NOTES

THE STARKEST MADNESS: MASSACHUSETTS' FAILURE TO PROTECT THE RIGHTS OF PEOPLE WITH MENTAL DISABILITIES

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* J.D. Candidate, 2022, Boston University School of Law. I would like to thank my faculty advisor, Gregory Dorchak, for his help, guidance, and feedback throughout the process of drafting this Note. Also, I would like to thank everyone on the *Boston University Public Interest Law Journal* for all their hard work on this Note and this edition. Additionally, this project would not have been possible without the inspiration, direction, and mentorship I received during my time interning with the Mental Health Litigation Division of the Committee for Public Counsel Services. Finally, I would like to thank my wife, Malavika Krishnan, for her unending support, both emotionally and grammatically, as I endeavored on this journey. I am so grateful for you all.

The main title is a quote from the celebrated poem, "Much Madness is divinest Sense" by Emily Dickinson:

> Much Madness is divinest Sense -
> To a discerning Eye -
> Much Sense - the starkest Madness -
> 'Tis the Majority
> In this, as all, prevail -
> Assent - and you are sane -
> Demur, - you're straightaway dangerous -
> And handled with a Chain -

EMILY DICKINSON, *Much Madness is divinest Sense*, *in* THE POEMS OF EMILY DICKINSON: VARIORUM EDITION, 613, 613 (Ralph W. Franklin ed., Harvard Univ. Press 1998), https://www.poetryfoundation.org/poems/51612/much-madness-is-divinest-sense-620.

ABSTRACT

Section 12 of Massachusetts' mental health laws fails to limit the detainment period for individuals suspected to be having a mental health crisis. As part of the state's commitment procedure, section 12 detainments often serve as preludes to civil commitments, but involve reduced or no process. This Note explores how every branch of Massachusetts' government has contributed to the construction and preservation of this facially unconstitutional law. Furthermore, it addresses why section 12 is indicative of a much larger problem in Massachusetts commitment legislation.

AN UNPLEASANT BEGINNING

Imagine you are at an airport. Any airport with long lines and unaffected personnel will do, so long as the mental image fills you with the appropriate amount of forlorn impatience that goes hand-in-hand with solo air travel on a tight schedule. Additionally, you have been having an extraordinarily bad day. Whatever cocktail of tragic and disillusioning events constitutes your worst-case scenario, it has unfortunately come to pass, and now you are stuck in a modern-day purgatory located somewhere between a Cinnabon and a screaming toddler waving a dead iPad. It is in this exhausted, perhaps emotionally unstable, state that you are confronted with yet another ill-fated event. It could be anything really—your phone screen cracks, you lose your passport, you forgot something at the hotel—it ultimately matters quite little. All that matters is that one last, cruel happenstance has pushed your thoughts past any concern for social propriety and deep into an unyielding spiral of panic and desperation. You are in a moment of crisis.

It is important to note that people with mental disabilities do not monopolize mental health crises, but in this specific instance, I want you to imagine you have a history of mental illness. For twenty percent of Americans, this will require no imagination at all.[1] But I want you to understand that for you, as someone whose brain chemistry is predisposed to escalate moments of distress, this cataclysm could manifest in any number of ways—likely none of which you get to make a conscious choice about. Whether you start screaming, or stomping on your belongings strewn on the ground, or rocking back and forth in a free spot of floor next to the airport pub, your actions start to draw concerned glances. It is not long thereafter that you are brought to your feet by a few burly men and promptly escorted to their vehicle, where fewer people will be inconvenienced by your anguish.

Now that "I missed my flight" has been forcefully added to your list of woes, you decide to voice your discontent. Maybe under normal circumstances you would choose your words with a bit more diplomacy. But, given the pain you

[1] *Mental Health Facts*, NAT'L ALL. ON MENTAL ILLNESS, https://www.nami.org/nami/media/nami-media/infographics/generalmhfacts.pdf (last visited Nov. 12, 2021).

are in, combined with the blank looks you receive in return, you end up filling your words with as much acid and spite as you can muster so that these strangers might begin to get an idea of the type of day you are having. Your ill-conceived taunts come off a bit too much like threats, and, almost as soon as you arrive at the emergency room, there is a needle in your arm. One dream sequence later, your limbs are strapped to a table. A serious-looking man with a clipboard glares at you disapprovingly. As your memories of what happened return, so does your frustration with not being understood. You are livid for being treated so callously. You make the man aware of that fact. The cycle repeats itself.

Questions pop into your weary and frightened brain as a doctor administers yet another sedative. When am I going to get an opportunity to explain myself? When are they going to let me go home? If you happen to be in Massachusetts, then the answer to both may as well be: when we get around to it.[2]

INTRODUCTION TO AN IMPERFECT SYSTEM

Civil commitment is a unique area of the law in which significant deprivations of liberty hinge on the limited process afforded to civil litigation. It toes the line between paternalistic and authoritarian as it prescribes what are, in effect, criminal penalties to civil defendants based purely on the manifestations of their mental disability.[3] The "massive curtailment of liberty"[4] resulting from commitment is deemed appropriate for an entire class of people, supposedly for their own good, based on flawed systems of determining risk.[5] Concededly, civil

[2] *See* MASS. GEN. LAWS ch. 123, § 12(a) (2021) (allowing unlimited emergency room detainment prior to evaluation at mental health facility); Mass. Gen. Hosp. v. C.R., 142 N.E.3d 545, 560 (Mass. 2020) (holding that prolonged, involuntary emergency room detainment of woman experiencing mental health crisis was not unconstitutional because the "period of confinement was no longer than necessary given difficulty of finding her an appropriate placement").

[3] *See* Donald H. Stone, *There Are Cracks in the Civil Commitment Process: A Practitioner's Recommendations to Patch the System*, 43 FORDHAM URB. L.J. 789, 796 (2016) ("[T]he civil commitment process became remarkably similar to a criminal proceeding through considering the potential loss of liberty as well as the negative impact on one's reputation (i.e., 'stigma')."); ch. 123, § 12(a) (allowing restraint of person where qualified examiner "has reason to believe that failure to hospitalize such person would create a likelihood of serious harm by reason of mental illness").

[4] Vitek v. Jones, 445 U.S. 480, 491 (1980).

[5] *See* James W. Hicks, *Ethnicity, Race, and Forensic Psychiatry: Are We Color-Blind?*, 32 J. AM. ACAD. PSYCHIATRY & L. 21, 23 (2004) ("Although risk assessment has improved, there remains imprecision and ample room for the clinician's bias to influence decisions, with serious consequences."); Michael L. Perlin & Heather Ellis Cucolo, "*Tolling for the Aching Ones Whose Wounds Cannot Be Nursed": The Marginalization of Racial Minorities and Women in Institutional Mental Disability Law Policing Rape Complaints*, 20 J. GENDER RACE & JUST. 431, 439–41 (2017) (describing processes by which African Americans are disproportionately deemed "dangerous" behaviors not labeled dangerous in their white counterparts).

commitment is a necessary mechanism of the state's inherent interest in the health and safety of its citizenry.[6] Certainly, some individuals in crisis benefit from involuntary treatment, and this Note does not endeavor to diminish the importance of the work being done to provide treatment to individuals in crisis. However, treatment is different than confinement, and the problem with mental health litigation is the pervasive and generally accepted practice of winnowing away defendants' procedural protections, even though they are at risk of losing their freedom as a result.[7] Regardless of whether a defendant should get treatment for their symptoms, it is unconstitutional to assume that simply because an individual has, or appears to have, a psychiatric disability, that they should be subjected to involuntary commitment.[8]

In *O'Connor v. Donaldson*, the Supreme Court found that "[a] finding of 'mental illness' alone cannot justify a State's locking a person up against his will and keeping him indefinitely in simple custodial confinement."[9] Perhaps for the first time, the ground floor for constitutional treatment of people with mental disabilities facing commitment had been clearly established.[10] In a practice area rife with tough questions and moral quandaries, the confinement principle set forth in *Donaldson* serves as a bright-line rule maintaining an unflinching expectation of liberty for non-dangerous individuals with mental disabilities.[11] The question is: what happens when that line is objectively crossed, and freedom is denied without process?

[6] *See C.R.*, 142 N.E.3d at 559.

[7] *See* Stone, *supra* note 3, at 809 ("Where other due process protections are severally limited or even completely lacking, at the very least the decision to deprive a person of his freedom should be based on reliable evidence that possesses adequate guarantees of trustworthiness and accuracy."); Parham v. J.R., 442 U.S. 584, 609 (1979) (suggesting that procedural protections of adversarial civil commitment hearings may, in practice, be "more illusory than real").

[8] O'Connor v. Donaldson, 422 U.S. 563, 575 (1975).

[9] *Id.*

[10] *Id.*; *see* Cooper v. Oklahoma, 517 U.S. 348, 368 (1996) (citations omitted) ("Although we have not had the opportunity to consider the outer limits of a State's authority to civilly commit an unwilling individual . . . our decision in *Donaldson* makes clear that due process requires at a minimum a showing that the person is mentally ill and either poses a danger to himself or others or is incapable of 'surviving safely in freedom.'").

[11] Every federal and state bench in the United States recognizes and follows the constitutional baseline for commitment requirements set by *Donaldson*. *See, e.g.*, Project Release v. Provost, 722 F.2d 960, 971 (2d Cir. 1983) (citing *Donaldson*, 422 U.S. at 575); Poree v. Collins, 866 F.3d 235, 248 (5th Cir. 2017) (citing *Donaldson*, 422 U.S. at 575); Montin v. Moore, 846 F.3d 289, 294 (8th Cir. 2017) (citing *Donaldson*, 422 U.S. at 576); Jensen v. Lane Cnty., 312 F.3d 1145, 1147 (9th Cir. 2002) (citing *Donaldson*, 422 U.S. at 575); Lynch v. Baxley, 744 F.2d 1452, 1459 (11th Cir. 1984) (citing *Donaldson*, 422 U.S. at 575); Garcia v. Commonwealth, 164 N.E.3d 862, 869 (Mass. 2021) (citing *Donaldson*, 422 U.S. at 575).

