

# Indiana Law Review

Volume 58

2025

Number 3

## NOTES

### TIME OUT OF MIND: EMERGENCY DETENTIONS UNDER INDIANA LAW, DUE PROCESS IMPLICATIONS, AND PROPOSED REFORMS

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#### INTRODUCTION

In the late winter of 2018, Eskenazi Health sought the involuntary commitment of C.N., an adult male.<sup>1</sup> Eskenazi filed an application for emergency detention,<sup>2</sup> alleging that C.N., by reason of untreated bipolar disorder, posed a danger to himself.<sup>3</sup> The Marion County Superior Court authorized detention and set a commitment hearing.<sup>4</sup>

At the hearing, a doctor testified that C.N., now diagnosed with schizoaffective disorder, was gravely disabled.<sup>5</sup> C.N. entertained delusions of grandeur: he believed he was a police officer and claimed to have worked with both the Federal Bureau of Investigation (F.B.I.) and the Drug Enforcement Agency.<sup>6</sup> A detective with the Indianapolis Metropolitan Police Department said that C.N. had “shown signs of mental illness,” including disorganized and delusional thinking.<sup>7</sup> A “plastic hybrid BB gun,” body armor, a gas mask, and a “footlocker type of thing” had been found in C.N.’s home.<sup>8</sup>

For his part, C.N. flatly contested the need for commitment.<sup>9</sup> He was gainfully employed, earning between \$10 and \$15 per hour working for a home

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1. *In re* Commitment of C.N., 116 N.E.3d 544, 545 (Ind. Ct. App. 2019).

2. As explained in greater detail below, an emergency detention is a form of civil commitment. *See infra* notes 33–35 and accompanying text. In an emergency detention, an individual alleged to be mentally ill and either dangerous or gravely disabled can be confined to a facility on a short-term basis. *Id.* At the time of C.N.’s commitment, an emergency detainee could be held without a hearing for no more than six days. *See infra* notes 39–49 and accompanying text. Under current Indiana law, the detainee can be held without a hearing for as many as fourteen days. *See infra* notes 51–60 and accompanying text.

3. *C.N.*, 116 N.E.3d at 545–46.

4. *Id.* at 546.

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

improvement company.<sup>10</sup> He was living with his girlfriend in a house she had inherited from her grandmother, and he was helping “get that house back in shape and fixed up.”<sup>11</sup> In his time at Eskenazi, he had seen to his dietary and hygiene needs.<sup>12</sup> He denied having claimed to be an “official member” of either the F.B.I. or the police department.<sup>13</sup>

The hearing concluded.<sup>14</sup> C.N. was, in the trial court’s assessment, “gravely disabled because he was demonstrating a substantial impairment in his judgment and reasoning that resulted in his inability to function independently.”<sup>15</sup> Notably, the trial court did *not* find that C.N. posed a danger to himself or others.<sup>16</sup> Nevertheless, the trial court ruled for Eskenazi and ordered the involuntary commitment of C.N. “for a period of time expected to exceed ninety days.”<sup>17</sup>

C.N. appealed, arguing that the evidence against him was insufficient to justify involuntary commitment.<sup>18</sup> The Indiana Court of Appeals agreed and vacated the trial court’s commitment order: the evidence “simply [did] not support the trial court’s conclusion that C.N. was gravely disabled.”<sup>19</sup>

This case vividly illustrates just what is at stake in a commitment proceeding. The Indiana Supreme Court has stressed that “[i]nvoluntary civil commitment, no less than imprisonment, is a tremendous intrusion on personal liberty and autonomy.”<sup>20</sup> Subjects “may be confined against their will, restrained, forcibly medicated, and even kept in seclusion.”<sup>21</sup> Moreover, “serious stigma and adverse social consequences” attach to the subjects of commitment proceedings.<sup>22</sup>

It is well established that commitment proceedings must comply with the dictates of due process.<sup>23</sup> Because commitment proceedings implicate such weighty interests, it is essential that the procedural apparatus be both finely calibrated and fitted with robust safeguards. Yet legislation enacted in 2023 actually *weakened* the safeguards surrounding emergency detentions in Indiana, creating an elevated risk of prolonged wrongful confinements.<sup>24</sup>

This Note argues that the statutes governing emergency detentions in Indiana deprive detainees of liberty without due process of law. Part I concerns essential context: how emergency detentions fit into the broader framework for

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10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.* at 546–47.

15. *Id.*

16. *Id.* at 547.

17. *Id.*

18. *Id.*

19. *Id.* at 548.

20. *A.A. v. Eskenazi Health/Midtown CMHC*, 97 N.E.3d 606, 608 (Ind. 2018).

21. *Id.*

22. *Civ. Commitment of T.K. v. Dep’t of Veterans Aff.*, 27 N.E.3d 271, 273 (Ind. 2015).

23. *Id.*

24. 2023 IND. ACTS 3148.

civil commitments, how the old statutory regime differs from the new, and what process is due in commitment proceedings. Part II addresses the timeliness of hearings: first, it contends that the statutes unconstitutionally extend the period of detainment prior to a hearing; second, it proposes reforms to reduce this delay. Part III examines the statutory rights afforded to the subjects of commitment actions: first, it argues that these rights, as presently formulated, do not extend to emergency detainees; second, it proposes amendments to remedy this defect. Finally, Part IV argues, by analogy to bedrock principles of criminal procedure, that any heightened fiscal and administrative burdens occasioned by the proposed reforms are outweighed by the detainee's liberty interest.

## I. BACKGROUND

### A. Civil Commitment Generally

The mechanisms of civil commitment are functions of a state's police and *parens patriae* powers.<sup>25</sup> The police power has long been applied to matters affecting "[p]ublic safety, public health, morality, peace and quiet, [and] law and order."<sup>26</sup> Pursuant to its police power, a state may "protect the community from the dangerous tendencies of some who are mentally ill."<sup>27</sup> The *parens patriae* power has its ancient roots in English constitutional law, which made the monarch the "guardian of persons under legal disabilities to act for themselves."<sup>28</sup> The state, as *parens patriae* (literally, "father of the nation"), "has a legitimate interest" in "providing care to its citizens who are unable because of [mental] disorders to care for themselves."<sup>29</sup>

However, these powers are not without their limits. The Supreme Court of the United States has held 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" because there is "no constitutional basis for confining such persons involuntarily if they are dangerous to no one and can live safely in freedom."<sup>30</sup> And yet, in the five decades since this somewhat vague pronouncement on substantive limits, the Court has offered the states scant instruction as to the procedural limits of the commitment power.<sup>31</sup> In the absence

25. BRUCE J. WINICK, *CIVIL COMMITMENT: A THERAPEUTIC JURISPRUDENCE MODEL* 42 (2005).

26. *Berman v. Parker*, 348 U.S. 26, 32 (1954).

27. *Addington v. Texas*, 441 U.S. 418, 426 (1979).

28. *Hawaii v. Standard Oil Co. of Cal.*, 405 U.S. 251, 257 (1972).

29. *Addington*, 441 U.S. at 426.

30. *O'Connor v. Donaldson*, 422 U.S. 563, 575 (1975).

31. See, e.g., Margaret J. Lederer, *Not So Civil Commitment: A Proposal for Statutory Reform Grounded in Procedural Justice*, 72 DUKE L.J. 903, 914 (2023) (noting that "the Court has offered little guidance" as to the procedural limits of the commitment power).

of any such instruction, the states have developed highly divergent civil commitment systems.<sup>32</sup>

Title 12, Article 26, of the Indiana Code governs this state's civil commitment system.<sup>33</sup> An emergency detention is but one of the commitment mechanisms available to the state under Article 26. For instance, an individual "alleged to be mentally ill and either dangerous or gravely disabled" may be temporarily committed for up to ninety days.<sup>34</sup> If a court later concludes that this same individual is, in fact, mentally ill and either dangerous or gravely disabled, the court may order a "regular commitment," the duration of which is generally indefinite.<sup>35</sup> Because emergency detentions are the focus of this Note, little else will be said about temporary and regular commitments. It is, however, noteworthy that an emergency detention is sometimes the first step on a path that leads to temporary or regular commitment (indeed, that was the case for C.N., as discussed above).<sup>36</sup> For that reason, the interplay among the emergency detention statutes and those governing temporary and regular commitments can be a matter of great consequence. The reader should bear that in mind as this Note proceeds in its analysis.

