

May 2025

Thinking Beyond Confinement: The Suspension of Minnesota's 48-Hour Law and the False Choice Between Incarceration or Institutionalization

Sophie Herrmann
University of Minnesota Law School

Follow this and additional works at: <https://lawandinequality.org/>

Recommended Citation

Sophie Herrmann, *Thinking Beyond Confinement: The Suspension of Minnesota's 48-Hour Law and the False Choice Between Incarceration or Institutionalization*, 43 L. & INEQUALITY 137 (2025).

Available at: <https://scholarship.law.umn.edu/lawineq/vol43/iss2/3>

Thinking Beyond Confinement: The Suspension of Minnesota’s 48-Hour Law and the False Choice Between Incarceration or Institutionalization

Sophie Herrmann[†]

Introduction

Anthony Swope was never supposed to go to jail.¹ Yet, he spent over fifty days behind bars.² Brandon Hegg-McLaughlin was also never supposed to be incarcerated.³ Still, he spent more than sixty days in jail.⁴ John Schilz never should have gone to jail either.⁵ He was held for over ten months in county jail.⁶ All of these individuals were found incompetent to stand trial in the State of Minnesota and were subsequently civilly committed.⁷ The state was required to

[†] J.D. Candidate 2025, University of Minnesota Law School, and Note and Comment Editor of *Minnesota Journal of Law & Inequality*, Vol. 43. First, I would like to thank Professor Susanna Blumenthal for her invaluable feedback, support, and guidance during the note-writing process. I’d also like to thank Geoffrey Isaacman and Melissa Fraser from the Hennepin County Public Defender’s Office. Clerking for HCPD has been my most formative law school experience and the lessons you’ve taught me are woven all throughout this Note. To Luke, thank you for your constant encouragement and, through it all, making me laugh every single day. To my mom and sisters, I’ll never understand how I got so lucky. Thank you for showing me what it looks like to build a life and a career dedicated to caring for others. You will always be my first and biggest role models. Finally, I am forever indebted to all the brilliant abolitionist scholars and organizers whose labor, genius, dedication, and compassion inspired this Note. One day may the carceral state finally fall—and may we be lucky enough to be there to see it happen.

1. Findings of Fact, Conclusions of Law, and Order Denying Demurrer, and Peremptory Writ of Mandamus at 1–2, *Swope v. Harpstead*, No. 70-CV-22-13153 (Minn. 1st Jud. Dist. Ct. Feb. 22, 2023) [hereinafter *Swope Findings of Fact*].

2. *Id.* at 1.

3. Petition for Writ of Mandamus and Writ of Habeas Corpus at 3-5, *Ly v. Harpstead*, No. 70 CV-22-13781 (Minn. 1st Jud. Dist. Ct. Nov. 5, 2022) [hereinafter *Ly Petition*].

4. *Id.*

5. Complaint at 4, *Schilz v. Harpstead*, No. 72-CV-23-135 (Minn. 1st Jud. Dist. Ct. July 17, 2023) [hereinafter *Schilz Complaint*].

6. Louis Krauss, *Inmates Sue State over Delays in Treatment Center Transfers*, STAR TRIB. (Aug. 6, 2023), <https://www.startribune.com/mentally-ill-inmates-sue-minnesota-hospital-jail-transfer-48-hour-rule/600295288> [https://perma.cc/9TRB-22YZ].

7. *Swope Findings of Fact*, *supra* note 1, at 1–2; *Ly Petition*, *supra* note 3, at 3–5; *Schilz Complaint*, *supra* note 5, at 4.

provide them with mental health treatment.⁸ Instead, Minnesota jailed the men and refused to provide them with the care they needed—the care the state was required to provide them.⁹

Minn. Stat. § 253B.10, better known as the 48-hour law, mandated that civilly committed individuals in Minnesota who were being held in a jail or correctional institution “must be admitted to a state-operated treatment program within 48 hours.”¹⁰ The law was enacted in July 2013, but in the spring of 2023 Minnesota lawmakers suspended it through June 2025.¹¹ Since the law’s enactment, the state has struggled to remain in compliance, resulting in individuals waiting months before being transferred from jail to a mental health facility.¹² Minnesota’s continued inability to comply with the 48-hour law led to many lawsuits being filed against the state’s Department of Human Services (DHS).¹³ In response to the multitude of lawsuits, in May 2023 Attorney General Keith Ellison asked the Minnesota legislature to temporarily suspend the 48-hour law in order “to give DHS enough flexibility so [they] can meet the requirements of the law.”¹⁴ The legislature complied with Ellison’s request and suspended the law.¹⁵

8. MINN. STAT. § 253B.10 (2020) (suspended 2023).

9. Swope Findings of Fact, *supra* note 1, at 1–2; Ly Petition, *supra* note 3, at 3–5; Schilz Complaint, *supra* note 5, at 4.

