁸ See *id.*

¹⁵⁹ See *id.*

¹⁶⁰ See *id.*

¹⁶¹ See Minority Report, *supra* note 82, at 2.

¹⁶² See *id.*

ally mandated, they agreed during meetings of the Ad Hoc Committee that a full commitment hearing within a very short period of time after commitment would obviate the need for a probable cause hearing in most cases.¹⁶³ The dissenting members offered this approach as an alternative to the Majority Report.¹⁶⁴ The Ad Hoc Committee's final recommendation, however, which rejected the minority's alternative approach, made the absence of a prompt probable cause hearing unacceptable to the minority.¹⁶⁵

b. *Length of Time Before Judicial Hearing on Extended Commitment*

The dissenting members also disagreed with the time frame proposed by the majority for scheduling a hearing on extended commitment, namely, requiring that the hospital file a petition for commitment within three business days and that the court schedule a hearing on the hospital's petition within five business days.¹⁶⁶ The Minority Report stated that in light of the Ad Hoc Committee's decision not to recommend a mandatory probable cause hearing, the proposed time frame for judicial review was unreasonably long.¹⁶⁷

As an alternative to the Majority Report, the Minority Report proposed that the three-business-day time period during which the hospital may file a commitment petition runs concurrently with the five-business-day time period the court has to schedule a hearing.¹⁶⁸ This concurrent approach would reduce the amount of time a patient may wait for a court hearing from eight business days to five business days.¹⁶⁹ Specifically, the minority's concurrent approach would require that on the first business day after the patient's involuntary admission, the hospital notify both CPCS, which would promptly appoint an attorney to represent the person, and the court, which would tentatively schedule a hearing within five days.¹⁷⁰ If the hospital then files a commitment petition, the hearing would be confirmed.¹⁷¹ If the hospital does not file a petition, the hearing would be canceled.¹⁷²

¹⁶³ See *id.*

¹⁶⁴ See *id.*

¹⁶⁵ See *id.*

¹⁶⁶ See Minority Report, *supra* note 82, at 3.

¹⁶⁷ See *id.*

¹⁶⁸ See *id.*

¹⁶⁹ See *id.*

¹⁷⁰ See *id.*

¹⁷¹ See Minority Report, *supra* note 82, at 3.

¹⁷² See *id.*

In the Majority Report, the Ad Hoc Committee stated that the minority's concurrent approach was unacceptable to the majority, including all of the judiciary department members, because it would require courts to set up schedules for judges to go to hearings that might never be held. In particular, the majority described such a system as "an undesirable aberration to the normal filing process in our busy court system."¹⁷³ The Minority Report stated that the canceled hearings that would inevitably result under this concurrent approach already occur in the current commitment process.¹⁷⁴ Under the present system, hearings are frequently canceled because the hospital decides to withdraw its petition or the person agrees to remain at the hospital on a voluntary basis.¹⁷⁵ The Minority Report noted that the study of commitment petitions filed in the Cambridge Division of the Massachusetts District Court revealed that more than sixty-seven percent of scheduled hearings are canceled for these reasons under the present system.¹⁷⁶

4. Constitutionality of Proposed Changes to Section 12

The Supreme Court's summary affirmances of both *Logan v. Arafeh* and *French v. Blackburn*, in which three-judge panels upheld statutes permitting forty-five and ten-day periods of commitment without a hearing, respectively, indicate that the emergency commitment procedures proposed by the Majority Report satisfy due process requirements.¹⁷⁷ These decisions suggest that the absence of a prompt probable cause hearing in these proposals does not violate due process.¹⁷⁸ Rather, as the Second Circuit reasoned in *Project Release*, the constitutionality of a statute should depend on the totality of the procedural scheme.¹⁷⁹

The Majority Report calls for a time frame that would provide judicial review within eight business days of commitment.¹⁸⁰ Additionally, it advocates for an emergency system whereby patients could obtain immediate hearings when the circumstances of admission consti-

¹⁷³ Majority Report, *supra* note 99, at 6.