### *B. Emergency Detentions in Indiana*

On May 4, 2023, Governor Eric Holcomb signed House Bill 1006 into law.<sup>37</sup> This omnibus mental health bill worked fundamental changes to the statutes governing emergency detentions.<sup>38</sup> The two subsections below describe in detail both the old statutory regime and the new. Each subsection proceeds chronologically, starting with the initiation of a detention, continuing through the facility's application and reporting processes, and concluding with the court's part in finding probable cause, conducting hearings, and ordering either release or continued confinement.

*1. The Old Statutory Regime.*—The controlling statutes authorized detention on the filing of a written application with a facility (as defined in Ind. Code Section 12-7-2-82).<sup>39</sup> The application consisted of (1) a "statement of the applicant's belief" that the individual to be detained was both "mentally ill and either dangerous or gravely disabled" and "in need of immediate restraint" and (2) a statement by a single physician, based either on the physician's own

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32. See, e.g., Donald Stone, *There Are Cracks in the Civil Commitment Process: A Practitioner's Recommendations to Patch the System*, 43 FORDHAM URB. L.J. 789 (2016) (cataloging critical differences in the states' civil commitment systems).

33. IND. CODE § 12-26-1-1 (2024).

34. I.C. § 12-26-6-1 (2024).

35. I.C. § 12-26-7-5 (2024).

36. See, e.g., *In re Commitment of C.N.*, 116 N.E.3d 544, 545–47 (Ind. Ct. App. 2019).

37. *House Bill 1006: Bill Details*, INDIANA GENERAL ASSEMBLY – 2023 SESSION, <https://iga.in.gov/legislative/2023/bills/house/1006/details> [<https://perma.cc/CP3J-ME6W>].

38. 2023 IND. ACTS 3148.

39. I.C. § 12-26-5-1 (2022).

examination or information provided to the physician, that the individual to be detained “may be mentally ill and either dangerous or gravely disabled.”<sup>40</sup>

The duration of an emergency detention was limited to seventy-two hours.<sup>41</sup> Within that period, the detaining facility filed a written report with a court of competent jurisdiction stating (1) that the individual had been examined and (2) whether there was probable cause to believe that the individual was “mentally ill and either dangerous or gravely disabled” and in need of “continuing care and treatment.”<sup>42</sup>

The court, in turn, would act on the facility’s report within twenty-four hours of receipt.<sup>43</sup> If the court found no probable cause to detain the individual, the court would order the detainee’s release.<sup>44</sup> If, on the other hand, the court did find probable cause for detainment, the court could order that the individual remain in detention pending a preliminary or final hearing.<sup>45</sup>

The purpose of a preliminary hearing was to establish probable cause justifying detention.<sup>46</sup> If ordered by the court, a preliminary hearing took place within two days of the court’s order.<sup>47</sup> The purpose of a final hearing was to determine whether the detainee was, in fact, “in need of temporary or regular commitment.”<sup>48</sup> A final hearing took place within either ten days of the preliminary hearing or, if no preliminary hearing was held, within two days of the court’s order.<sup>49</sup>

*2. The New Statutory Regime.*—The old statutory regime remained in force from 1994 until 2023, when the new statutory regime took effect.<sup>50</sup> Now, pursuant to this new regime, a facility may detain an individual for up to forty-eight hours without involving the court.<sup>51</sup> Detainment can continue for up to seventy-two hours if the facility files a detention application with the court within the first forty-eight hours of confinement.<sup>52</sup> That application must contain an attestation, signed by a physician, stating that the detainee has been examined by a physician, an advanced practice registered nurse, or a physician assistant.<sup>53</sup> The attestation must also state that, on the basis of an examination or other information provided to the examiner, “there is probable cause to believe” that (1) “the individual is mentally ill and either dangerous or gravely disabled” and

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40. *Id.*

41. *Id.*

42. I.C. § 12-26-5-5 (2022).

43. I.C. § 12-26-5-8 (2022).

44. I.C. § 12-26-5-9 (2022).

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*; I.C. § 12-26-5-11 (2022).

50. I.C. § 12-26-5-1 (2022) (originally adopted in 1992 and amended in 1993 and 1994).

51. I.C. § 12-26-5-1 (2024).

52. *Id.*

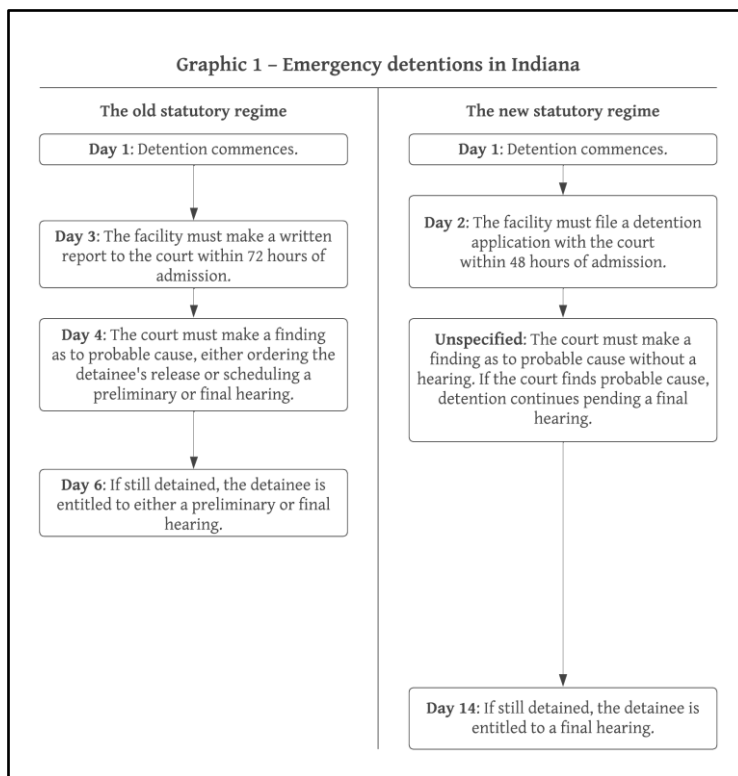
53. *Id.*

(2) “the individual requires continuing involuntary detention to receive care and treatment.”<sup>54</sup>

On receiving an application, the court must determine, without conducting a hearing, whether there is probable cause for detention.<sup>55</sup> If the court finds no probable cause, it must order the detainee’s release.<sup>56</sup> However, if the court *does* find probable cause, the facility may hold the detainee pending a final hearing.<sup>57</sup> The controlling statute does not specify a deadline by which the court must make its determination as to probable cause.<sup>58</sup>

The new statutory regime dispenses with preliminary hearings altogether. The purpose of a final hearing is “to determine by clear and convincing evidence whether the individual is: (1) mentally ill and either dangerous or gravely disabled; and (2) in need of temporary or regular commitment.”<sup>59</sup> A final hearing can take place as late as fourteen days after the date of initial confinement.<sup>60</sup>

The following is a graphic representation of the differences between the old statutory regime and the new.