One might expect that the prolonged imprisonment of people with disabilities—for little more than the *asserted existence* of their disability—would be met with outrage, protest, and a general unwillingness to accept that sort of treatment as fair. However, in Massachusetts, it happens time and time again, and is met, not with passionate dissent, but with clamorous apathy and shirking platitudes.[12] In 2019, 839 people were detained in emergency rooms in Massachusetts for days, and sometimes weeks, without placement in a Department of Mental Health ("DMH") facility, without a hearing, without a formal evaluation, and without the appointment of an attorney.[13] Massachusetts is the only state in the country that allows for the indefinite detainment of people with mental disabilities, by law.[14] This is not a mistake. This is not an oversight.[15] It is a blatant refusal to adhere to due process, and it is indicative of much more than misplaced priorities.[16]

This Note begins in Part I with an exploration of the immediate and surrounding legislative, judicial, and administrative history of chapter 123, section 12 of the Massachusetts General Laws. Then, Part II argues that section 12 is unconstitutional, as written and as practiced, because the Supreme Court has established that indefinite mental health detainments without process are unconstitutional. This analysis delves into the meaning and ramifications of Massachusetts' deeply troubling timeline of documented acknowledgement that its mental health laws are unfair, and their subsequent failure to act on that knowledge. Finally, Part III explains that in order to set clear limits to mental health detainments and guarantee basic due process rights to individuals facing civil commitment, the legislature must amend section 12 and reassess Massachusetts' civil commitment process as a whole. Furthermore, this Note explores what could be done to address the insufficient due process Massachusetts affords civil commitment defendants. Section 12, the Massachusetts mental health law permitting the indeterminate emergency room detainment of supposedly mentally ill individuals, is facially unconstitutional,

[12] *See infra* Part II (discussing how different branches of the Massachusetts government have identified the problem but failed to act); COMMONWEALTH OF MASS. EXEC. OFF. OF HEALTH AND HUM. SERVS., PRESENTATION ON EXPEDITED PSYCHIATRIC INPATIENT ADMISSION PROTOCOL 2.0, 5–12 (Jan. 22, 2020) [hereinafter EPIA PRESENTATION], https://www.mass.gov/doc/expedited-psychiatric-inpatient-admission-presentation/download (breaking down outcomes of 839 emergency room detainments that occurred in Massachusetts in 2019).

[13] *See* EPIA PRESENTATION, *supra* note 12; MASS. GEN. LAWS ch. 123, § 12(b) (2021) (instructing that counsel only be appointed after admission under this subsection); *C.R.*, 142 N.E.3d at 547 (finding that section 12(b) is not limited or modified by § 12(a), and therefore, process afforded by section 12(b) does not begin until individual is admitted to Department of Mental Health facility).

[14] *See* ch. 123, § 12; *infra* Table 1.

[15] *See infra* Part II.

[16] *See id.*; *infra* Part I (explaining why chapter 123, section 12 of Massachusetts General Laws violates due process).

and Massachusetts' failure to amend it demonstrates the conscious deprioritization of the liberty interests of people with mental disabilities.[17]

I. THE HISTORY OF M.G.L. CH. 123, § 12

The Constitution guarantees that a state shall not "deprive any person of life, liberty, or property, without due process of law."[18] However, until the late twentieth century, this guarantee was an empty promise for people with mental disabilities, who were regularly subjected to huge curtailments of liberty at the behest of one or two physicians.[19] Several states did not require hearings prior to commitment, and those that did often left a great deal to the judge's discretion—including the decision of whether or not to inform the patient of the hearing in the first place.[20] In 1967, California passed the Lanterman-Petris-Short Act, which provided much-needed clarification on the due process requirements in commitment hearings, thus beginning a trend of reform favoring the liberty interests of people with mental disabilities.[21]

Over the course of the next two decades, the Supreme Court ruled in several landmark decisions that established baseline constitutional requirements of due process for civil commitments.[22] As a result, many states adopted new criteria that required a finding of "dangerousness" or "grave disability" to justify an involuntary commitment.[23] However, states have ultimately used the inclusion of "grave disability" and broad constructions of "dangerousness" to erode the limits on civil commitments.[24]

Turning to the idiosyncrasies of Massachusetts' mental health legislation, it is crucial to understand where section 12 came from to identify the problems with how it is currently drafted. An account of the legal history surrounding

[17] *See* ch. 123, § 12(a).

[18] U.S. CONST. amend. XIV, § 1.

[19] *See* PAUL S. APPELBAUM, ALMOST A REVOLUTION: MENTAL HEALTH LAW AND THE LIMITS OF CHANGE 21 (1994).

[20] *See id.*

[21] *See id.* at 26.

[22] *See, e.g.*, Addington v. Texas, 441 U.S. 418, 433 (1979) (establishing standard of proof for civil commitment cases as "clear and convincing"); O'Connor v. Donaldson, 422 U.S. 563, 575 (1975) (establishing that "[a] finding of 'mental illness' alone" is constitutionally insufficient to justify civil commitment); Jackson v. Indiana, 406 U.S. 715, 729, 731–33, 738 (1972) (holding that indefinite commitment of criminal defendant incompetent to stand trial was unconstitutional).

[23] Stone, *supra* note 3, at 792.

[24] *See id.* (noting that states have "expand[ed] the definition of 'dangerousness' back to the dark ages prior to the 1960s . . . . Forty-two states provide criteria broader than dangerousness that often include either a 'grave disability' or a 'need for treatment,'" thus broadening the types of situations that justify involuntary commitment and bypassing constitutional limits on civil commitments.); *see also* APPELBAUM, *supra* note 19, at 28.

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section 12 should begin with the mental health law revolution of the sixties and seventies to provide the context under which the detention statute itself came into being. After that, the discussion follows the Supreme Court precedent that set the sparse limits that currently exist for mental health detainments. Penultimately, an analysis of *Massachusetts v. C.R.* will bring into frame the problem inherent with section 12, by clarifying that the section permits indefinite detainment of people with mental disabilities.[25] Part I concludes with a reflection on the efforts of the Massachusetts executive branch to address prolonged detainments through a streamlined process of communication with insurers.

A. *Legislative History of § 12*

Every state legislature in the United States has passed an emergency detainment statute along with their civil commitment procedures.[26] Statutory language surrounding detainment varies from state to state, but for the purposes of this Note, "emergency detainment" means the period of time during which an individual may be held prior to the filing of any formal commitment petition. Several states allow for "emergency commitments" that are usually limited to three to ten days, and follow an evaluation and petition that often take place during the patient's emergency detainment.[27] Emergency commitments at least have the meager procedural protections of an application, evaluation, and hearing.[28] Emergency detainments, on the other hand, are not afforded any significant process; their purpose is merely one of "restraint" while the administrative machine spins its gears in preparation for a formal evaluation.[29]

Nearly half of all states have chosen seventy-two hours as their maximum detainment period.[30] One Wisconsin appellate court reasoned that "[t]he purpose of the seventy-two-hour limit is to prevent individuals from being detained any longer than necessary before holding a hearing to determine probable cause."[31] Although several other states opt for limitations even shorter than seventy-two hours, a few allow for emergency detainments as long as seven

[25] *See* Mass. Gen. Hosp. v. C.R., 142 N.E.3d 545, 558–59 (Mass. 2020).

[26] *See infra* Table 1.

[27] *See* N.H. REV. STAT. ANN. § 135-C:28 to :32 (2019) (limiting detainment for evaluation to six hours but permitting petition for ten-day emergency commitment if deemed necessary by evaluation); MASS. GEN. LAWS ch. 123, § 12(e) (2021) (permitting petition for three-day emergency commitment).

[28] *See* N.H. REV. STAT. ANN. § 135-C:31 (2019) (requiring probable cause hearing within three days of involuntary emergency admission).

[29] *See* ch. 123, § 12(a) (permitting restraint of mentally ill person without prior examination).

[30] *See infra* Table 1 (listing twenty-two states that limit mental health detainments to seventy-two hours).

[31] *In re* Mental Commitment of Ryan E.M., 642 N.W.2d 592, 595 (Wis. Ct. App. 2002).

days.[32] There is no clear constitutional requirement for detainment limitation, but the Supreme Court has indicated that there must be some clear end point and guarantee of process.[33] Generally, there must be procedural due process such that all practicable safeguards are implemented to prevent undue deprivations of liberty.[34] Massachusetts, however, is the only state that allows for emergency detainment but fails to administer a time limit for custody.[35]

In 1986, Massachusetts passed procedures that have remained, for the most part, intact as the legal standards for civil commitment in the Bay State.[36] Chapter 123 of the Massachusetts General Laws, entitled "Mental Health," contains a number of legal idiosyncrasies that separate it from other state commitment frameworks.[37] Perhaps most notably, section 12, detailing emergency detainment procedures, leaves the permissible timeframe of an emergency room detainment ambiguous.[38]

At first glance, section 12 seems to set a three-day limit for detainments.[39] However, section 12(b) suggests that the three-day limit only applies once the individual has been admitted to a facility "in accordance with the regulations of the department."[40] Massachusetts' Department of Mental Health ("DMH") has "specifically designated" physicians and facilities that satisfy the requirements of admittance to a mental health facility for the purposes of section 12.[41] However, section 12(a) permits detainment in anticipation of the individual being admitted to a pre-approved facility.[42] Given the limited number of mental

[32] *See infra* Table 1. *Compare* ARIZ. REV. STAT. ANN. § 36-527(A) (2021) (twenty-four hours), *and* 405 ILL. COMP. STAT. 5/3-607 (2010) (twenty-four hours), *with* IDAHO CODE § 66-329(4) (2021) (five days), *and* ALA. CODE § 22-52-8(a) (2021) (seven days).

[33] *See* McNeil v. Dir., Patuxent Inst., 407 U.S. 245, 249 (1972); *see also* Lessard v. Schmidt, 349 F. Supp. 1078, 1091 (E.D. Wis. 1972), *vacated on other grounds*, 414 U.S. 473 (1974) ("[I]t follows that no significant deprivation of liberty can be justified without a prior hearing on the necessity of the detention.").

[34] *See* Zinermon v. Burch, 494 U.S. 113, 132–36 (1990).

[35] *See* MASS. GEN. LAWS ch. 123, § 12(a)–(b); Mass. Gen. Hosp. v. C.R., 142 N.E.3d 545, 547 (Mass. 2020).

[36] *See* ch. 123, §§ 1–36C.

[37] *See id.* (naming the chapter "Mental Health"); TREATMENT ADVOC. CTR., GRADING THE STATES: AN ANALYSIS OF INVOLUNTARY PSYCHIATRIC TREATMENT LAWS 74–75 (2018), https://www.treatmentadvocacycenter.org/storage/documents/2018_Grading_the_States.pdf (finding that Massachusetts is one of only three states that do not have an outpatient option for involuntary commitment).