¹⁷⁴ See Minority Report, *supra* note 82, at 3.

¹⁷⁵ See *id.*

¹⁷⁶ See *id.* at 2 n.4.

¹⁷⁷ See *French v. Blackburn*, 428 F. Supp. 1351, 1356 (M.D.N.C. 1977), *aff'd mem.*, 443 U.S. 901 (1979); *Logan v. Arafeh*, 346 F. Supp. 1265, 1268 (D. Conn. 1972), *aff'd sub nom. Briggs v. Arafeh*, 411 U.S. 911 (1973); see also *Hicks v. Miranda*, 422 U.S. 332, 344-45 (1975) (United States Supreme Court summary decisions are binding on lower courts).

¹⁷⁸ See *Blackburn*, 428 F. Supp. at 1356; *Arafeh*, 346 F. Supp. at 1268.

¹⁷⁹ See *Project Release v. Prevost*, 722 F.2d 960, 974, 975 (2d Cir. 1983).

¹⁸⁰ See Majority Report, *supra* note 99, at 5.

tute a misuse of the involuntary commitment process.¹⁸¹ Furthermore, the opportunity for patients to have counsel appointed immediately will enhance their ability to take full advantage of these hearings.¹⁸² Thus, when considered as a whole, the layers of due process protection provided by this proposal comport with due process.¹⁸³

The Minority Report's position that due process requires a prompt probable cause hearing is not supported by case law.¹⁸⁴ The Minority Report relies principally on the United States District Court's reasoning in *Lessard* to support its contention that due process requires a probable cause hearing as soon as possible after commitment.¹⁸⁵ The Supreme Court's affirmances of *Blackburn* and *Arafeh* effectively overruled *Lessard*.¹⁸⁶ Thus, the Minority Report's assertion that due process requires a prompt probable cause hearing is unfounded.¹⁸⁷

III. ANALYSIS OF PROPOSED EMERGENCY COMMITMENT PROCEDURES

An ideal emergency commitment process is one that best protects patients' rights in practice.¹⁸⁸ To develop such a process, it is essential to recognize that in most cases, emergency commitment affects both the liberty interests and the clinical interests of the patient.¹⁸⁹ Striking a workable balance between these competing interests requires consideration of this issue from the civil libertarian, clinical and public perspectives. The Ad Hoc Committee's Majority Report, described above, best respects both liberty and clinical interests because it bal-

¹⁸¹ See *id.* at 3-4.

¹⁸² See *id.* at 5.

¹⁸³ See *Project Release*, 722 F.2d at 974, 975.

¹⁸⁴ See *id.* at 974-75; *Blackburn*, 428 F. Supp. at 1356; *Arafeh*, 346 F. Supp. at 1268.

¹⁸⁵ See Minority Report, *supra* note 82, at 1.

¹⁸⁶ See *Blackburn*, 428 F. Supp. at 1356; *Lessard v. Schmidt*, 349 F. Supp. 1078, 1091 (E.D. Wis. 1972); *Arafeh*, 346 F. Supp. at 1268.

¹⁸⁷ See *Blackburn*, 428 F. Supp. at 1356; *Arafeh*, 346 F. Supp. at 1268. The Minority Report stated that "[i]n a series of consistent constitutional decisions, numerous federal courts held that states must provide a prompt probable cause hearing after a person is involuntarily detained." Minority Report, *supra* note 82, at 1. In support of this statement, the report cited *Lessard* and *Cannon v. Garland County*, 948 F. Supp. 1368 (W.D. Ark. 1996). See *id.* In *Cannon*, the United States District Court for the Western District of Arkansas held that an Arkansas involuntary commitment statute that allowed a hearing to be held up to 11 days after admission violated constitutional due process requirements. See *Cannon*, 948 F. Supp. at 1369, 1380. The Eighth Circuit Court of Appeals later vacated the district court's decision, however, because it concluded that the plaintiff lacked standing. See *Cannon v. Garland County*, 141 F.3d 1167, 1998 WL 172612, at *1 (8th Cir. 1998) (unpublished disposition).