54. *Id.*

55. I.C. § 12-26-5-9 (2024).

56. *Id.*

57. *Id.*

58. *See id.*

59. I.C. § 12-26-5-11 (2024).

60. *Id.*

### *C. Due Process*

Our respect for the rule of law has as its predicate an abiding faith in its promise that procedural fairness gives rise to substantive justice.<sup>61</sup> This is implicit in the United States Constitution, which twice enjoins governmental actors from deprivations of “life, liberty, or property, without due process of law.”<sup>62</sup> The Indiana Constitution, in its guarantee that “every person, for injury done to him in his person, property, or reputation, shall have remedy by due course of law,” likewise emphasizes process as the essential mechanism of substantive justice.<sup>63</sup>

The Supreme Court of the United States “repeatedly has recognized that civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection.”<sup>64</sup> The Court has aptly explained why this is so:

The loss of liberty produced by an involuntary commitment is more than a loss of freedom from confinement. It is indisputable that commitment to a mental hospital “can engender adverse social consequences to the individual[.]” . . . Also, “[a]mong the historic liberties” protected by the Due Process Clause is the “right to be free from, and to obtain judicial relief for, unjustified intrusions on personal security.”<sup>65</sup>

Setting aside axiomatic statements about its importance and application, “due process of law” defies easy definition. Justice Felix Frankfurter perhaps put it best:

‘[D]ue process,’ unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place[,] and circumstances. Expressing as it does in its ultimate analysis respect enforced by law for that feeling of just treatment which has been evolved through centuries of Anglo-American constitutional history and civilization, ‘due process’ cannot be imprisoned within the treacherous limits of any formula. Representing a profound attitude of fairness between man and man, and

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61. See, e.g., *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963) (“From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law.”); *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934), *overruled on other grounds by Malloy v. Hogan*, 378 U.S. 1, 2 (1964) (“[A state] is free to regulate the procedure of its courts in accordance with its own conception of policy and fairness, *unless* in so doing it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.”) (emphasis added).

62. U.S. CONST. amend. V; U.S. CONST. amend. XIV, § 1.

63. IND. CONST. art. 1, § 12.

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

65. *Vitek v. Jones*, 445 U.S. 480, 492 (1980) (quoting *Addington v. Texas*, 441 U.S. 418, 426 (1979); *Ingraham v. Wright*, 430 U.S. 651, 673 (1977)).

more particularly between the individual and government, 'due process' is compounded of history, reason, the past course of decisions, and stout confidence in the strength of the democratic faith which we profess.<sup>66</sup>

There being no easy formula, determining the constitutional sufficiency of process requires careful analysis of both the private and governmental interests involved in a given factual setting.<sup>67</sup> The balancing test articulated in *Mathews v. Eldridge* is instructive. The *Mathews* test turns on three factors:<sup>68</sup>

- The private interest involved;<sup>69</sup>
- The risk that existing process will result in an unwarranted deprivation of that interest, as well as the probable value of additional or alternative process;<sup>70</sup> and
- The government's interest, "including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."<sup>71</sup>

Fifty years hence, the *Mathews* test has proved durable; federal courts continue to apply it in a variety of contexts,<sup>72</sup> as do Indiana courts.<sup>73</sup> This Note will therefore make occasional reference to the *Mathews* test as it proceeds in its analysis.

## II. TIMELY HEARINGS

### *A. The Problem: Fourteen Days Without a Hearing*

As noted above, the statutes governing emergency detentions now dispense altogether with preliminary hearings.<sup>74</sup> The court must determine, without conducting a hearing, whether there is probable cause justifying detention.<sup>75</sup> If

66. *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 162–63 (1951) (Frankfurter, J., concurring).

67. *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976); *see also Morrissey v. Brewer*, 408 U.S. 471, 481 (1972) (stressing that due process "calls for such procedural protections as the particular situation demands").

68. *Mathews*, 424 U.S. at 335.

69. *Id.*

70. *Id.*

71. *Id.*

72. *See, e.g., Wilkinson v. Austin*, 545 U.S. 209, 224–25 (2005) (applying the *Mathews* test in a case concerning a state's policy governing placement in a "supermax" prison); *Clancy v. Off. of Foreign Assets Control of U.S. Dep't of the Treasury*, 559 F.3d 595, 600 (7th Cir. 2009) ("We apply the *Mathews* test when determining what procedures *are* necessary to ensure that a citizen is not deprived of property without due process of law.").

73. *See, e.g., In re C.G.*, 954 N.E.2d 910, 917–19 (Ind. 2011) (applying the *Mathews* test in a case concerning the termination of parental rights); *Ruge v. Kovach*, 467 N.E.2d 673, 678–81 (Ind. 1984) (applying the *Mathews* test in a case concerning the constitutionality of a statute providing for summary suspension of driver's licenses).

74. 2023 IND. ACTS 3148.

75. IND. CODE § 12-26-5-9 (2024).



the court finds probable cause, the detainee can be held pending a final hearing.<sup>76</sup> That final hearing can take place as late as fourteen days after the date of initial confinement.<sup>77</sup> This change, which is shocking on its face, is all the more startling in light of caselaw, which demonstrates that fourteen days without a hearing is far too long.

First and foremost, in *Matter of Tedesco*, the Indiana Court of Appeals concluded that detainment for fourteen days without a hearing to establish probable cause was unreasonable and, therefore, violative of the right to due process.<sup>78</sup> In this case, Tedesco's father filed a petition for Tedesco's involuntary commitment.<sup>79</sup> The trial court ordered that the sheriff take Tedesco into custody and transport him to a state hospital pending a hearing, which was set for fourteen days later.<sup>80</sup> At that hearing, the trial court ordered Tedesco's commitment.<sup>81</sup> Tedesco appealed, arguing that his pre-hearing detention violated his right to due process.<sup>82</sup> The Court of Appeals agreed.<sup>83</sup> In its analysis of "what process is due and whether [the] procedures provided to Tedesco were adequate," the court applied the *Mathews* balancing test.<sup>84</sup>

The court reasoned that Tedesco's private interest was "twofold."<sup>85</sup> First, he had "a vital interest in being protected from unjustified and significant deprivations of his personal liberty."<sup>86</sup> Second, in view of the "adverse social consequences" that can follow from detainment in a mental hospital, he had "an interest in being protected from any [resulting] stigma."<sup>87</sup>

The court next considered both the risk of erroneous deprivation and the probable value of other procedural safeguards.<sup>88</sup> The court determined that the risk of erroneous deprivation was "relatively high" because the petition prompting the commitment proceedings reflected the opinion of a single physician, "without opportunity for anyone, including the alleged mentally ill individual, to question that opinion."<sup>89</sup> Moreover, "certain procedures, such as a hearing with the alleged mentally ill individual present with counsel, would reduce the risk of an erroneous conclusion" because "[s]uch a procedure would allow the individual or counsel to question the opinion of the physician to [e]nsure that the detention was necessary."<sup>90</sup>

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76. *Id.*

77. I.C. § 12-26-5-11 (2024).

78. *In re Tedesco*, 421 N.E.2d 726, 730 (Ind. Ct. App. 1981).

79. *Id.* at 727.

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.* at 728.

84. *Id.* at 729.

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

The court conceded that “the state may sometimes have a compelling interest in emergency detention of persons who threaten violence to themselves or others for the purpose of protecting society and the individual.”<sup>91</sup> That interest notwithstanding, the court concluded that Tedesco’s right to due process had been violated.<sup>92</sup>

[I]n light of the significant risk of an erroneous conclusion and the individual’s compelling interest in liberty, [an] emergency detention can be justified only for a reasonable length of time in order to arrange for a hearing to determine whether probable cause for the detention exists. In the present case, Tedesco was detained for fourteen days without being afforded such a hearing. We find this period of detainment without a probable cause hearing to be unreasonable. Therefore, we hold that the prehearing detainment of Tedesco violated his due process rights.<sup>93</sup>

The court held that “a probable cause hearing must be afforded the individual within a reasonable time.”<sup>94</sup> If a trial court finds probable cause justifying detention, then a full hearing on the merits “must be held as soon after detention as possible, for probable cause does not justify a prolonged period of confinement without a full hearing.”<sup>95</sup>

*Tedesco* remains good law. Our courts have cited it as recently as 2017,<sup>96</sup> and its central holdings have gone uncontested.<sup>97</sup> And *Tedesco* precludes on constitutional grounds precisely what is now purportedly sanctioned by statute: confinement for up to fourteen days without a hearing of any sort.