[38] *C.R.*, 142 N.E.3d at 547.

[39] *See* ch. 123, § 12(a) (authorizing qualified practitioner to "restrain or authorize the restraint of [a designated at-risk] person and apply for the hospitalization of such person for a 3-day period").

[40] *See* ch. 123, § 12(b).

[41] *Id.*; *see* 104 MASS. CODE REGS. 33.02 (2020).

[42] *See* ch. 123, § 12(a).

health facility beds,[43] section 12(a) authorizes a designated professional who "has reason to believe that failure to hospitalize [a] person would create a likelihood of serious harm by reason of mental illness"[44] to hold that person in an emergency room for an indefinite period of time while they await an open bed at an approved facility.[45] Although section 12(d) requires that the person be released if no commitment petition is filed within three days of the evaluation, the period between initial detainment and evaluation is not defined by law.[46]

The Massachusetts legislature has amended section 12 three times in the past two decades.[47] In 2000, the legislature made three significant changes: (1) the mandatory cut-off for admission for purposes of evaluation was reduced from ten days to four days; (2) an added provision gave individuals admitted under section 12(b) a right to an attorney; and (3) admitted individuals were allowed to call for an emergency hearing if their admittance resulted from an abuse or misuse of section 12.[48] Although provision of counsel to defendants in commitment cases was an important step, to this day, the language of 12(b) only provides for appointment of counsel *after* the individual has been admitted to a mental health facility—rendering any promise of counsel impotent for individuals subjected to a prolonged detainment.[49] Then, in 2004, the permissible evaluation period was again reduced, this time from four to three days.[50] Finally, in 2010, the language of section 12(a) was superficially changed.[51] Although these amendments ushered in some positive change to post-admission procedures, they have done nothing to address the absence of a detention limit.

Massachusetts introduced another proposed amendment in the summer of 2020 but the proposed amendment does very little to change the substance of the law.[52] The Massachusetts judiciary and executive have both flagged emergency

[43] *See* TREATMENT ADVOC. CTR., GOING, GOING, GONE: TRENDS AND CONSEQUENCES OF ELIMINATING STATE PSYCHIATRIC BEDS 7, tbl.1 (2016), https://www.treatmentadvocacycenter.org/storage/documents/going-going-gone.pdf (finding that number of psychiatric beds in Massachusetts decreased from 696 in 2010 to 608 in 2016).

[44] *See* ch. 123, § 12(a).

[45] *See id.*; Mass. Gen. Hosp. v. C.R., 142 N.E.3d 545, 547 (Mass. 2020).

[46] *See* ch. 123, § 12(a)–(b), (d).

[47] *See* 2010 Mass. Legis. Serv. 278 (West); 2004 Mass. Legis. Serv. 410 (West); 2000 Mass. Legis. Serv. 249 (West).

[48] 2000 Mass. Legis. Serv. 249 (West).

[49] *See* ch. 123, § 12(b).

[50] 2004 Mass. Legis. Serv. 410 (West).

[51] 2010 Mass. Legis. Serv. 278 (West) (changing the word "three" to the number "3"). The legislature also recently proposed another amendment to section 12 that, although introducing language that would limit detainments for violent or homicidal individuals, would ultimately leave the current, problematic language unchanged and in effect for individuals who are accused of being a danger to themselves. Mass. S.B. 1269, 192nd Gen. Ct. (Mass. 2021).

[52] *See* Mass. S.B. 2796, 191st Gen. Ct. (Mass. 2020). The proposed amendment fixes some of the grammar and replaces masculine pronouns with gender neutral language. *Id.*

room detainments as an important issue in need of review, but the legislature has repeatedly amended the statute without addressing the issue of unlimited detainment.[53]

B. *Precedent for Commitment Due Process Requirements*

At present, there is minimal controlling precedent that specifically addresses the due process issue for individuals subjected to a mental health detainment. However, the closest thing to a clear statement on this topic is found in the dictum of *Lessard v. Schmidt*: "[I]t follows that no significant deprivation of liberty can be justified without a prior hearing on the necessity of the detention."[54] Although the Supreme Court vacated *Lessard* on other grounds,[55] the District Court's opinion has persisted as a rallying point for advocates of mental health reform, and has been cited in several jurisdictions as support for striking down state commitment laws.[56] Despite the *Lessard* court's call to action, only nine states guarantee any sort of pre-detention hearing.[57]

Similarly, there is no nationally mandated limitation for mental health detainments; although the Supreme Court has recognized that there must be some limit on detainment, there has not been a clear articulation of what that limit is.[58] Exceptions to due process may be appropriate for emergency detainments amounting to a "short-term confinement with a limited purpose," but "the duration of the confinement must be strictly limited."[59] Detainment

Additionally, it replaces "psychiatric nurse mental health clinical specialist" with "advanced practice registered nurse." *Id.* The legislature also recently proposed another amendment to section 12 that, although introducing language that could limit detainments for violent or homicidal individuals, would ultimately leave the current, problematic language unchanged and in effect for most individuals. Mass. S.B. 1269, 192nd Gen. Ct. (Mass. 2021).

[53] *See* Mass. Gen. Hosp. v. C.R., 142 N.E.3d 545, 547, 556 (Mass. 2020) ("Furthermore, the Legislature has not yet amended G. L. c. 123, § 12 (a), despite the unexpected enlargement of time spent in EDs, often referred to as 'ED boarding,' even as the Legislature has amended other provisions of the statute to tighten other time frames. Absent constitutional violations, we will not impose such a time deadline, when the Legislature has chosen not to do so."); EPIA PRESENTATION, *supra* note 12, at 2, 4, 6 (establishing one of the purposes of the Massachusetts executive office's EPIA Initiative as gathering baseline information, such as ED boarding frequency, for "policy purposes").

[54] Lessard v. Schmidt, 349 F. Supp. 1078, 1091 (E.D. Wis. 1972), *vacated on other grounds*, 414 U.S. 473 (1974).

[55] *See* Schmidt v. Lessard, 414 U.S. 473, 477 (1974).

[56] *See* APPELBAUM, *supra* note 19, at 28.

[57] Leslie C. Hedman et al., *State Laws on Emergency Holds for Mental Health Stabilization*, 67 PSYCHIATRIC SERVS. 529, 533 fig. 1 (2016), https://ps.psychiatryonline.org/doi/full/10.1176/appi.ps.201500205.

[58] *See* McNeil v. Dir., Patuxent Inst., 407 U.S. 245, 249 (1972).

[59] *Id.* at 249–50.

periods of seventy-two hours have repeatedly been upheld as constitutional.[60] However, the upper limit of constitutional detainments has not been set.

In *Zinermon v. Burch*,[61] the Supreme Court "makes clear that to determine whether a procedural due process violation has occurred, courts must consult the entire panoply of predeprivation and postdeprivation process provided by the state."[62] The *Zinermon* Court also held that a patient facing civil commitment has a right to a hearing, notice, an opportunity to present evidence, and counsel.[63] In Massachusetts, individuals subjected to an emergency commitment are entitled to a hearing, notice, an attorney, and adversarial presentation of evidence.[64] Moreover, the state must prove the necessity of commitment "beyond a reasonable doubt,"[65] a higher bar than the federal standard of "clear and convincing" proof.[66]

Massachusetts common law also has robust precedent for limiting detainment. Echoing the doctrine of *Vitek v. Jones*, the Supreme Judicial Court has stated that a patient's right "to be free from physical restraint is a paradigmatic fundamental right."[67] Massachusetts courts have regularly interpreted commitment statutes with an understanding of "the intent of the Legislature to extend further procedural protections" to individuals subjected to commitment proceedings.[68] Furthermore, the Supreme Judicial Court has previously construed amendments to section 12 as "intended to protect the individual's due process rights by minimizing the length of time for which he or she could be involuntarily committed prior to judicial review."[69] Finally, the Supreme Judicial Court has characterized the limits on hearing delays in chapter 123 mental health laws as integral parts of the state's public duty.[70]

Though there may be gaps in the specifications for constitutional detainment limits, precedent is clear that detainments must be strictly limited.[71]

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[60] *See* Project Release v. Provost, 722 F.2d 960, 974 (2d Cir. 1983) (listing detainment statutes which require a hearing within seventy-two hours that have been upheld as constitutional).

[61] Zinermon v. Burch, 494 U.S. 113, 125 (1990).

[62] Fields v. Durham, 909 F.2d 94, 97 (4th Cir. 1990) (citing *Zinermon*, 494 U.S. at 125).

[63] *See Zinermon*, 494 U.S. at 131.

[64] *See* MASS. GEN. LAWS ch. 123, § 12(b), (e).

[65] Superintendent of Worcester State Hosp. v. Hagberg, 372 N.E.2d 242, 243 (Mass. 1978).

[66] Addington v. Texas, 441 U.S. 418, 433 (1979).

[67] Matter of E.C., 92 N.E.3d 724, 730 (Mass. 2018) (quoting Commonwealth v. Knapp, 804 N.E.2d 885, 891 (Mass. 2004)); *see* Vitek v. Jones, 445 U.S. 480, 491 (1980).

[68] Newton-Wellesley Hosp. v. Magrini, 889 N.E.2d 929, 935 (Mass. 2008).

[69] Matter of N.L., 71 N.E.3d 476, 480 (Mass. 2017).

[70] *See* Hashimi v. Kalil, 446 N.E.2d 1387, 1390 (Mass. 1983) ("That the statute imposes a restraint on liberty also compels the conclusion that the time limit on the holding of the hearing goes to the essence of the public duty.").

[71] *See* McNeil v. Dir., Patuxent Inst., 407 U.S. 245, 249–50 (1972).