¹⁸⁸ See Hermann, *supra* note 91, at 94-95.

¹⁸⁹ See *id.*

ances the need for prompt judicial review after deprivation of liberty with the clinical needs of patients.¹⁹⁰

First, the time frame for judicial review proposed by the Majority Report would effectively serve both clinical and liberty interests.¹⁹¹ Requiring hospitals to file a petition for commitment within three business days of emergency commitment marks a significant reduction from the present ten-day period permitted by section 12.¹⁹² Moreover, because many acute psychiatric episodes subside within one to four days, the three-business-day period would allow the hospital to make an informed decision on the need for further commitment or to decide that the patient has improved sufficiently to be released.¹⁹³ Second, the Majority Report's recommendation that a judicial commitment hearing on the petition filed by the hospital be held within five business days of receipt of the petition represents a fair balancing of the patient's right to a hearing and the burdens the hearing process places on the judicial system.¹⁹⁴ In considering this five-day period, it is important to note that the Majority Report suggests that these hearings be held at the hospitals and to recognize the scheduling difficulties that this may pose.¹⁹⁵ Holding the hearings at the hospitals is less disruptive for patients and makes the process seem less criminal in nature.¹⁹⁶ Moreover, by not requiring physicians to travel to court, it also reduces the amount of time that the commitment process takes away from physicians' clinical duties.¹⁹⁷

Although emergency commitment for eight business days without judicial review may seem outrageous when compared to the due process procedures afforded by the criminal justice system, in practice, this

¹⁹⁰ See Majority Report, *supra* note 99, at 5.

¹⁹¹ See *id.*

¹⁹² See MASS. GEN. LAWS ANN. ch. 123, § 12(d).

¹⁹³ See Stromberg & Stone, *supra* note 39, at 324.

¹⁹⁴ See Majority Report, *supra* note 99, at 5.

¹⁹⁵ See *id.* at 4.

¹⁹⁶ Some people who have been involuntarily committed, however, believe that hearings should be held at courthouses. On April 7, 1998, the Massachusetts legislature's Joint Committee on Human Services and Elderly Affairs held a hearing on a bill to revise section 12. The bill incorporated all of the proposals of the Majority Report. See H.R. 5402, 180th Leg., 2d Spec. Sess. (Mass. 1998). At the hearing, several persons who had been involuntarily committed testified that commitment hearings should be held at courthouses. See *An Act to Reform the Civil Commitment Process for Persons with Mental Illness: Hearing on H.R. 5402*, 180th Leg., 2d Spec. Sess. (Mass. 1998) (statement of Judi Chamberlin). For example, Judi Chamberlin, an advocate for persons with mental disabilities who was once involuntarily committed herself, stated that hearings held in hospitals do not make impressions on patients as being judicial process. See *id.* Ms. Chamberlin testified that patients want "their day in court." See *id.*

¹⁹⁷ See *Thompson v. Commonwealth*, 438 N.E.2d 33, 37 (Mass. 1982) (expressing concern about demands judicial hearings place on psychiatrists' time).

time frame provides more due process protection than would an immediate probable cause hearing.¹⁹⁸ If a hearing were held immediately after admission, physicians would be forced to seek commitment for many patients whose condition might improve sufficiently for them to be released a few days later.¹⁹⁹ If a hearing were held after eight business days, however, such patients would be released prior to court involvement.²⁰⁰ Moreover, because judges seem unwilling to second-guess the judgment of physicians, immediate probable cause hearings would likely result in rubber stamps on physicians' commitment petitions.²⁰¹ The Cambridge District Court study that revealed that only five percent of patients for whom commitment petitions were filed were discharged as a result of the petitions being denied indicates that judicial review is not a patient's best means of securing an early discharge.²⁰² Faced with the decision of releasing a patient whose mental illness, according to a physician, poses a serious harm to him or herself or others, most judges would defer to the professional judgment of the physician. Thus, although an immediate probable cause hearing would, in the abstract, comport more with civil libertarian notions of fairness, in practice, a hearing held some days after admission would provide greater protection for a person's liberty.²⁰³