In reaching these conclusions, the *Tedesco* court relied heavily on the reasoning of *Lessard v. Schmidt*, an influential decision that struck down much of Wisconsin’s commitment system. The *Lessard* court held, in pertinent part, that the subject of a commitment action is entitled to a preliminary hearing within forty-eight hours of initial confinement.<sup>98</sup>

[W]e believe that the maximum period which a person may be detained without a preliminary hearing is 48 hours. It must be remembered that

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91. *Id.* at 730 (quoting *Lessard v. Schmidt*, 349 F. Supp. 1078, 1091 (E.D. Wis. 1972)).

92. *Id.*

93. *Id.* (citation omitted).

94. *Id.*

95. *Id.*

96. *K.J. v. State*, No. 18A02-1607-MH-1610, 2017 WL 192876, at \*6 (Ind. Ct. App. Jan. 18, 2017) (unpublished mem. decision) (noting that *Tedesco*, which “considered only the time limitations for conducting an initial hearing when committing an individual,” was inapplicable to the instant case, which concerned “the statutorily-mandated annual review of [K.J.’s] case”).

97. *See, e.g.*, *M.E. v. V.A. Med. Ctr.*, 957 N.E.2d 637, 639 (Ind. Ct. App. 2011); *Commitment of C.A. v. Ctr. for Mental Health*, 776 N.E.2d 1216, 1217 (Ind. Ct. App. 2002).

98. *Lessard v. Schmidt*, 349 F. Supp. 1078, 1091 (E.D. Wis. 1972) (vacated and remanded on procedural grounds).

at this time the necessity for commitment of an individual has not yet been established. Those who argue that notice and a hearing at this time may be harmful to the patient ignore the fact that there has been no finding that the person is in need of hospitalization. The argument also ignores the fact that even a short detention in a mental facility may have long lasting effects on the individual's ability to function in the outside world due to the stigma attached to mental illness.<sup>99</sup>

In the years following *Lessard*, courts across the country issued decisions concerning the timeliness of commitment hearings, and many of those decisions bear *Lessard's* unmistakable imprint.<sup>100</sup> More recent decisions, although less reliant on *Lessard*, also recognize that the timeliness of hearings is a central due process concern.<sup>101</sup>

It is true that a consensus as to the exact interval between initial confinement and a hearing has yet to emerge. However, one ought not misconstrue this divergence of opinion as evidence that the states retain unfettered discretion. After all, the decisions clearly suggest a range of constitutionally permissible intervals, from forty-eight hours on the low end to seven days on the high end.<sup>102</sup> State statutes reflect this same range.<sup>103</sup> Fourteen days, falling far outside it, is simply too long to pass constitutional muster.

### *B. The Solution: A Hearing Within Seven Days*

Regrettably, the *Tedesco* court stopped short of “specify[ing] the precise length of time an individual may be [confined] before a probable cause hearing must be held.”<sup>104</sup> The Supreme Court of the United States has likewise failed to prescribe clear requirements as to the timing of commitment hearings.<sup>105</sup>

99. *Id.* (footnote omitted).

100. *See, e.g.,* *Lynch v. Baxley*, 386 F. Supp. 378, 388 (M.D. Ala. 1974) (“In no event may [an emergency detention] in the absence of a probable cause hearing exceed seven (7) days from the date of the initial detention.”); *Doe v. Gallinot*, 486 F. Supp. 983, 994 (C.D. Cal. 1979) (holding that “due process requires a probable cause hearing after the 72-hour emergency detention period for persons alleged to be gravely disabled”); *State ex rel. Doe v. Madonna*, 295 N.W.2d 356, 365 (Minn. 1980) (holding that “a preliminary probable cause hearing must be held within 72 hours after confinement”).

101. *See, e.g.,* *N.M. Dep’t of Health v. Compton*, 34 P.3d 593, 600 (N.M. 2001) (holding that a statutory seven-day hearing requirement in proceedings for thirty-day commitments was “constitutional on its face”).

102. *See Madonna*, 295 N.W.2d at 365 (“There is no consensus in the courts as to the maximum time limits between initial confinement and a probable cause hearing that will not violate due process. The tendency, however, has been to shorten the delay before a preliminary hearing, and, for example, certain courts have suggested that the maximum delay is 96–120 hours or even as limited a period as 48 hours.”) (citations omitted).

103. *See, e.g.,* *Lederer, supra* note 31, at 919 (noting that at least eight states require hearings within seventy-two hours while at least five states require hearings within five to seven days).

104. *In re Tedesco*, 421 N.E.2d 726, 730 (Ind. Ct. App. 1981).

105. *See, e.g.,* *Lederer, supra* note 31, at 914 (observing that “the Court has offered little guidance” as to the procedural limits of the commitment power).

In the absence of clear and controlling precedents, the law of surrounding states can be illuminating. The table below summarizes the law governing the timeliness of hearings in Indiana and four neighboring states: Illinois, Kentucky, Michigan, and Ohio.<sup>106</sup>

Table 1 — Provision of hearings in emergency detentions: selected comparisons				
	Initial detention	Preliminary (probable cause) hearing	Final (merits) hearing	Total possible time without a hearing
<b>Indiana</b>	The facility can detain the individual up to 2 days without the court's permission. <sup>107</sup> The facility can detain the individual up to 3 days if it files a detention application with the court. <sup>108</sup>	None; the court makes a finding as to probable cause without a hearing. <sup>109</sup>	A hearing to determine whether an individual should be committed on a temporary or regular basis must be held within 14 days of initial confinement. <sup>110</sup>	14 days. <sup>111</sup>
<b>Illinois</b>	The facility can detain the individual up to 1 day without the court's permission. <sup>112</sup>	None.	A hearing to determine whether the individual should be involuntarily committed must be held within 5 days of the court's receipt of a petition for involuntary commitment. <sup>113</sup>	6 days. <sup>114</sup>

106. Note that these comparisons are necessarily somewhat imperfect because no two states impose identical requirements for emergency detentions. Conceptual frameworks vary, as does even the language used to describe commitment actions. In collecting and presenting the below information, the author has taken pains to account for these differences in order to facilitate fitting comparisons.

107. IND. CODE § 12-26-5-1 (2024).

108. *Id.*

109. I.C. § 12-26-5-9 (2024).

110. I.C. § 12-26-5-11 (2024).

111. *Id.*

112. 405 ILL. COMP. STAT. 5/3-611 (2024).

113. *Id.*; *In re Lanter*, 576 N.E.2d 1219, 1220 (Ill. App. Ct. 1991).