Furthermore, any significant deprivation should be preceded by procedural safeguards, including a hearing, to avoid unjust deprivations of liberty.[72]

C. Massachusetts General Hospital v. C.R.

The constitutionality of section 12 was tested in early 2020 in *Massachusetts General Hospital v. C.R.*, in which the Supreme Judicial Court ruled that C.R.'s six-day detainment was constitutional because C.R. was only detained for as long as it took to find an open bed at a DMH facility.[73] The *C.R.* court avoided addressing the statute's constitutionality by noting that C.R. failed to bring a facial challenge of the statute in her complaint.[74]

C.R., a woman with bipolar disorder, was admitted to the emergency department of Massachusetts General Hospital ("MGH") in August 2018 after experiencing a mental health crisis at Logan Airport.[75] C.R. was detained and transported to the emergency room by the police who acted under the authority of section 12(a).[76] When she arrived at MGH, she was "agitated and was yelling, screaming, and threatening staff," at which point employees administered antipsychotics, secluded C.R., and placed her in a four-point restraint.[77] Doctors at MGH decided to apply for C.R.'s admission to a DMH facility and to hold C.R. in a room in the emergency department until a DMH facility bed became available.[78] She waited five days before being transferred to MGH's psychiatric department, a DMH-licensed facility.[79]

One day after C.R.'s transfer, MGH filed a petition pursuant to sections 7 and 8 to have C.R. civilly committed.[80] MGH's commitment petition stated that "because of her florid mania and delusional thinking, [C.R.] appears unable to take care of her basic needs in the community."[81] C.R. filed a *pro se* petition for an emergency hearing under section 12(b), which the Boston Municipal Court denied.[82] After C.R. was appointed counsel, she filed a second petition for emergency hearing.[83] The court heard arguments three days after it received the petition, but again denied C.R.'s request for release.[84]

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[72] *See* Zinermon v. Burch, 494 U.S. 113, 131 (1990).

[73] 142 N.E.3d 545, 547–48 (Mass. 2020).

[74] *Id.*

[75] *Id.*

[76] *Id.*

[77] *Id.* at 548.

[78] *Id.*

[79] *Id.* at 547

[80] *Id.* at 548.

[81] *Id.*

[82] *Id.*

[83] *Id.* at 548–49.

[84] *Id.* at 549.

On August 23, 2018, C.R. filed a motion to dismiss MGH's petition on the grounds that MGH filed it outside of the three-day period set forth in section 12(a).[85] At C.R.'s commitment hearing, one of C.R.'s treating physicians, Dr. Beck, testified for the petitioner: "[W]hen people come into the emergency room or they're on the medical floor and there's a thought about them going to an inpatient [psychiatric] unit, they institute a [§ 12(a) application]. They [(the patients)] can sit there for days to weeks . . . ."[86] The trial judge denied C.R.'s motion to dismiss and ordered C.R. to be involuntarily committed.[87]

C.R. appealed both the court's commitment order and its denial of her motion to dismiss.[88] The Massachusetts Appeals Court reversed the trial court's denial of C.R.'s motion to dismiss.[89] However, the Supreme Judicial Court reversed the appeals court, reaffirming the trial court's denial.[90] In doing so, Massachusetts' highest court determined that the three-day period mentioned in sections 12(a) and 12(b) only applies after admission to a DMH facility for evaluation.[91] The court specified that their decision "leaves unresolved the question of how long the Legislature allowed the § 12 (a) process to last, and whether such process as currently employed violates constitutional due process standards."[92]

Although the court noted that section 12(a)'s lack of a detainment limit raised a due process concern, it chose to leave the question unanswered because C.R.'s appeal did not challenge the facial constitutionality of the law.[93] Instead, the court limited its constitutional analysis to the process provided in the instant case.[94] The court characterized the detainment in this case as a "grave impairment of liberty for C.R."[95]

> C.R. was deemed to be so agitated as to require four-point restraints. While in that condition, she was restrained in an [emergency department] for five days while qualified medical personnel applied for her admission to a licensed psychiatric facility. The application process was complicated by the fact that she was deemed to require a private room in a facility. During this time period she had no right to counsel or other procedural protections beyond the original preliminary determination by a qualified medical professional that there was "reason to believe that failure to hospitalize

[85] *Id.*; *see* MASS. GEN. LAWS ch. 123, § 12(a).

[86] *C.R.*, 142 N.E.3d at 549 (alterations in original).

[87] *Id.*

[88] *Id.*

[89] *Id.*

[90] *Id.* at 547.

[91] *Id.* at 552.

[92] *Id.* at 553.

[93] *Id.* at 560.

[94] *Id.*

[95] *Id.* at 558.

> [C.R.] would create a likelihood of serious harm by reason of mental illness."[96]

The court acknowledged that the government interest must be particularly strong to overcome the patient's significant liberty interest.[97]

> Here, that compelling interest is the patient's health and safety and the safety of the public. The restraint must be narrowly tailored to protect that compelling patient and public safety interest, employing the least restrictive means possible to accomplish that objective. Restraint here is only justified long enough to find an appropriate facility to evaluate the patient. Any unnecessary delay is unconstitutional. The suitability of the location of that restraint must also be considered.[98]

However, this dismissal was not without warning, as Justice Kafker "encourage[d]" the Legislature to identify a time period capping the time of [emergency department] boarding to clarify the over-all § 12 (a) time deadline and avoid future constitutional difficulties, and to do so as expeditiously as possible."[99] Justice Kafker also lauded the legislative and executive branches for their "diligent efforts" to combat the detainment crisis.[100] Conveniently, this identifies the next area in need of scrutiny: executive action.

D. *Administrative Action Related to § 12*

On November 14, 2019, several departments within Massachusetts' Executive Office of Health and Human Services ("EOHHS")—including DMH and the Department of Public Health—announced new protocols for emergency room "boarding" and treatment escalation.[101] The announcement presented the collaboration as the culmination of a year and a half of information gathering conducted by the Emergency Psychiatric Inpatient Admission ("EPIA") Task Force on emergency-room detainments in Massachusetts.[102] The product of the administrative branch's attempt at "understanding the problem," is a procedure

[96] *Id.*

[97] *Id.*

[98] *Id.* at 559.

[99] *Id.* at 559–60.

[100] *Id.* at 548, 559.

[101] EPIA PRESENTATION, *supra* note 12.

[102] *See* EXEC. OFF. OF HEALTH AND HUM. SERVS., EXPEDITED PSYCHIATRIC INPATIENT ADMISSIONS (EPIA) POLICY, MASS.GOV [hereinafter EPIA POLICY], https://www.mass.gov/info-details/expedited-psychiatric-inpatient-admissions-epia-policy#related (last visited Nov. 12, 2021); EPIA PRESENTATION, *supra* note 12, at 1 ("The Executive Office of Health and Human Services (EOHHS), its Department of Mental Health (DMH), Department of Public Health (DPH) and Office of MassHealth and the Executive Office of Housing and Economic Development (EOHED) and its Division of Insurance (DOI), are committed to addressing the ongoing crisis of ED boarding in the Commonwealth and supports this Protocol that identifies and resolves barriers to psychiatric admission.").

for communications between the detaining hospital, the patient's insurance carrier, and DMH to coordinate placement efforts for each involuntarily detained mental health patient.[103] The requisite steps for the EPIA protocols depend on how long the patient has spent in the emergency room, with "escalation steps" triggered at arrival, after twenty-four hours, and after ninety-six hours.[104] The final step in the new EPIA procedures, which begins after the patient has been held for ninety-six hours, requires that the insurance carrier request assistance from DMH and participate in a "Standard Bed Search."[105] In its protocols, the EOHHS states that the aforementioned bed search is still a "work . . . in progress."[106]

The EOHHS also released some of the data that the task force considered after the implementation of the first version of EPIA.[107] The data reveals that 839 patients were referred to DMH for escalated placement procedures in 2019, and that bed availability and a lack of insurance were the causes of most prolonged detainments.[108]

In his opinion in *C.R.*, Justice Kafker applauds the state administration for being "actively engaged in addressing the length of time of ED boarding," and "imposing numerous deadlines during the ED boarding process."[109] The deadlines that Justice Kafker refers to are, of course, the communication escalations discussed above.[110] However, Justice Kafker also acknowledges that "DMH received 481 requests for assistance for patients who had waited at least ninety-six hours" during the first year of the EPIA's implementation.[111]

Section 12 was, and still is, an outlier of a detainment statute.[112] Every branch of the state government has recognized that the statute creates abnormal circumstances for patients, providers, and the courts.[113] Despite precedent being settled that indefinite mental health detainments are unconstitutional, section 12 nonetheless survived the scrutiny of the Massachusetts Supreme Judicial Court.[114] This Note thus identifies why indefinite detainments have survived in Massachusetts for so long, and what must be done to rectify the situation.

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[103] EPIA POLICY, *supra* note 102; EPIA PRESENTATION, *supra* note 12, at 1.

[104] EPIA PRESENTATION, *supra* note 12, at 3–6.

[105] *Id.* at 5.

[106] *Id.*

[107] *Id.* at 3–13.

[108] *Id.* at 12.

[109] Mass. Gen. Hosp. v. C.R., 142 N.E.3d 545, 555 (Mass. 2020).

[110] *See* EPIA PRESENTATION, *supra* note 12, at 1–6.

[111] *C.R.*, 142 N.E.3d at 556.

[112] *See infra* Table 1.

[113] *See C.R.*, 142 N.E.3d at 547–48 (acknowledging the problem posed by section 12 detainments and the other branches' efforts to fix the problem).

[114] *See* McNeil v. Dir., Patuxent Inst., 407 U.S. 245, 249–50 (1972) (holding unconstitutional any detainment allowing for indefinite holding without process).

II. SECTION 12 AND THE FAILURE OF THE MASSACHUSETTS GOVERNMENT

The indefinite deprivation of liberty prescribed by section 12 poses a unique challenge for due process. First and foremost, section 12 is facially unconstitutional because it permits significant, temporally unlimited deprivations of liberty without any meaningful process.[115] Additionally, by allowing for indefinite detainments, the state subjects individuals to a "massive curtailment of liberty," similar to that of an emergency commitment.[116] However, unlike in an emergency commitment, section 12 does not consider the countervailing interests of the patient that are inalienable from involuntary treatment cases.

Indefinite detainment periods should not be permitted, and certainly not with less process than what is required for an emergency commitment.[117] As previously discussed, to comply with due process, the time period of emergency commitments must be strictly limited or otherwise preceded by procedural safeguards.[118] Section 12 disregards both of these mandates by permitting indefinite detainment without any process.[119] Precedent dictates that unlimited detainment under section 12 is plainly unconstitutional.[120]

The question that we must now ask ourselves is why such a bald-faced violation of constitutional due process has gone unaddressed for nearly four decades.[121] Why have legislators, judges, and state officials, all of whom have

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[115] *See* U.S. CONST. amend. XIV, § 1; MASS. GEN. LAWS ch. 123, § 12(a)–(b); *McNeil*, 407 U.S. at 249–50 (finding that due process may only be ignored for strictly limited time periods in emergency situations where detainment is an immediate necessity); *C.R.*, 142 N.E.3d at 559–60 (finding that that section 12(a) does not have a temporal limit).