Furthermore, the procedure for requesting an emergency hearing when counsel or the patient feels that the circumstances of admission constitute a misuse of section 12 would provide an additional layer of protection.²⁰⁴ This emergency hearing process would address the concern that the time frame of the emergency commitment process presumes a need for a clinical relationship. Thus, in cases such as Susan Rockwell's, where there was no basis for admission under section 12,

¹⁹⁸ See Stromberg & Stone, *supra* note 39, at 324.

¹⁹⁹ See *id.*

²⁰⁰ See *id.*; Brant, *supra* note 108, at 1.

²⁰¹ See Brant, *supra* note 108, at 1 (estimating approximately five percent of patients discharged as a result of petitions for commitment being denied); see also Kenneth L. Appelbaum, M.D. & William H. Fisher, Ph.D., *Judges' Assumptions About the Appropriateness of Civil and Forensic Commitment*, PSYCHIATRIC SERVICES, May 1997, at 711. A survey of Massachusetts district court judges asked if they ever "felt concerned that the mental health system might inadequately treat or prematurely discharge a patient" who had been civilly committed. *Id.* Fifty-four judges, 93.1% of those who responded, acknowledged having concerns about the adequacy of treatment or confinement in the civil mental health system. See *id.* Although this survey does not relate directly to the likelihood of a judge's denying a commitment petition, it does provide some insight into judges' views of the commitment process.

²⁰² See Brant, *supra* note 108, at 1.

²⁰³ See Stromberg & Stone, *supra* note 39, at 324.

²⁰⁴ See *Project Release v. Prevost*, 722 F.2d 960, 974 (2d Cir. 1983); Majority Report, *supra* note 99, at 3-4.

patients can petition the court for a hearing to be held no later than the next business day after the petition is filed.²⁰⁵

One potential problem with such an emergency hearing process, however, is defining the grounds for requesting a hearing. The Majority Report does not contain specific guidelines for the emergency hearing process. The criteria for an emergency hearing must be sufficiently narrow so that these hearings do not become routine.²⁰⁶ Because all section 12 commitments are involuntary, most patients would undoubtedly feel that their admissions were improper and that they deserve emergency hearings. A patient's disagreement with his or her admission under section 12, however, is not necessarily tantamount to an improper commitment and should not trigger an emergency hearing in every case. Moreover, if such emergency hearings were to become a substitute for the regular system of judicial review, they would be counterproductive to the patients' interests and would overburden the judicial system.²⁰⁷ Therefore, emergency hearings should be available only when the circumstances of the emergency admission suggest that the admitting physician did not make reasonable efforts to ensure that commitment was necessary, e.g., when the admitting physician did not conduct a thorough examination of the patient.

Of all the elements of the proposals described in Part II, perhaps the most significant is the element calling for immediate appointment of counsel.²⁰⁸ Appointing counsel immediately would serve the interests of patients, physicians and the courts because it would increase the likelihood of an extra-judicial resolution of improper section 12 admissions. Where a patient's admission under section 12 was a clear abuse of the process, the patient's counsel would be able to work with the physician and the hospital's counsel to resolve the matter immediately. In Susan Rockwell's case, for example, immediate appointment of counsel almost certainly would have resulted in her being discharged more quickly.²⁰⁹ Appointed counsel could have facilitated her discharge by arranging a conference between the admitting physician and Rockwell's psychiatrist.²¹⁰ Moreover, even in cases of proper admission, immediate appointment of counsel would enhance patients' rights.²¹¹ If

²⁰⁵ See Majority Report, *supra* note 99, at 3-4.