10. MINN. STAT. § 253B.10 (2020) (suspended 2023) (“(a) When a person is committed, the court shall issue a warrant or an order committing the patient to the custody of the head of the treatment facility, state-operated treatment program, or community-based treatment program. The warrant or order shall state that the patient meets the statutory criteria for civil commitment. (b) The commissioner shall prioritize patients being admitted from jail or a correctional institution who are: (1) ordered confined in a state-operated treatment program for an examination under Minnesota Rules of Criminal Procedure, rules 20.01, subdivision 4, paragraph (a), and 20.02, subdivision 2; (2) under civil commitment for competency treatment and continuing supervision under Minnesota Rules of Criminal Procedure, rule 20.01, subdivision 7; (3) found not guilty by reason of mental illness under Minnesota Rules of Criminal Procedure, rule 20.02, subdivision 8, and under civil commitment or are ordered to be detained in a state-operated treatment program pending completion of the civil commitment proceedings; or (4) committed under this chapter to the commissioner after dismissal of the patient’s criminal charges. Patients described in this paragraph must be admitted to a state-operated treatment program within 48 hours.”).

11. Krauss, *supra* note 6.

12. OFF. OF THE LEGIS. AUDITOR, STATE OF MINN., PROGRAM EVALUATION DIV., MENTAL HEALTH SERVICES IN COUNTY JAILS 93 (2016) (“One of every four placements subject to the 48-hour law has failed to occur within 48 hours of the time when DHS was notified of the court order.”); Krauss *supra* note 6 (“In May, Attorney General Keith Ellison asked state legislators to suspend the [48-hour] law, noting a ‘vast’ amount of litigation targeting DHS from inmates and their families.”).

13. Krauss, *supra* note 6.

14. *Id.*

15. *Id.*

Minnesota has struggled to provide accessible and adequate mental healthcare to its entire population, but especially to those incarcerated.¹⁶ A commonly cited indicator of this problem is a lack of beds in Minnesota's psychiatric treatment facilities.¹⁷ Minnesota does not have enough beds for those voluntarily seeking longer-term care, nor enough beds to accommodate its civilly committed population.¹⁸ Therefore, civilly committed individuals are often forced to wait in jails until a bed opens for them in a mental health facility.¹⁹

The story often goes as follows: individuals who find themselves civilly committed are first processed through the criminal legal system.²⁰ They are arrested for some crime, a court concludes that they are in need of mandatory psychiatric treatment, and they are civilly committed.²¹ However, the lack of space in psychiatric facilities has, in part, led to the civilly committed having to wait in jails for a bed to open up for them.²² So, while they wait, these civilly committed inmates often receive either no mental health care or mental health care inside of the jails where they are being held.²³ Jails provide neither adequate nor effective mental health care.²⁴ Therefore, a significant portion of the civilly

16. OFF. OF THE LEGIS. AUDITOR, *supra* note 12, at ix ("Problems with service availability in Minnesota's adult mental health system have persisted for years, limiting peace officers' options for referring persons with mental illness they take into custody.").

17. Riham Feshir, *Despite Law, Mentally Ill Wait in Jail Without Treatment*, MINN. PUB. RADIO NEWS (Feb. 29, 2016), <https://www.mprnews.org/story/2016/02/29/jailed-mentally-ill-wait-for-treatment> [<https://perma.cc/5P3H-7GSY>] ("Hennepin County Sheriff Rich Stanek argues that jails aren't medical facilities appropriate for treating mentally ill inmates. He said DHS officials need to secure funding to open up more beds for people with mental illness.").

18. Krauss, *supra* note 6 ("Minnesota is 'not meeting the requirements of the 48-hour law, and people are suing,' said [Attorney General Keith] Ellison, whose office is representing DHS. 'I don't believe we can meet the resource needs in an instant, but we can change the law to give DHS enough flexibility so we can meet the requirements of the law.'"); OFF. OF THE LEGIS. AUDITOR, *supra* note 12, at x ("Community hospital psychiatric beds are often full, partly because they have had problems discharging patients to state-run psychiatric facilities Meanwhile, DHS's smaller psychiatric hospitals have had significant staffing reductions, and they are now operating well below their capacity.").

19. Krauss, *supra* note 6.

20. *See* OFF. OF THE LEGIS. AUDITOR, *supra* note 12, at 5–15 (discussing the arrest, jailing, and civil commitment process).

21. *Id.* at 79.

22. Krauss, *supra* note 6.

23. *Id.*; OFF. OF THE LEGIS. AUDITOR, *supra* note 12.