[116] Vitek v. Jones, 445 U.S. 480, 491, 495 (1980) (quoting Humphrey v. Cady, 405 U.S. 504, 509 (1972)) (finding that state has interest in segregating and treating mentally ill patients); *see* Lessard v. Schmidt, 349 F. Supp. 1078, 1091 (E.D. Wis. 1972), *vacated*, 414 U.S. 473 (1974); *McNeil*, 407 U.S. at 249.

[117] *See McNeil*, 407 U.S. at 249–50.

[118] *See* discussion *supra* Part I(B).

[119] *See* ch. 123, § 12(a)–(b); *C.R.*, 142 N.E.3d at 547.

[120] O'Connor v. Donaldson, 422 U.S. 563, 575 (1975); *see* U.S. CONST. amend. XIV, § 1; ch. 123, § 12(a)–(b); Zinermon v. Burch, 494 U.S. 113, 131 (1990); *Vitek*, 445 U.S. at 491–92; *McNeil*, 407 U.S. at 249; *Lessard*, 349 F. Supp. at 1091.

[121] Although the earliest versions of section 12 allowed for a ten-day emergency commitment that was later shortened to three days, and a ten-day post-evaluation hold that was later shortened to three days as well, the absence of a detainment limit has been a feature of the law since its inception. *See* 2010 Mass. Legis. Serv. 278 (West); 1988 Mass. Legis. Serv. 1 (West); *McNeil*, 407 U.S. at 249–50 (concluding that emergency holds that do not provide process must be strictly limited in duration).

repeatedly acknowledged that there is a problem, chosen not to remedy a clear mistake?[122]

A. *The Failure of the Massachusetts Legislature*

Every state legislature in the country has implemented a time limit to emergency detainments of individuals in crisis, except for Massachusetts.[123] Although some states limit detainments to less than a single day while others allow over a week, patients in every state but Massachusetts, at the very least, can see an end in sight.[124] Many states that permit longer periods of pre-placement detainment provide for probable cause hearings after the first few days the patient spends in the emergency room.[125] Why then, has Massachusetts chosen a course of unlimited detainment periods? Given that the Massachusetts legislature explicitly established procedures that are required for emergency commitment orders,[126] it makes little sense that its detainment law—a tool that must be limited in its use[127]—should permit for a longer period of detention with markedly less process.[128] If anything, the decision to allow for unlimited detainment seems to contradict the legislature's general policy goal for its amendments to section 12, aimed at protecting "the individual's due process rights by minimizing the length of time for which he or she could be involuntarily committed prior to judicial review."[129]

This Note suggests three conceivable explanations for why the state legislature wrote such a law. First, it is possible that the legislature initially intended to impose a three-day limit to detainments but has failed to remedy its mistake after realizing that the law had been applied improperly. Section 12(a) states that physicians "may restrain or authorize the restraint . . . and apply for the hospitalization of [a mentally ill and dangerous patient] for a 3-day period . . . ."[130] Although *C.R.* made clear that the three-day period addressed in section 12 does not apply to pre-evaluation detainment under 12(a), the court suggested that C.R.'s detainment "extended beyond the Legislature's original expectations" and that the Mental Health chapter generally "provides for tight

[122] *See C.R.*, 142 N.E.3d at 556–60 (identifying efforts of executive and legislative branches to remedy what they recognize to be an "ED boarding crisis" and imploring legislature to enact a time limit "expeditiously"); EPIA PRESENTATION, *supra* note 12, at 1.

[123] *See infra* Table 1.

[124] *See id.*

[125] *See id.*; ALA. CODE § 22-52-8(a) (2020) (guaranteeing probable cause hearing to determine necessity of continued detainment); IDAHO CODE § 66-329(4) (2020) (guaranteeing probable cause ex parte hearing to determine propriety of detainment).

[126] *See* MASS. GEN. LAWS ch. 123, § 12(e).

[127] *See* McNeil v. Dir., Patuxent Inst., 407 U.S. 245, 249–50 (1972).

[128] *See* ch. 123, § 12(a)–(b).

[129] Matter of N.L., 71 N.E.3d 476, 480 (Mass. 2017).

[130] *See* ch. 123, § 12(a).

time limits . . . ."[131] Given that C.R.'s detainment lasted just over five days, it seems that Justice Kafker may be indicating that the statute intended to apply a three-day time limit but failed to do so.[132] A common sense reading of the statute favors an interpretation that the words "3-day period" apply to section 12(a), not section 12(b), because only 12(a) mentions a time period.[133] This is evidenced by the fact that many legal scholars and advocates continue to misread section 12 as imposing a three-day limit to detainments.[134] It would be reasonable, then, to speculate that the Massachusetts legislature intended to enforce a finite limit on detainments but misworded the final statute.

Secondly, the legislature may have simply failed to abide by the constitutional requirement to limit detainments when no process is given.[135] Mental health laws cannot allow for indefinite detainment of a person that the law has not yet deemed mentally ill and dangerous.[136] "Or, to put it more colorfully, purgatory cannot be worse than hell."[137] However, let us assume that the legislature shares in the court's rationale from *C.R.*—that detainment is permissible if it is limited to the period necessary "to find an appropriate facility to evaluate the patient."[138] It is clear from the rest of the state's mental health laws that the Massachusetts legislature intended to delegate a great deal of emergency decision making power to medical professionals.[139] Perhaps then, the only limit the legislature thought necessary to impose was a malleable one. However, the Constitution prevents law makers from impinging upon certain entitlements, and the right to physical liberty is, without question, one of them.[140] If the legislature knowingly authorized Massachusetts' hospitals to detain hundreds of patients, without any process of law, for undefined periods of time, and for no other reason than

[131] Mass. Gen. Hosp. v. C.R., 142 N.E.3d 545, 558, 560 (Mass. 2020).

[132] *Id.* at 558–60.

[133] *See* ch. 123, § 2(a)–(b).

[134] *See* Hedman et al., *supra* note 57, at 530, tbl.1 (listing detainment duration in Massachusetts as seventy-two hours); *Emergency Hospitalization for Evaluation Assisted Psychiatric Treatment Standards by State*, TREATMENT ADVOC. CTR. (June 2011), https://www.treatmentadvocacycenter.org/storage/documents/Emergency_Hospitalization_for_Evaluation.pdf (citing to portion of section 12(a) that limits detainments in Massachusetts to three days).

[135] *See* McNeil v. Dir., Patuxent Inst., 407 U.S. 245, 249–50 (1972).

[136] O'Connor v. Donaldson, 422 U.S. 563, 575 (1975).

[137] Jones v. Blanas, 393 F.3d 918, 933 (9th Cir. 2004).

[138] Mass. Gen. Hosp. v. C.R., 142 N.E.3d 545, 559 (Mass. 2020).

[139] *See, e.g.*, MASS. GEN. LAWS ch. 123, § 7(a) (allowing facility superintendent to petition for patient's commitment if superintendent "determines that the failure to hospitalize would create a likelihood of serious harm by reason of mental illness"); ch. 123, §§ 10–11 (allowing superintendent to file for involuntary commitment of any voluntary patient that gives notice of their intent to leave facility); ch. 123, § 21 (permitting superintendent to authorize one hour of non-chemical restraints when deemed necessary).

[140] *See* U.S. CONST. amend. XIV, § 1; *O'Connor*, 422 U.S. at 575; Vitek v. Jones, 445 U.S. 480, 495–96 (1980).

administrative issues, there can be little doubt they did so in violation of the Constitution.[141]

Finally, and perhaps most pessimistically, it is possible that the legislature has simply failed to consider or care about the liberty of people with mental disabilities. Such a disregard for the liberty interest of people with mental health issues would hardly be a departure from national or state history.[142] It would not come as a shock if section 12, rather than owing its ambiguity to miscalculation and error, was borne of the wholesale indifference with which society regards the freedom of people many consider to be a burden.[143] Many advocates of longer detainment and commitment periods believe that confinement and segregation are necessary to contain the threat that the violently mentally ill pose to society.[144] Instead of fortifying community treatment and intervention, there are undoubtedly lawmakers that approach mental health legislation with the perspective that the socially optimal solution is a carceral one.[145] However, if imprisoning individuals for their disability is truly the route the legislature intended to go—setting aside for a moment the abhorrence of such a position—then an application of anything short of criminal due process to detainments and imprisonments would likely be unconstitutional.[146]

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[141] *See* McNeil v. Dir., Patuxent Inst., 407 U.S. 245, 249 (1972).

[142] In 2016, the Boston Globe's Spotlight team ran a series of articles called *The Desperate and the Dead* that chronicled the myriad ways in which the Massachusetts government has failed to implement a system that effectively treats mental illness. *See* BOS. GLOBE, *The Desperate and the Dead*, https://apps.bostonglobe.com/spotlight/the-desperate-and-the-dead/ (last visited Nov. 12, 2021). The stories include reports on police violence toward people with mental disabilities, cuts to mental health programs, and inaccessibility of community care.

[143] *See Mental Illness and Violence*, 27 HARV. HEALTH PUBL'G 1 (Jan. 2011), http://www.biblioteca.cij.gob.mx/Archivos/Materiales_de_consulta/Drogas_de_Abuso/Articulos/55984270.pdf ("A 2006 national survey found, for example, that 60% of Americans thought that people with schizophrenia were likely to act violently toward someone else, while 32% thought that people with major depression were likely to do so.").

[144] *See* ARK. CODE ANN. § 20-46-601 (2019) ("Persons who suffer from mental illness and who abuse various chemical substances contribute disproportionately to the problem of violence in our society . . . .").

[145] Massachusetts is one of the few states that houses civilly committed patients in a facility run by the state Department of Corrections, in which a civil patient may be housed next to patients convicted of violent crimes. *See Bridgewater State Hospital*, MASS.GOV, https://www.mass.gov/locations/bridgewater-state-hospital (last visited Nov. 12, 2021). Furthermore, 90% of inmates with mental illness get little or no help from Department of Mental Health as they try to find treatment upon release and are more likely to return to prison as a result. *See* Jenna Russell & Maria Cramer, *The Desperate and the Dead: Prisons*, BOS. GLOBE (Nov. 25, 2016), https://apps.bostonglobe.com/spotlight/the-desperate-and-the-dead/series/prisons/?p1=Spotlight_MI_Overview_Read.