²⁰⁶ Cf. *Thompson*, 438 N.E.2d at 37 (noting intolerable fiscal and administrative burdens that would result if there were no means of disposing or discouraging filing of frivolous applications pursuant to MASS. GEN. LAWS ch. 123, § 9(b)).

²⁰⁷ See *Mathews v. Eldridge*, 424 U.S. 319, 348 (1976); *Thompson*, 438 N.E.2d at 37.

²⁰⁸ See Majority Report, *supra* note 99, at 3.

²⁰⁹ See *supra* notes 1-6 and accompanying text.

²¹⁰ See *supra* notes 1-6 and accompanying text.

²¹¹ See *CHAMBERLIN*, *supra* note 87, at 39.

patients believe that the physicians are not acting in their best interests, counsel may be the only person whom the patients believe they can trust.²¹² It should be noted, however, that requiring immediate appointment of counsel would place an added burden on CPCS. Therefore, the Commonwealth should provide CPCS with sufficient funding so that it would be able to meet this demand.

It is worthwhile to note that the Minority Report calling for a prompt probable cause hearing was supported exclusively by patient advocates and representatives.²¹³ This may signal a fundamental clash of perspectives on what should be the goals of emergency commitment procedures.²¹⁴ Whereas the Majority Report balances the clinical and liberty interests of patients, the Minority Report focuses exclusively on the patient's legal rights. The primary goal of the Minority Report appears to be to design a system that will meet the needs of the relatively small percent of persons admitted improperly under section 12.²¹⁵ In doing so, it does not address the clinical needs of the majority of patients who are properly admitted.²¹⁶ If one looks at the involuntary commitment process only from the perspective of the criminal justice system, it is easy to reject the idea that liberty interests should be balanced against clinical interests.²¹⁷ If, however, one acknowledges the therapeutic aspect of the involuntary commitment process, consideration of a patient's clinical needs is essential to protecting a patient's rights.²¹⁸

CONCLUSION

An emergency commitment statute should reflect the fact that the emergency commitment process affects both liberty and clinical interests. Because the emergency commitment process deprives persons of their liberty, persons subject to it must have a means of quickly challenging physicians' decisions to admit them. At the same time, how-

²¹² See *id.*

²¹³ See Minority Report, *supra* note 82, at 1. The introductory paragraph of the Minority Report states: "Several members of the Committee strongly disagree with the recommendations of the majority. These members are all representatives and advocates for persons with mental disabilities." *Id.*

²¹⁴ See *id.*

²¹⁵ See *id.* at 2. The Minority Report criticized the emergency hearing process proposed by the Majority Report because its purpose was "restricted to correcting obvious abuses in the emergency detention process, rather than providing a judicial forum for all involuntarily detained persons for the constitutionally-required determination of probable cause." *Id.*

²¹⁶ See Hermann, *supra* note 91, at 94-95, 106.

²¹⁷ See *id.*

²¹⁸ See *id.*

ever, it must be remembered that the purpose of the emergency commitment process is therapeutic and that the consequences of failing to admit someone when warranted can be severe. The most effective means of protecting these competing interests is to appoint counsel immediately and to provide a procedure for requesting an emergency hearing when counsel or the patient feels that the circumstances of the admission constituted a misuse of the emergency commitment process. This would allow for fast resolution of cases of improper commitment in which there are no clinical interests at stake. For cases of emergency commitment that do not require emergency hearings, judicial review within eight business days would provide protection of patients' liberty interests and allow time for possible extra-judicial resolutions of the involuntary commitments. Equally important, a hearing within eight business days would provide physicians sufficient time to make informed decisions on the need for continued commitment and, therefore, best protect patients' clinical interests.

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