114. This is inferred by reading 405 ILL. COMP. STAT. 5/3-611 and 405 ILL. COMP. STAT. 5/3-611 in conjunction.

<b>Kentucky</b>	The facility can detain the individual up to 3 days without the court's permission. <sup>115</sup>	A hearing to establish probable cause for continued confinement must be held within 6 days of initial confinement. <sup>116</sup>	A final hearing to determine whether the individual should be committed must be held within 21 days of initial confinement. <sup>117</sup>	6 days. <sup>118</sup>
<b>Michigan</b>	The facility can detain the individual up to 1 day without the court's permission. <sup>119</sup>	None; if the examining physician or psychologist executes a clinical certificate, confinement can continue pending a final hearing. <sup>120</sup>	A final hearing to determine whether the individual is in need of treatment must be held within 7 days of the court's receipt of a petition and clinical certificate(s). <sup>121</sup>	8 days. <sup>122</sup>
<b>Ohio</b>	The facility can detain an individual up to 3 days if it files an affidavit alleging that the individual is "a person with a mental illness subject to court order." <sup>123</sup>	None as a matter of right; a court may make a finding as to probable cause without a hearing. <sup>124</sup>	A hearing to determine whether the individual is "a person with a mental illness subject to court order" must be held within 5 days of initial confinement or the filing of the affidavit, whichever occurs first. <sup>125</sup>	5 days. <sup>126</sup>

In Ohio, the detainee is entitled to a hearing on the merits within five days of either initial confinement or the filing of the affidavit alleging the detainee to

115. KY. REV. STAT. § 202A.031 (2024).

116. KY. REV. STAT. § 202A.071 (2024).

117. *Id.*

118. *Id.*

119. MICH. COMP. LAWS § 330.1429 (2024).

120. *Id.*

121. MICH. COMP. LAWS § 330.1452 (2024).

122. This is inferred by reading MICH. COMP. LAWS § 330.1429 and MICH. COMP. LAWS § 330.1452 in conjunction.

123. OHIO REV. CODE §§ 5122.10–.11 (2024).

124. *Id.* § 5122.11.

125. OHIO REV. CODE § 5122.141 (2024).

126. *Id.*

be “a person with a mental illness subject to court order,” whichever occurs first.<sup>127</sup> In both Illinois and Kentucky, the detainee is entitled to a hearing of some sort within six days of initial confinement.<sup>128</sup> In Michigan, a hearing on the merits must be set within eight days of the detainee’s initial confinement.<sup>129</sup> Indiana lags far behind, affording the detainee a hearing within fourteen days of his or her initial confinement.<sup>130</sup> This disparity is deeply troubling. Fortunately, it is also easily remedied.

First, a hearing should occur no more than seven days out from the date of initial confinement. From a clinical perspective, a seven-day interval constitutes a major extension as compared to the three-day interval imposed by the old statutory regime, and that extension may benefit some detainees. Although “many patients with psychiatric needs can be evaluated, stabilized, and discharged within 72 hours,” there is some evidence that “72-hour and other short-term holds may foster neglect of patients and ineffective churn in mental health settings.”<sup>131</sup> A seven-day detention, by contrast, affords clinicians more time “to better observe their [patients’] clinical needs and to provide necessary care.”<sup>132</sup> From a legal perspective, there is considerable support for the proposition that a seven-day interval meets the requirements of due process.<sup>133</sup> Moreover, as demonstrated above, a seven-day interval more closely aligns with the law of surrounding states.<sup>134</sup>

Second, a detainee ought to be able to obtain an earlier hearing upon request, and that hearing should be held within forty-eight hours of the court’s receipt of the request. Such provisions are not uncommon, especially in states that conduct relatively late hearings.<sup>135</sup> This guarantees that any detainee eager to contest the grounds of detention is granted a prompt opportunity to do so.<sup>136</sup>

127. *Id.*

128. 405 ILL. COMP. STAT. 5/3-611 (2024); *In re Lanter*, 576 N.E.2d 1219, 1220 (Ill. App. Ct. 1991); KY. REV. STAT. § 202A.071 (2024).

129. MICH. COMP. LAWS §§ 330.1452, .1429 (2024).

130. IND. CODE § 12-26-5-11 (2024).

131. Nathaniel P. Morris, *Reasonable or Random: 72-Hour Limits to Psychiatric Holds*, 72 PSYCHIATRIC SERVICES 210, 211 (2021).

132. *Id.*

133. *See, e.g.*, N.M. Dep’t of Health v. Compton, 34 P.3d 593, 600 (N.M. 2001) (holding that “the seven-day hearing requirement [in proceedings for thirty-day commitments] is constitutional on its face”); *Lynch v. Baxley*, 386 F. Supp. 378, 388 (M.D. Ala. 1974) (“In no event may [an emergency detention] in the absence of a probable cause hearing exceed seven (7) days from the date of the initial detention.”); Lederer, *supra* note 31, at 919 (noting that at least thirteen states require hearings within seven days).

134. *See supra* notes 127–130 and accompanying text.

135. *See, e.g.*, N.Y. MENTAL HYGIENE LAW § 9.39 (McKinney2024) (providing that the subject of an emergency admission can petition the court for what is, in essence, a probable cause hearing, and that such hearing must be held no more than five days out from the court’s receipt of the request).

136. *See, e.g.*, *Project Release v. Prevost*, 722 F.2d 960, 975 (2d Cir. 1983) (holding that “the New York State Mental Hygiene Law’s elaborate notice and hearing provisions, including notice to relatives and others designated by the patient, and the availability of a judicial hearing within five days of demand” satisfy the dictates of due process) (emphasis added).

Finally, a preliminary hearing ought to be available as a matter of right. Although some of Indiana's sister states (including Illinois, Michigan, and Ohio) forgo preliminary hearings in favor of accelerated final hearings, preliminary hearings constitute a critical procedural safeguard for detainees because they afford the detainee a unique opportunity both to hear the evidence offered in support of detention and to rebut that evidence.<sup>137</sup> Accordingly, courts across the country have suggested that a preliminary hearing is an essential element of due process in commitment proceedings.<sup>138</sup> Although preliminary hearings need not be as formal as final hearings on the merits of commitment, they are subject to some foundational requirements:<sup>139</sup>

At the very least . . . due process does require that the hearing be preceded by adequate notice informing the person (or his counsel) of the factual grounds upon which the proposed commitment is predicated and the reasons for the necessity of confinement; that the person be represented by counsel, appointed if necessary; and that the person proposed to be committed be present at the hearing unless his presence is waived by counsel and approved by the court after an adversary hearing at the conclusion of which the court judicially finds and determines that the detainee is so mentally or physically ill as to be incapable of attending the probable cause hearing.<sup>140</sup>

### III. THE DETAINED PERSON'S RIGHTS

#### *A. The Problem: No Express Delineation of the Detainee's Rights*

A hearing by itself, no matter how timely, does precious little for the detainee who—unaided by counsel and ill-apprised of his right to appear, to testify in his own behalf, and to confront the witnesses against him—is disempowered to participate meaningfully.<sup>141</sup> The importance of these

137. See, e.g., *In re Tedesco*, 421 N.E.2d 726, 729 (Ind. Ct. App. 1981) (noting that a preliminary hearing for the purpose of establishing probable cause “allow[s] the individual or counsel to question the opinion of the physician [alleging mental illness justifying detention] to [e]nsure that the detention was necessary”).

138. See, e.g., *Lynch*, 386 F. Supp. at 388 (“Emergency detention without a hearing on its appropriateness and necessity can be justified only for the length of time required to arrange a probable cause hearing before the probate judge or other judicial officer empowered by law to commit persons to [state] mental institutions.”); *In re Barnard*, 455 F.2d 1370, 1374 (D.C. Cir. 1971) (“[W]e believe that where a person, said to be mentally ill and dangerous, is involuntarily detained, he must be given a hearing within a reasonable time to test whether the confinement is based upon probable cause.”).

139. *Lynch*, 386 F. Supp. at 388.