[146] If the focus of commitment was segregation and punishment rather than treatment, then it would be indistinguishable from incarceration, and would therefore require more stringent safeguards. *See* Lessard v. Schmidt, 349 F. Supp. 1078, 1086 (E.D. Wis. 1972), *vacated*, 414 U.S. 473 (1974).

Regardless of what spurred the creation of section 12, the reasons behind its persistence are multitudinous, complex, and rooted in the inconvenient truth that adding a duration limit now would have messy outcomes. Given that the already over-burdened mental health system in Massachusetts has acclimated to open-ended detainment periods, the imposition of tighter deadlines for emergency room detainments would almost certainly exacerbate their already encumbered workload.[147] Furthermore, the primary reason why so many detainments are prolonged, as a practical matter, results from a shortage of mental health beds; a shortage that has worsened as "Massachusetts has reduced state-funded inpatient psychiatric beds by more than ninety-seven percent" since 1953.[148] Although we may speculate over the original intent of section 12, we can be sure that the present-day Massachusetts legislature has made a deliberate choice regarding detainments. The legislature has been made repeatedly aware of the seriousness of the problem.[149] After recognizing the existence of this budding constitutional issue and weighing the policy considerations for and against fixing it, the liberty interest of individuals with mental disabilities ultimately lost, and the legislature chose inaction.[150]

The highest court in Massachusetts has urged the legislature to address the detainment problem.[151] The executive has illustrated in detail how serious the problem presently is.[152] Section 12's detainment procedures were an egregious violation of due process requirements when they were written into existence thirty-four years ago, and "the Legislature has not yet chosen to include a specific deadline despite its recognition of the issue."[153]

B. *The Failure of the Massachusetts Judiciary*

The American court system exists to uphold the law, and the Constitution is the highest law of the land.[154] Although it is not in the job description of a judge

[147] *See* Scott Helman, *The Desperate and the Dead: Community Care*, BOS. GLOBE (Nov. 25, 2016), https://apps.bostonglobe.com/spotlight/the-desperate-and-the-dead/series/community-care/?p1=Spotlight_MI_Overview_Read.

[148] *See id.*

[149] *See supra* note 53.

[150] *See id.*

[151] *See id.* ("We do, however, encourage the Legislature to include a time deadline for the § 12 (a) evaluation process as expeditiously as possible to clarify the statute and ensure the protections of the important liberty interests at stake.").

[152] *See* EPIA PRESENTATION, *supra* note 12, at 1, 4, 6.

[153] Mass. Gen. Hosp. v. C.R., 142 N.E.3d 545, 560 (Mass. 2020); *see* MASS. GEN. LAWS ch. 123, § 12(a)–(b).

[154] *See* U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").

to enact or amend legislation, it is squarely within their duty to strike down unconstitutional conduct on challenge.[155] As discussed above, the legislature has demonstrated a resolve for inaction.[156] Here, the judiciary's failure was less glaring, and more avoidant in nature. As the Supreme Judicial Court severally stated in *C.R.*, it avoided the constitutional question in this case out of an abundance of caution to prevent deciding the issue "prematurely."[157] Some may argue that the decision in *C.R.* was not a failure at all, and merely an exercise of the court's duty to "avoid[] unnecessary decisions of serious constitutional issues."[158] However, this Note posits that the judicial avoidance—or partial avoidance—of the detainment question in this case was an unjust refusal to engage meaningfully with the unconstitutional conduct of MGH authorized by section 12.[159] Although the *C.R.* court acknowledged a potential constitutional issue with section 12, it deflected the question of the facial constitutionality of the detainment law to the legislature despite the necessity of addressing the lack of due process provided to C.R.[160] After all, the court's duty is an imperative "to interpret statutes in a manner that avoids unnecessary decision of a serious constitutional question."[161] Here, the statute was interpreted as one that permitted for C.R.'s unlimited detainment, thus squarely facing the question of whether such conduct is constitutional.[162]

"In this context, we decide only the constitutional questions necessary to resolve this case and to provide required guidance to the governmental and nongovernmental actors involved in resolving the ED boarding crisis."[163] The appropriate exercise of judicial restraint is, historically, quite common in Massachusetts jurisprudence, but there are circumstances in which a constitutional ruling is unavoidable.[164] Here, avoidance would only be

[155] *See* Marbury v. Madison, 5 U.S. 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each."); Matal v. Tam, 137 S. Ct. 1744, 1755 (2017) (quoting Spector Motor Serv., Inc. v. McLaughlin, 323 U.S. 101, 105 (1944)) ("[W]e ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable.").

[156] *See* discussion *infra* Part II.A.

[157] *See C.R.*, 142 N.E.3d at 559.

[158] Beeler v. Downey, 442 N.E.2d 19, 21 n.4 (Mass. 1982).

[159] *See Marbury*, 5 U.S. at 178 ("If then the courts are to regard the constitution; and the constitution is superior to any ordinary act of the legislature; the constitution, and not such ordinary act, must govern the case to which they both apply."); *C.R.*, 142 N.E.3d at 560; *Matal*, 137 S. Ct. at 1755.

[160] *See C.R.*, 142 N.E.3d at 560.

[161] *Beeler*, 442 N.E.2d at 21.

[162] *See C.R.*, 142 N.E.3d at 558.

[163] *Id.*

[164] *See* Thomas A. Barnico, *The Public Law Decisions of Chief Justice Herbert P. Wilkins*, 84 MASS. L. REV. 109, 109 (1999) (finding that Chief Justice Herbert Wilkins of the Supreme Judicial Court, "generally gave greater deference to the products of direct democratic action—

appropriate if the case could be resolved without addressing the constitutional question of whether an indefinite detainment period is constitutional.[165] Justice Kafker navigates this requirement by pointing out that C.R. did not levy a facial challenge against the constitutionality of section 12.[166] What possible guidance can the court give in its constitutional analysis if the court avoids discussing the constitutionality of section 12 altogether?

The truth of the matter is that the treatment of C.R. was very likely unconstitutional, but if the Supreme Judicial Court said as much, it would cause problems for the EOHHS and the legislature. Justice Kafker came close to saying as much in his opinion.[167] But perhaps worse still, the court claimed the plaintiff raised no constitutional challenge, yet proceeded to comment on the constitutionality of C.R.'s treatment anyway.[168] The Supreme Judicial Court found—much to the detriment of C.R., and people with mental disabilities generally—that C.R.'s detainment, despite its unconstrained duration, was not in violation of due process.[169] This maneuver to buy the legislature time to fix a mistake it should have addressed years ago comes at a steep cost.[170] By writing into Massachusetts common law that it was constitutional to detain C.R. for nearly a week without so much as the courtesy of providing a timeline for when she might be able to explain herself, the Supreme Judicial Court has continued Massachusetts' tradition of telling people with mental disabilities: hold on while we figure out what to do with you.[171] Furthermore, it risks setting a precedent that the hundreds of prolonged detainments that happen annually in Massachusetts—which look just like C.R.'s—also survive constitutional muster.[172]

Although Justice Kafker openly acknowledges the constitutional concerns that would arise from a facial challenge of section 12, the court explains that a

laws enacted by the legislature or by the people through the initiative process" and avoided constitutional questions on legislation whenever possible).

[165] *See id.* at 110.

[166] *See C.R.*, 142 N.E.3d at 560.

[167] *Id.* at 559 ("Our precautionary approach also is informed and influenced by the concerted, ongoing efforts on the part of the Commonwealth to address the ED boarding crisis . . . and the active engagement of the executive branch with the Legislature to attempt to address the problem.").

[168] *Id.* at 560 ("As applied to C.R., we conclude that the statute did not violate due process, as the § 12 (a) period of confinement was no longer than necessary given the difficulty of finding her an appropriate placement.").

[169] *Id.*

[170] *See* EPIA POLICY, *supra* note 102, at 1 ("Each day residents of the Commonwealth in need of inpatient psychiatric hospitalization wait in hospital emergency departments (EDs) for extended periods of time . . . .").

[171] *See* Helman, *supra* note 147 ("The daily struggle to find and pay for care is an indictment of political leadership in Massachusetts and beyond that spans generations.").

[172] *See* EPIA PRESENTATION, *supra* note 12, at 5 (identifying 839 patients who were kept in prolonged detainments in Massachusetts in 2019 alone).

ruling on its constitutionality in *C.R.* would be "premature[]" because the resolution of the constitutional question was unnecessary to decide the case.[173] However, the court also expresses the expediency with which the legislature should impose a time limit on detainments.[174] Perhaps the court recognized that running the clock on this issue could have dire consequences.[175] After all, despite its acknowledgement of the legislature and executive's efforts to "address the ED boarding crisis,"[176] the necessity of prolonged detainments was unavoidably caused by those same legislators and administrative officials.[177] After decades of budget cuts, red tape, and persistent inaction, leaving just a few hundred state-sponsored psychiatric beds in existence, all the legislative and executive branches have to show for their newfound concern for mental illness detainments is a protocol for emailing insurers sooner.[178] The court recognized that the duration of C.R.'s detainment "was not exceptional" and elaborated that "the record describes a widespread problem of ED boarding exceeding ninety-six hours."[179]

C.R. asked the court to fix the unlimited detainment problem.[180] The court responded by agreeing there was a problem, denying to say anything about the constitutionality of the law, and handing over the decision on what to do about it to the group that has failed to resolve that very problem for the better part of a half century.[181] If what happened to C.R. was deemed constitutional, what incentive does the legislature have to amend the statute to help people just like her? If "no significant deprivation of liberty can be justified without a prior hearing on the necessity of the detention," how can section 12 be permissible?[182] If the constitutionality of mental health detainments must be assessed on the basis of the "panoply of predeprivation and postdeprivation process provided by the state," why is detainment not afforded the same process as emergency

[173] *C.R.*, 142 N.E.3d at 558.

[174] *Id.* at 559–60.

[175] *See* EPIA PRESENTATION, *supra* note 12, at 3, 5.

[176] *C.R.*, 142 N.E.3d at 490.

[177] *See* Helman, *supra* note 147 ("The result, the Legislature's Mental Health Advisory Committee concluded in 2014, is a system in which accountability for the care of the most severely ill people is often 'lost or nonexistent.' They bounce from hospital to hospital, caregiver to caregiver, until, with some frequency, something awful happens.").