140. *Id.*

141. See, e.g., *A.A. v. Eskenazi Health/Midtown CMHC*, 97 N.E.3d 606, 618 (Ind. 2018) (“This [case] highlights the importance of a respondent's right to appear at an involuntary-commitment proceeding. If present, A.A. could have voiced concerns on issues like adverse side

participatory rights is reflected in the Sixth Amendment to the United States Constitution:

In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.<sup>142</sup>

The Indiana Constitution makes similar assurances:

In all criminal prosecutions, the accused shall have the right . . . to be heard by himself and counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof; to meet the witnesses face to face, and to have compulsory process for obtaining witnesses in his favor.<sup>143</sup>

Although these constitutional provisions apply directly only in criminal prosecutions,<sup>144</sup> the protections therein are as essential to the subject of a commitment action as to the criminal defendant because the interests implicated in commitment actions and criminal proceedings are much the same. Both commitment and imprisonment constitute a “tremendous intrusion on personal liberty and autonomy,” as both involve forcible confinement, restraint, and isolation.<sup>145</sup> In implicit recognition of this fact, lawmakers in every state have enacted procedural protections for committed persons that are often closely akin to those guaranteed to criminal defendants.<sup>146</sup>

Indiana is no exception. The statutory rights afforded to subjects of involuntary mental health treatment are consonant with the constitutional rights afforded to criminal defendants.<sup>147</sup> Ind. Code Section 12-26-2-2 furnishes the subject with the right to receive notice of hearings and copies of petitions and orders, to be present at hearings, and to be represented by counsel.<sup>148</sup> Ind. Code Section 12-26-2-3 confers the right to testify and to present and cross-examine

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effects of forced medications; assisted his counsel in cross-examining witnesses, such as family members; and offered mitigating evidence.”); *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 315 (1950) (“[W]hen notice is a person’s due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it.”).

142. U.S. CONST. amend. VI.

143. IND. CONST. art. I, § 13.

144. *See, e.g., In re V.H.*, 996 N.W.2d 530, 538–39 (Iowa 2023) (holding that the Sixth Amendment does not apply in civil commitment proceedings and noting a dearth of federal cases to the contrary).

145. *A.A.*, 97 N.E.3d at 608.

146. WINICK, *supra* note 25, at 162–64 (listing citations to statutory procedures for commitment hearings in the 50 states and the District of Columbia).

147. IND. CODE §§ 12-26-2-1–9 (2024).

148. I.C. § 12-26-2-2 (2024).



witnesses.<sup>149</sup> The rights delineated in these two statutes are expressly applicable in actions and proceedings arising under Ind. Code Sections 12-26-6 (temporary commitments), 12-26-7 (regular commitments), 12-26-12 (discharges), and 12-26-15 (reviews); however, neither Ind. Code Section 12-26-2-2 nor Section 12-26-2-3 make any reference whatsoever to Ind. Code Section 12-26-5, which governs emergency detentions.<sup>150</sup> These omissions imply that the two statutes do not apply in emergency detentions.

In *A.A. v. Eskenazi Health/Midtown CMHC*, the Indiana Supreme Court had occasion to consider the effect of these omissions. This case concerned an adult male whose mother, troubled by his erratic behavior, sought to have him committed.<sup>151</sup> In an application for emergency detention, the mother stated that her son suffered from a psychiatric disorder.<sup>152</sup> She said he “wasn’t sleeping, was going outside and making disruptive noises, and wanted to fight family members.”<sup>153</sup> Two days later, a trial court ordered the son’s emergency detention.<sup>154</sup> In a subsequent report to the court, a physician recommended regular involuntary commitment.<sup>155</sup>

The commitment hearing proceeded in the son’s absence.<sup>156</sup> The son, according to his attorney, was not brought to the hearing because he was “agitated.”<sup>157</sup> The attorney waived the son’s right of appearance.<sup>158</sup> A physician testified as to the son’s “menacing” and “aggressive” conduct, reporting that hospital staff had at times found it necessary to apply restraints and administer sedatives.<sup>159</sup> The mother said her son’s behavior sometimes caused her to fear for her safety.<sup>160</sup> The son’s attorney presented no evidence.<sup>161</sup> The trial court concluded that the son was “gravely disabled” by reason of mental illness and ordered his regular involuntary commitment.<sup>162</sup>

The Indiana Supreme Court vacated the commitment order, holding that, although the respondent in a commitment proceeding “can personally waive the right to appear if the waiver is knowing, intelligent, and voluntary,” the respondent’s attorney “cannot waive the right by proxy.”<sup>163</sup> In a footnote, the court acknowledged that Ind. Code Section 12-26-2-2, which provides for the right of appearance, “does not directly refer to the emergency detention

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149. I.C. § 12-26-2-3 (2024).

150. I.C. §§ 12-26-2-2(a)–12-26-2-3(a) (2024).

151. *A.A. v. Eskenazi Health/Midtown C.M.H.C.*, 97 N.E.3d 606, 609 (Ind. 2018).

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.* at 618.

statutes.”<sup>164</sup> However, the court concluded that the “commitment statutes as a whole . . . make clear that the rights listed in that section do apply to preliminary and final hearings for respondents in emergency detentions.”<sup>165</sup> The court noted that, “once the detaining facility files [the report required by the emergency detention statutes], the trial court must quickly either order the individual released or set a preliminary or final hearing.”<sup>166</sup> Because both preliminary and final hearings “involve determining whether temporary or regular commitment is appropriate,” the court reasoned that one is entitled to the rights delineated in Ind. Code Section 12-26-2-2 as soon as either a preliminary or final hearing has been set.<sup>167</sup>

However, the ultimate effect of the court’s pronouncement here is unclear for two reasons. First, it may be nothing more than mere *obiter dictum*, appearing as it does in a footnote to the court’s opinion.<sup>168</sup> The Indiana Court of Appeals has made the point, plainly and categorically: “As always, it should be remembered that we do not decide issues in footnotes.”<sup>169</sup> The Indiana Supreme Court has made the same point plainly, if somewhat less categorically.<sup>170</sup>

Second, even assuming *arguendo* that the *A.A.* footnote is binding, its sweep is unclear. The footnote is unambiguous insofar as Ind. Code Section 12-26-2-2 is concerned: “[O]nce a preliminary or final hearing has been set for an individual in emergency detention, that individual is afforded the statutory rights in Indiana Code Section 12-26-2-2, including the right to be present.”<sup>171</sup> But what about Ind. Code Section 12-26-2-3? Narrowly construed, the footnote does not reach Ind. Code Section 12-26-2-3 (i.e., the footnote makes no explicit statement that an emergency detainee must be afforded the rights in Ind. Code Section 12-26-2-3). However, the rights established in Ind. Code Section 12-26-2-2 have little meaning if isolated from the rights established in Ind. Code Section 12-26-2-3. The right to appear is rendered utterly hollow if the detainee cannot testify in his own behalf, call witnesses, and cross-examine the witnesses against him.

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164. *Id.* at 612 n.2.

165. *Id.*

166. *Id.*

167. *Id.*

168. *Dictum*, BLACK’S LAW DICTIONARY (11th ed. 2019) (defining *obiter dictum* as “[a] judicial comment made while delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential”).

169. *Sw. Allen Cnty. Fire Prot. Dist. v. City of Fort Wayne*, 142 N.E.3d 946, 956 (Ind. Ct. App. 2020); *see also* *Hillebrand v. Supervised Est. of Large*, 914 N.E.2d 846, 850 (Ind. Ct. App. 2009) (noting that “a footnote’s legal value is merely dicta at best”).

170. *See, e.g.,* *Montgomery v. Bd. of Tr. of Purdue Univ.*, 849 N.E.2d 1120, 1130 (Ind. 2006) (noting that a footnote from an earlier opinion was *dictum* and, as such, “not binding on this Court”); *Hyundai Motor America, Inc. v. Goodin*, 822 N.E.2d 947, 953–54 (Ind. 2005) (dismissing as *dictum* an oft-cited footnote from an earlier opinion).

171. *A.A.*, 97 N.E.3d at 612 n.2.