[178] *See* TREATMENT ADVOC. CTR., *supra* note 43, at 8; EPIA PRESENTATION, *supra* note 12, at 3.

[179] *C.R.*, 142 N.E.3d at 559.

[180] *Id.* at 547.

[181] *Id.* at 559–60.

[182] Lessard v. Schmidt, 349 F. Supp. 1078, 1091 (E.D. Wis. 1972), *vacated*, 414 U.S. 473 (1974).

commitments when detainments regularly last twice as long?[183] These are just some of the pressing questions the court chose to ignore here.

The Supreme Judicial Court has stated that the entitlement "to be free from physical restraint is a paradigmatic fundamental right."[184] Furthermore, the court has severally affirmed that "[t]he restraint must be narrowly tailored to protect that compelling patient and public safety interest," and that "[a]ny unnecessary delay is unconstitutional."[185] It seems that even as applied to the facts of *C.R.*, a blank check approach to detainment does not lend itself well to characterizations such as "narrowly tailored" or avoiding "unnecessary delay."[186] The court's excuse in *C.R.* that the detainment took no longer than was necessary to place C.R. in a DMH bed is nonsensical. If Massachusetts continues to cut DMH beds, it will not be long before the wait times for availability last months. The deprivation of liberty of a person with mental disabilities must not be prolonged solely because of administrative friction stemming from the state's mismanaged system. Furthermore, the Supreme Judicial Court has previously construed amendments to section 12 as "intended to protect the individual's due process rights by minimizing the length of time for which he or she could be involuntarily committed prior to judicial review."[187] This principle should be applied in *C.R.*.

The Constitution does not hold sway over the law only when it is convenient.[188] The level of judicial avoidance in this case controverts the obligations of the judiciary by intentionally bypassing a clear constitutional violation in fear of stepping on the legislature's toes. It punts the issue to the legislature, and perhaps more realistically, to the executive.

C. *The Failure of the Massachusetts Executive*

The EPIA task force has been attempting to "understand the problem" for nearly two years. However, the summary of the EPIA Policy on the Massachusetts state website identifies the problem quite succinctly: "Each day residents of the Commonwealth in need of inpatient psychiatric hospitalization wait in hospital emergency departments (EDs) for extended periods of time . . . ."[189] What more is there to understand? If nothing else, the goals and direction of the EPIA task force illuminates the motives behind maintaining the status quo. Ultimately, after coming to "understand" the problem, the EPIA's solution did very little to prevent further obfuscation of due process or relieve

[183] Fields v. Durham, 909 F.2d 94, 97 (4th Cir. 1990) (citing Zinermon v. Burch, 494 U.S. 113, 125–26 (1990)).

[184] Matter of E.C., 92 N.E.3d 724, 730 (2018) (quoting Commonwealth v. Knapp, 804 N.E.2d 885, 891 (2004)); *see* Vitek v. Jones, 445 U.S. 480, 491 (1980).

[185] *C.R.*, 142 N.E.3d at 559.

[186] *Id.*

[187] *See* Matter of N.L., 71 N.E.3d 476, 480 (2017).

[188] *See* U.S. CONST. art. VI, cl. 2.

[189] *See* EPIA POLICY, *supra* note 102, at 1.

patients of unreasonable emergency room stays.[190] Instead, it elected to validate and reinforce the administrative machinery that keeps patients waiting in emergency rooms in the first place.[191] By putting forward a policy solution that focused on communications with insurance providers, the administration proved that communications about funding the patient's stay and the administrative need for complete paperwork takes priority over a mentally disabled person's liberty.[192] Rather than set a deadline for a hospital to secure a transfer to a DMH facility, the EPIA sets its sights on the tedium of deskwork.

This is unsatisfactory. Undefined and unlimited emergency room detainment is unacceptable. That should be the end of the conversation. It is not something to be avoided, mitigated, or optimized; it is something that must be dealt with swiftly and directly, if not flatly disallowed for violating the Constitution.

III. WHERE TO GO FROM HERE

Ultimately, the solution to the unlimited detainment problem is as simple as implementing a limit. All that is required to fix this unconstitutional, ableist, unjust law, is the addition of the following sentence:

> The patient will be held for no longer than seventy-two hours without a hearing.

It is painfully straightforward. And if legislators prefer a different construction, they have forty-nine other examples to choose from.[193] So why has it not happened yet? It is possible the legislature has failed to implement a detainment limit because there is much more wrong with Massachusetts mental health laws than just the detainment statute.[194] The pervasive practice in Massachusetts—as well as other jurisdictions throughout the country—to dispose of normal due process in civil commitment demonstrates the obtuseness with which our legal system approaches mental health.[195]

It is long overdue that lawmakers reassess institutional procedures and build a commitment process that works.[196] Treatment, involuntary or otherwise,

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[190] *See* EPIA PRESENTATION, *supra* note 12, at 1–6.

[191] *See id.* at 3–6 (establishing procedure by which communications are "expedited" after detainment has been deemed to be prolonged).

[192] *See id.* at 1–6.

[193] *See infra* Table 1.

[194] *See* Helman, *supra* note 147 (reflecting on effects of decades of multi-million-dollar budget cuts and legislation that has rendered "accountability for the care of the most severely ill people . . . 'lost or nonexistent'").

[195] *See* Stone, *supra* note 3, at 809 (identifying incongruity between magnitude of punishment imposed by commitment orders and minimal process afforded to commitment defendants).

[196] *See id.* at 791 ("As a person's freedom is at stake, the serious nature of confinement warrants a critical review of how we address the need for psychiatric treatment of our dangerously mentally ill."); Helman, *supra* note 147 ("The sudden closure of Comprehensive Outpatient Services—which left as many as 2,500 people temporarily without counseling,

should focus on serving citizens with mental disabilities rather than punishing them for something outside of their control.[197] Civil commitment procedures should be structured around the definition of disability as championed by the Americans with Disabilities Act and strive for equal treatment of citizens with mental disabilities rather than an unnecessarily discriminatory one.[198] Massachusetts should cut all ties between the Department of Corrections and civil mental health services.[199] Community treatment alternatives need to be made more widely accessible, especially in areas that are historically underserved and frequently subjected to over-policing and the criminalization of mental illness.[200] Police should not be first responders to mental health crises.[201] And most importantly, Massachusetts needs to invest in the mental health of its citizens.[202] Despite being one of the most affluent states in the country, Massachusetts spends less per capita on mental health programs than the already low national average.[203]

A just commitment program requires more robust due process. Furthermore, the current Massachusetts procedures for civil commitment must no longer blur

psychiatric prescriptions, and other critical assistance—was a sharp illustration of the destructive forces splintering the Massachusetts mental health care system.").

[197] *See* Russell & Cramer, *supra* note 145 ("There may be no worse place for mentally ill people to receive treatment than prison.").

[198] *See* David D. Doak, *Theorizing Disability Discrimination in Civil Commitment*, 93 TEX. L. REV. 1589, 1616 (2015) ("[T]here is a strong argument to be made that commitment decisions based on stereotypes or prejudice about people with mental illness are actionable under Title II of the ADA, properly construed.").

[199] Although Massachusetts has disallowed the civil commitment of women to facilities run by the Department of Corrections, men with mental disabilities are still sent to prisons despite being innocent of any crime. *See* WBUR News & Wire Servs., *New Law Ends Civil Commitments to State Prison for Women*, WBUR NEWS (Jan. 25, 2016), https://www.wbur.org/news/2016/01/25/new-law-ends-civil-commitments-to-state-prison-for-women; Deborah Becker, *Advocates Press Lawsuit Despite DOC Claims Of Improved Involuntary Addiction Treatment*, WBUR NEWS (Oct. 20, 2020), https://www.wbur.org/commonhealth/2020/10/20/section-35-lawsuit-amended-addiction-state-prisons.

[200] *See* Paul M. Grekin et al., *Racial Differences in the Criminalization of the Mentally Ill*, 22 BULL. AM. ACAD. PSYCHIATRY L., no. 3, 1994, at 415, tbl.2 (finding that white individuals experiencing crises were more than twice as likely to be sent to mental health facilities than prisons, while Black individuals were nearly twice as likely to be sent to prisons, and Hispanic individuals were more than three times as likely to be sent to prisons).

[201] *See* Russell & Cramer, *supra* note 145 ("Nearly half of people killed by Massachusetts police over the last 11 years were suicidal, mentally ill, or showed clear signs of crisis, a Spotlight Team investigation shows.").

[202] *See* Helman, *supra* note 147 (finding that Massachusetts has reduced inpatient psychiatric beds by more than 97% since 1953).

[203] *Id.* ("[A] 2013 study showed that the Massachusetts Department of Mental Health spent less money per capita than the national average even though the cost of living here is among the highest in the country.").

the line between civil and criminal law.[204] Robust due process is necessary for just commitment decisions. First, Massachusetts should follow the example set by several states that require a pre-detainment hearing, and subsequent court order, for a detainment to be authorized.[205] Individuals with mental disabilities that are innocent of any crime must not be deprived of their liberty without process, and preliminary hearings could help prevent abuses of the system that authorize unjust detainments.[206] This protection could also decrease fatal interactions between people with mental disabilities and the police by reframing detainment as a deliberate action rather than one that is reactionary.[207] Second, commitment hearings must follow normal evidence rules without admitting excessive hearsay into the record.[208] Watered-down hearsay rules will only serve to prevent effective advocacy on behalf of an individual with mental disabilities as they defend against involuntary deprivations of their liberty.[209] Lastly, the right to counsel upon detainment for indigent defendants and meaningful notice of the commitment petition—along with a guarantee that the defendant will be allowed to attend and participate in their hearing—should be

[204] *See* Stone, *supra* note 3, at 809 ("The confinement against one's will is more akin to the criminal consequences of punishment than to pure treatment, necessitating greater adherence to due process, specifically with the applicability of the rules of evidence.").

[205] *See, e.g.*, ARIZ. REV. STAT. ANN. § 36-535 (2016); COLO. REV. STAT. ANN. § 27-65-105 (2021); KY. REV. STAT. ANN. § 202a.076(2) (West 2021).