*B. The Solution: Express Delineation of the Detainee's Rights*

In light of these ambiguities, the statutes are in desperate need of amendment. Surrounding states offer useful models for reform. The table below summarizes the statutes delineating an emergency detainee's rights in Indiana and four neighboring states: Illinois, Kentucky, Michigan, and Ohio.

Table 2 — Delineation of the detainee's rights: selected comparisons				
	Express advisement of rights	Right to counsel	Right to notice	Right to appear, to testify, and to cross-examine witnesses
<b>Indiana</b>	None. <sup>172</sup>	Unspecified. <sup>173</sup>	Unspecified. <sup>174</sup>	Unspecified. <sup>175</sup>
<b>Illinois</b>	Within 12 hours of admission, the detainee is entitled to a written statement of rights. <sup>176</sup>	Right to counsel, either retained or appointed (if the detainee is indigent). <sup>177</sup>	The detainee is entitled to a copy of the petition seeking admission and notice of hearings. <sup>178</sup>	Right to appear; <sup>179</sup> right to testify and to cross-examine witnesses, although unspecified, is arguably implicit.
<b>Kentucky</b>	None. <sup>180</sup>	Unspecified. <sup>181</sup>	Unspecified. <sup>182</sup>	Right to appear; <sup>183</sup> right to testify and to cross-examine witnesses. <sup>184</sup>
<b>Michigan</b>	Within 4 days of the court's receipt of a	Right to counsel, either retained or appointed. <sup>186</sup>	Within 4 days of the court's receipt of a	Right to appear; <sup>188</sup> right to testify and to

172. *See, e.g.*, IND. CODE § 12-26-2-2 (2024).

173. *Id.*

174. *Id.*

175. I.C. § 12-26-2-3 (2024).

176. 405 ILL. COMP. STAT. 5/3-205 (2024).

177. 405 ILL. COMP. STAT. 5/3-805 (2024).

178. 405 ILL. COMP. STAT. 5/3-611 (2024).

179. 405 ILL. COMP. STAT. 5/3-806 (2024).

180. KY. REV. STAT. § 202A.191 (2024) (delineating certain *non-legal* rights without making provision for an express advisement of even those rights).

181. KY. REV. STAT. § 202A.121 (2024) (providing explicitly for the right to counsel in proceedings for 60-day commitments, 360-day commitments, and commitments prompted by warrantless arrests).

182. *See* KY. REV. STAT. § 202A.071 (2024) (providing for the timing of preliminary and final hearings, without reference to notice requirements).

183. KY. REV. STAT. § 202A.131 (2024).

184. KY. REV. STAT. § 202A.076 (2024).

186. MICH. COMP. LAWS § 330.1454 (2024).

188. MICH. COMP. LAWS § 330.1455 (2024).

	petition seeking admission, the detainee is entitled to notice of rights. <sup>185</sup>		petition seeking admission, the detainee is entitled to a copy of the petition and notice of hearings. <sup>187</sup>	cross-examine witnesses, although unspecified, is arguably implicit.
<b>Ohio</b>	None. <sup>189</sup>	Right to counsel, either retained or appointed (if the detainee is not indigent, the detainee may be taxed the costs of appointed counsel). <sup>190</sup>	The detainee is entitled to a copy of the affidavit alleging that the detainee is “a person with a mental illness subject to court order” and notice of hearings. <sup>191</sup>	Right to appear; right to testify and to cross-examine witnesses. <sup>192</sup>

At a minimum, the scope of both Ind. Code Sections 12-26-2-2 and 12-26-2-3 should be enlarged to encompass emergency detentions. These easy amendments would clear any confusion as to the detainee’s rights. Properly enlarged, Ind. Code Sections 12-26-2-2 and 12-26-2-3 would affirm that the emergency detainee is shielded by the same rights afforded in proceedings for temporary and regular commitments: (1) the right to representation, (2) the right to receive notice of hearings and copies of petitions and court orders, (3) the right to be present, and (4) the right to testify, to call witnesses, and to cross-examine opposing witnesses.

Moreover, Ind. Code Section 12-26-2-2 ought to provide for the appointment of counsel, at least in cases involving indigent detainees. This would be in keeping with most of our sister states. In Illinois, the court is obligated to appoint counsel if “the respondent [in a commitment proceeding] is indigent or an appearance has not been entered on his behalf at the time the matter is set for hearing.”<sup>193</sup> In Michigan, the court must appoint counsel within twenty-four hours of an individual’s hospitalization unless an attorney has already entered an appearance on that individual’s behalf.<sup>194</sup> In Ohio, the court

185. MICH. COMP. LAWS § 330.1453 (2024).

187. MICH. COMP. LAWS § 330.1453 (2024).

189. OHIO REV. CODE § 5122.29 (2024) (delineating certain *non-legal* rights without making provision for an express advisement of even those rights).

190. OHIO REV. CODE § 5122.141 (2024) (establishing that the detainee is entitled to counsel as provided in OHIO REV. CODE § 5122.15).

191. OHIO REV. CODE § 5122.12 (2024).

192. OHIO REV. CODE § 5122.141 (2024) (providing that a hearing “to determine whether or not the [detainee] is a person with a mental illness subject to court order” is to be conducted in accordance with OHIO REV. CODE § 5122.15, which delineates the detainee’s right to appear, to testify, and to cross-examine witnesses).

193. 405 ILL. COMP. STAT. 5/3-805 (2024).

194. MICH. COMP. LAWS § 330.1454 (2024).

is obligated to appoint counsel if the subject of a commitment proceeding “is not represented by counsel, is absent from the hearing, and has not validly waived the right to counsel.”<sup>195</sup> The failure of Ind. Code Section 12-26-2-2 to make adequate provision for the detainee’s right to counsel is indefensible in light of Ind. Code Section 12-26-2-5, which provides, in some detail, for the *petitioner’s* right to counsel.<sup>196</sup> Indeed, Ind. Code Section 12-26-2-5 goes so far as to authorize the appointment of counsel on a showing of the petitioner’s indigency.<sup>197</sup> If the party seeking the detainee’s commitment is sometimes entitled to appointment of counsel, then surely the party whose liberty is at stake is owed the same.

One last simple prophylactic measure is in order: an express advisement of the detainee’s rights, to be given to the detainee in writing within twenty-four hours of initial confinement. There is ample precedent for such advisements, both among our neighboring states and farther afield.<sup>198</sup> The advisement need not be cumbersome, even assuming incorporation of the aforementioned reforms. The following language would suffice:

If you feel you have been wrongfully detained, you can contest the grounds of your detention at a court hearing. This hearing will take place within seven days by default. If you would like an earlier hearing, you or your attorney can make a written request to the court, which must then schedule a hearing within forty-eight hours.

You have the right to an attorney. If you cannot afford an attorney, the court will provide one to represent you. You have the right to receive notice of hearings and copies of any papers related to your case. You have the right to be present at your hearing. You have the right to testify at your hearing. You have the right to present your own witnesses, and you have the right to ask questions of opposing witnesses.

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195. OHIO REV. CODE § 5122.141 (2024) (establishing that a detainee is entitled to counsel as provided in OHIO REV. CODE § 5122.15); *Id.* § 5122.15 (2024).

196. IND. CODE § 12-26-2-5 (2024).

197. *Id.*

198. *See, e.g.*, 405 ILL. COMP. STAT. 5/3-205 (2024) (mandating that the director of a mental health facility must furnish the subject of an involuntary commitment with “a clear and concise written statement explaining the person’s legal status and his right to counsel and a court hearing”); MICH. COMP. LAWS § 330.1453 (2024) (requiring that the court furnish the subject of an involuntary commitment with “notice of the right to a full court hearing, notice of the right to be present at the hearing, notice of the right to be represented by legal counsel, notice of the right to demand a jury trial, and notice of the right to an independent clinical evaluation”); VT. STAT. TIT. 18, § 7613 (2024) (providing that, when an application for involuntary commitment is filed, the court must transmit to the “proposed patient” notice of the hearing, which “shall contain a list of the proposed patient’s rights at the hearing”).

## IV. FISCAL AND ADMINISTRATIVE BURDENS TO THE STATE

One may argue that the reforms proposed in this Note (namely, the provision of more timely hearings, the delineation of the detainee's rights, and advisement of those rights) might unduly burden the state. It is true that, pursuant to *Mathews*, courts confronted with due process challenges must consider both the private interest at stake and the governmental interest, which includes "the fiscal and administrative burdens that [any] additional or substitute procedural requirement would entail."<sup>199</sup> However, as explained below, any heightened fiscal and administrative burdens occasioned by the proposed reforms are outweighed by the detainee's liberty interest.

Requiring a hearing within seven days as opposed to fourteen may force the state to shoulder heightened fiscal and administrative burdens. However, these burdens pale in comparison to the detainee's liberty interest. Criminal procedure makes for a fitting analogy because, as noted elsewhere in this Note, the interests implicated in commitment actions and criminal proceedings are much the same (both represent a "tremendous intrusion on personal liberty and autonomy," involving forcible confinement, restraint, and isolation).<sup>200</sup> As a general matter, a state must furnish a criminal defendant with "a fair and reliable determination of probable cause as a condition for any significant [pre-trial] restraint of liberty, and this determination must be made by a judicial officer either before or promptly after arrest."<sup>201</sup> Of course, multiplying pre-trial proceedings and otherwise "introducing further procedural complexity into an already intricate system" burdens the state.<sup>202</sup> Nevertheless, confinement constitutes a profound "restraint of liberty," which may "imperil the [arrestee's] job, interrupt his source of income, and impair his family relationships."<sup>203</sup> The balance of interests, therefore, tips in favor of the defendant. Accordingly, if a state fails to facilitate a determination as to probable cause within forty-eight hours of arrest, then it must "demonstrate the existence of a *bona fide* emergency or other extraordinary circumstance."<sup>204</sup> In a commitment proceeding, the balance of interests likewise tips in favor of the detainee.

As for the delineation of the detainee's rights, the minimum amendments outlined above amount to mere *clarification*, affirming that the detainee is shielded by the same rights as the subject of a temporary or regular commitment. These are likely to impose negligible fiscal and administrative burdens on the state.<sup>205</sup> This Note also proposes that indigent detainees be provided with

199. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

200. *A.A. v. Eskenazi Health/Midtown CMHC*, 97 N.E.3d 606, 608 (Ind. 2018).

201. *Gerstein v. Pugh*, 420 U.S. 103, 125 (1975).

202. *Cnty. of Riverside v. McLaughlin*, 500 U.S. 44, 53 (1991).

203. *Gerstein*, 420 U.S. at 114.

204. *McLaughlin*, 500 U.S. at 57.

205. *See, e.g., Edward W. v. Lamkins*, 122 Cal. Rptr. 2d 1, 23 (Cal. Ct. App. 2002) (holding that "a routine practice of seeking notice waivers in temporary conservatorships violates the proposed conservatees' right to due process," noting "the relatively small costs associated with providing notice in most cases").

appointed counsel, and, admittedly, such provision will burden the state.<sup>206</sup> However, in light of the weight of the detainee's liberty interest, this burden is warranted. Again, criminal procedure provides an apt point of comparison. A criminal defendant's right to counsel is "fundamental and essential" to a fair trial.<sup>207</sup> The "noble ideal" of equality before the law "cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him."<sup>208</sup> An indigent defendant is, therefore, constitutionally entitled to appointment of counsel, notwithstanding the burden such appointment imposes on the state.<sup>209</sup> The same should go for the subject of a commitment proceeding, whose liberty interest is imperiled in much the same manner as that of the criminal defendant.

Lastly, it is difficult, if not impossible, to quantify the extent to which an advisement of the detainee's rights is likely to burden the state.<sup>210</sup> However, assuming *arguendo* that an advisement constitutes a significant burden for the state, the weight of the detainee's liberty interest is sufficient to counter it. Consider the *Miranda* warning, which is closely akin to the advisement envisioned in this Note. A criminal defendant subjected to custodial interrogation "must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed."<sup>211</sup> This necessarily adds somewhat to "the burdens which law enforcement officials must bear, often under trying circumstances."<sup>212</sup> Still, it does not constitute "an undue interference with a proper system of law enforcement."<sup>213</sup> Because the privilege against self-incrimination "is so fundamental to our system of constitutional rule and the expedient of giving an adequate warning as to the availability of the privilege so simple," a universal warning requirement is altogether appropriate.<sup>214</sup> Similarly, the detainee's liberty interest is so "fundamental," and an express advisement of rights "so simple," as to warrant whatever burden such an advisement imposes on the state.

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206. See, e.g., Tonya L. Brito et al., *What We Know and Need to Know About Civil Gideon*, 67 S.C. L. REV. 223, 239 ("In debates about how best to address the civil justice gap, it is often taken for granted that the cost of providing counsel to economically needy pro se litigants will be prohibitive. This assumption may be in part due to the sheer magnitude of the civil justice gap and the projected costs of providing counsel to needy litigants. . . . However, existing studies suggest that the provision of representation in civil cases can in fact provide both direct and indirect economic benefits that offset costs.").

207. *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).

208. *Id.*

209. *Id.* at 345.

210. See, e.g., Fred E. Inbau & James P. Manak, *Miranda v. Arizona—Is it Worth the Cost? (A Sample Survey, with Commentary, of the Expenditure of Court Time and Effort)*, 24 CALIF. W. L. REV. 185, 190 (1987) ("As is true with regard to the trial court expenditure of time and effort, there is no way by which the overall *monetary costs* produced by *Miranda* could be assessed.").

211. *Miranda v. Arizona*, 384 U.S. 436, 444 (1966).

212. *Id.* at 481.

213. *Id.*

214. *Id.* at 468.

## CONCLUSION

The Supreme Court of the United States, in holding that the standard of proof in civil commitment proceedings must be “greater than the preponderance of the evidence standard applicable to other categories of civil cases,”<sup>215</sup> made a powerful point that bears repeating in full:

At one time or another every person exhibits some abnormal behavior which might be perceived by some as symptomatic of a mental or emotional disorder, but which is in fact within a range of conduct that is generally acceptable. Obviously, such behavior is no basis for compelled treatment and surely none for confinement. However, there is the possible risk that a factfinder might decide to commit an individual based solely on a few isolated instances of unusual conduct. Loss of liberty calls for a showing that the individual suffers from something more serious than is demonstrated by idiosyncratic behavior.

...

*The individual should not be asked to share equally with society the risk of error when the possible injury to the individual is significantly greater than any possible harm to the state.*<sup>216</sup>

This Note has argued, in essence, that the statutes governing emergency detentions in Indiana disregard this admonishment and force the individual to shoulder a disproportionate share of the risk of wrongful confinement. This is so for at least two reasons: first, the statutes fail to provide for prompt hearings, denying the detainee a meaningful opportunity to contest the grounds of detention in a timely manner; second, the statutes fail both to delineate the detainee’s procedural rights and to ensure that the detainee is advised of those rights. This Note has proposed simple statutory reforms to remedy these defects.

These reforms would empower the detainee, and that is a desirable end in itself. However, the benefits of these reforms would accrue not only to the detainee, but to society at large. Ours is an adversarial system, and rights are akin to armor. When well-armed opponents confront one another in court on equal footing, a just and equitable outcome is made more likely. The moral force of the law itself, in effecting such outcomes, is strengthened, and our faith in the law is reinforced. And we all reap the rewards of that reinforced faith.

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

216. *Id.* at 426–27 (emphasis added).