[206] *See* Alexander Tsesis, *Due Process in Civil Commitments*, 68 WASH. & LEE L. REV. 253, 277 (2011) (identifying "tremendous potential for abuse of the emergency confinement" statutes in Alaska and Idaho by friends, relatives, and partners); Mariana Kay, *"You're Crazy": My Abusive Partner Had Me Committed*, SALTY (Aug. 10, 2019), https://saltyworld.net/youre-crazy-when-your-partner-has-you-committed/; Jhilmil Breckenridge, *My Family Colluded to Have Me Put in a Mental Health Facility. This is the Story of How I Survived.*, MEDIUM (Sept. 5, 2017), https://medium.com/skin-stories/my-family-colluded-to-have-me-put-in-a-mental-health-facility-this-is-the-story-of-how-i-survived-e0b8f11062c6.

[207] Delaying police action that "overemphasizes rapid problem-solving" could allow for intervention by trained professionals and provide notice of detainment such that a violent confrontation becomes less likely. Russell & Cramer, *supra* note 145 (explaining that police in Massachusetts have "no in-depth training in handling mental health crises" and that most fatal shootings occurred within minutes of arrival of police).

[208] *See* Stone, *supra* note 3, at 807–08 ("Often testimony presented at the civil commitment hearing relies on declarations of family members, employers, neighbors, mental health professionals, police, and other interested individuals who interacted with the mentally ill person prior to the hospital confinement."). The numerous issues inherent to the haphazard and broadly inclusive use of evidence—including various types of evidence inadmissible under normal evidence rules—in commitment proceedings is outside the scope of this Note, but surely part of the steps necessary to make a healthier system of mental health laws.

[209] *See id.* at 809 ("The patient who is subject to involuntary hospitalization is denied the opportunity to cross-examine the key individuals, whether the police, emergency room staff, or family members, when the testifying psychiatrist offers statements from said individuals as part of his testimony at the hearing.").

afforded to any defendant at risk of being deprived of their liberty.[210] Without guarantees to notice and representation, civil commitment defendants would be forced to prepare their defense without sufficient time or resources to contend with the typically prepared and sophisticated petitioner. Ultimately, if civil defendants are to be subjected to lasting stigma and significant deprivations of liberty, then they should receive the same level of process that is afforded to criminal defendants.[211]

Additionally, the Massachusetts government must begin taking responsibility for the effective and compassionate treatment of people with mental disabilities. The mental health system has stagnated and collapsed in the twenty-first century largely because each branch of government refused to address obvious issues, all while pointing at other branches to effect change.[212] The complete lack of accountability and coordination concerning the betterment of mental health treatment led to ruin.[213] Although the closing of mental hospitals in the state may have been founded in the well-intended pursuit of more community-based treatment, the execution lacked follow through, and the new system simply replaced old human rights abuses with new ones.[214]

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[210] Lessard v. Schmidt, 349 F. Supp. 1078, 1103 (E.D. Wis. 1972), *vacated*, 414 U.S. 473 (1974) (finding constitutionally insufficient a detainment law that "fails to require effective and timely notice of the 'charges' under which a person is sought to be detained; fails to require adequate notice of all rights, including the right to jury trial; [and] permits detention longer than 48 hours without a hearing on probable cause . . . .").

[211] *See In re* a Minor, 148 N.E.3d 1182, 1188 (Mass. 2020) ("[W]e have determined that the continuing stigma of a potentially wrongful commitment alone sufficed to defeat a claim of mootness."). Despite the contention that civil commitments are "purely rehabilitative," they are unlike any traditional rehabilitation in that treatment is involuntarily imposed on the patient. *See* Pesci v. Budz, 935 F.3d 1159, 1166 (11th Cir. 2019).

[212] *See* Helman, *supra* note 147 ("Governors from Francis Sargent to Deval Patrick, House speakers, Senate presidents, and other legislative leaders, and federal officials together cut hundreds of millions of dollars in mental health spending over the last 50 years. They closed psychiatric hospitals but funneled comparatively little of the savings into community treatment programs—once successfully defying a federal court order requiring that they spend millions more."); Mass. Gen. Hosp. v. C.R., 142 N.E.3d 545, 547 (Mass. 2020) ("The record and briefing, however, also establish that there is a concerted effort by the executive branch to address this crisis, including the establishment of specific time frames for hospitals and insurance providers to initiate escalation steps for placement searches within the § 12 (a) period, and ongoing communication between the executive branch and the Legislature regarding this effort.").

[213] *See* Helman, *supra* note 147 (explaining how Massachusetts' decision to shut down mental health facilities without a proper plan to continue care has led to a "revolving door of emergency room visits, frequent run-ins with police, and nagging fears among family and providers that someone under their care will turn violent").

[214] JEFFREY A. LIEBERMAN & OGI OGAS, SHRINKS: THE UNTOLD STORY OF PSYCHIATRY 35 (2015) (stating that early mental health facilities were explicitly for segregation of people with mental disabilities from society, not for treatment).

Section 12 is a clear example that civil commitment law—and mental health legislation in general—has not been given proper attention and consideration by the Massachusetts legislature. If the legislature once again fails to heed warnings that section 12 is unconstitutional, an explicit facial challenge of the law must be brought before the Supreme Judicial Court. But even after the most problematic aspects of section 12 are stricken from law, meaningful change cannot be accomplished with an apathetic legislature, an overly deferential judiciary, and a meandering executive. Before actual and lasting change can be realized in mental health programs, the Massachusetts government must listen to their constituents who have been advocating for decades for the protection and fair treatment of their friends, family, and loved ones with mental disabilities. It is imperative that our institutional structures stand up for people with mental disabilities in order to put an end to the latest chapter of ableist law and jurisprudence in Massachusetts.

CONCLUSION

The civil commitment system is broken. The Massachusetts government is, and has been, aware of the problem for decades. The individuals in power have done, and continue to do, nothing of substance to ameliorate the deprivation of liberty imposed on individuals with mental disabilities. Instead, judges, legislators, and administrative officials all offer the same empty reassurance that they are doing everything they can, and that there are complex policy decisions being weighed. But anyone who has seen a commitment hearing is likely to know that the reason for this failure is relatively uncomplicated: the American justice system treats people with mental disabilities with quiet but unrelenting distrust, and as a result, their liberty is simply not prioritized. Section 12 is not all that is wrong with Massachusetts commitment law, but it is an excellent indication of how woefully inadequate the current structure is for the appropriate, just, and constitutional treatment of people with mental disabilities. If the system as it exists today is to change, there must be accountability for the outcomes of mental health programs, due process for involuntary treatment, and significantly more funding directed to mental health facilities.

Table 1. Detainment Limitations by States & District of Columbia

State	Duration	Statute
Alabama	7 Days	ALA. CODE § 22-52-8(a)
Alaska	72 Hours	ALASKA STAT. § 47.30.730 (a)
Arizona	24 Hours	ARIZ. REV. STAT. § 36-527 (A)
Arkansas	72 Hours	ARK. CODE ANN. § 20-47-210
California	72 Hours	CAL. WELF. & INST. CODE § 5171
Colorado	72 Hours	COLO. REV. STAT. § 27-65-105
Connecticut	72 Hours	CONN. GEN. STAT. § 17a-502(d)
Delaware	24 Hours (+48 Hours)	DEL. CODE ANN. tit. 16, § 5008(a)
District of Columbia	3 Days	D.C. CODE § 21-541
Florida	72 Hours (or 24 Hours in Stabilization)	FLA. STAT. § 394.875(1)(a)
Georgia	48 Hours	GA. CODE ANN. § 37-3-43
Hawaii	48 Hours	HAW. REV. STAT. § 334-59
Idaho	5 Days	IDAHO CODE § 66-329(4)
Illinois	24 Hours	405 ILL. COMP. STAT. 5/3-607
Indiana	72 Hours	IND. CODE § 12-26-5-1
Iowa	48 Hours	IOWA CODE § 229.22
Kansas	48 Hours (or 17 Hours at MH Facility)	KAN. STAT. ANN. § 59-2953
Kentucky	72 Hours	KY. REV. STAT. ANN. § 202a.031
Louisiana	72 Hours	LA. STAT. ANN. § 28:53
Maine	24 Hours	ME. REV. STAT. tit. 34-B, § 3863
Maryland	30 Hours	MD. CODE ANN., HEALTH-GENERAL § 10-625
Massachusetts	Unlimited (+3 Days Post-Evaluation)	MASS. GEN. LAWS ch. 123, § 12(b)
Michigan	24 Hours	MICH. COMP. LAWS § 330.1429
Minnesota	72 Hours	MINN. STAT. § 253b.051
Mississippi	72 Hours	MISS. CODE ANN. § 41-21-67
Missouri	96 Hours	MO. REV. STAT. § 632.305
Montana	72 Hours	MONT. CODE ANN. § 53-21-1402

Nebraska	7 Days	NEB. REV. STAT. § 71-923
Nevada	72 Hours	NEV. REV. STAT. § 433A.150
New Hampshire	6 Hours (+3 Days)	N.H. REV. STAT. ANN. § 135-C:28
New Jersey	72 Hours	N.J. STAT. ANN. § 30:4-27.10
New Mexico	7 Days	N.M. STAT. ANN. § 43-1-10
New York	72 Hours	N.Y. MENTAL HYG. LAW § 9.39-40
North Carolina	24 Hours	N.C. GEN. STAT. § 122C-266
North Dakota	23 Hours	N.D. CENT. CODE § 25-03.1-25
Ohio	48 Hours	OHIO REV. CODE ANN. § 5122.17
Oklahoma	72 Hours	OKLA. STAT. tit. 43A, § 5-413
Oregon	5 Days	OR. REV. STAT. § 426.210
Pennsylvania	120 Hours	50 PA. CONS. STAT. § 7302
Rhode Island	72 Hours	40.1 R.I. GEN. LAWS § 40.1-5-7(c)
South Carolina	24 Hours	S.C. CODE ANN. § 44-17-530
South Dakota	5–7 Days	S.D. CODIFIED LAWS § 27A-10-8
Tennessee	12 hours (+ 72 Hours Extension)	TENN. CODE ANN. § 33-6-304
Texas	48 Hours	TEX. HEALTH & SAFETY CODE ANN. § 573.021(b)
Utah	24 Hours	UTAH CODE ANN. § 62A-15-629
Vermont	24 Hours + 72 Hours	VT. STAT. ANN. tit. 18, § 7508
Virginia	72 Hours	VA. CODE ANN. § 37.2-809
Washington	72 Hours	WASH. REV. CODE § 71.05.153
West Virginia	24 Hours	W. VA. CODE § 27-5-2a
Wisconsin	72 Hours	WIS. STAT. § 51.20
Wyoming	72 Hours	WYO. STAT. ANN. § 25-10-112