24. OFF. OF THE LEGIS. AUDITOR, *supra* note 12; Tom Robbins, *The Tragedy of Mental Illness in Prisons*, ATLANTIC (Nov. 17, 2018), <https://www.theatlantic.com/politics/archive/2018/11/american-prisons-cant-handle->

committed population in Minnesota finds themselves incarcerated and without any type of real mental health care.²⁵ At the same time, many scholars, medical experts, and activists question the efficacy, ethics, and constitutionality of civil commitment in the first place.²⁶

While the suspension of the 48-hour law represents a failure to take care of some of the most vulnerable people in our community, it is also an opportunity to pursue more just alternative treatment options for those with severe mental illness in Minnesota. Instead of enlarging the role of jails in providing mental health care or expanding the capacity of mental health facilities to institutionalize more people, Minnesota should take the suspension as an opportunity to invest in community-based, non-carceral mental health treatment options.

I. Background

A. *The 48-Hour Law Sought, Yet Ultimately Failed, to Address the Mental Health Needs of Minnesotans*

Passed in 2013, the 48-hour law mandated that civilly-committed jail inmates be transferred to a mental health facility within 48 hours.²⁷ Admissions made pursuant to the 48-hour law were called “priority admissions.”²⁸ Four populations were covered under the law. First, the law covered individuals who were being held in a jail or a correctional institution while awaiting a competency examination under the Minnesota Rules of Criminal Procedure, rule 20.01, subdivision 2.²⁹ Second, it covered jail

mentally-ill-inmates/576634/ [https://perma.cc/V43W-43LB].

25. OFF. OF THE LEGIS. AUDITOR, *supra* note 12, at 93 (“One of every four placements subject to the 48-hour law has failed to occur within 48 hours of the time when DHS was notified of the court order.”).

26. LIAT BEN-MOSHE, DECARCERATING DISABILITY: DEINSTITUTIONALIZATION AND PRISON ABOLITION 16 (2020) (“[C]alling for certain populations to be released from jails and prisons often sends them to be reincarcerated in other institutions or by other means, including by forced drugging or by indefinite detention in detention centers, psychiatric hospital, or psych forensic units.”); Eliot T. Tracz, *Mentally Ill, or Mentally Ill and Dangerous?: Rethinking Civil Commitments in Minnesota*, 42 MITCHELL HAMLINE L.J. PUB. POL’Y & PRAC. 137, 137–39 (2019).

27. MINN. STAT. § 253B.10 (2020) (suspended 2023).

28. DEP’T OF HUM. SERVS, TASK FORCE ON PRIORITY ADMISSIONS TO STATE-OPERATED TREATMENT PROGRAMS REPORT AND RECOMMENDATIONS TO THE MINNESOTA LEGISLATURE (2024) [hereinafter TASK FORCE REPORT], <https://mn.gov/dhs/partners-and-providers/news-initiatives-reports-workgroups/behavioral-health/priority-admissions-task-force/> [https://perma.cc/V7BX-94HF].

29. MINN. STAT. § 253B.10, subd. 2 (2020) (suspended 2023).; MINN. R. CRIM. P. 20.01, subd. 2 (repealed 2024) (“A defendant is incompetent and must not plead, be tried, or be sentenced if the defendant due to mental illness or cognitive impairment

inmates who were “under civil commitment for competency treatment and continuing supervision under Minnesota Rules of Criminal Procedure, rule 20.01, subdivision 7,” which details the process under which a defendant, who has been previously held incompetent to stand trial, must be reevaluated at least every six months for competency.³⁰ Third, the 48-hour law covered those who are “found not guilty by reason of mental illness . . . and under civil commitment or are ordered to be detained in a state-operated treatment program pending completion of the civil commitment proceedings”³¹ Lastly, the law covered individuals “committed under this chapter to the commissioner after dismissal of the patient’s criminal charges.”³² For the ten years that the 48-hour law was in effect, approximately 2,413 individuals were admitted to state mental health facilities from jails or correctional institutions under the authority of the statute.³³

B. 48-Hour Law’s Reception

After Minnesota passed the 48-hour law, many groups voiced their opposition to the legislation, citing unintended consequences.

lacks the ability to: (a) rationally consult with counsel; or (b) understand the proceedings or participate in the defense.”).

30. MINN. STAT. § 253B.10, subd. 2 (2020) (suspended 2023); MINN. R. CRIM. P. 20.01, subd. 7 (repealed 2024) (“The head of the institution to which the defendant is committed, or if the defendant is not committed to an institution, the person charged with the defendant’s supervision, must report to the court periodically, not less than once every six months, on the defendant’s mental condition with an opinion as to competency to proceed.”).

31. MINN. STAT. § 253B.10, subd. 3 (2020) (suspended 2023).

32. *Id.*, subd. 4. The statute was amended in 2024. MINN. STAT. § 253B.10 (2024). In addition to removing the 48-hour requirement for admissions, the amendment altered the covered populations that qualify for “priority admission.” *Id.* Under the amended statute, the two populations eligible for priority admission are “civilly committed patients being admitted from jail or a correctional institution,” or “civilly committed patients . . . who are referred to a state-operated treatment facility for competency attainment or a competency examination . . . using a priority admissions framework.” *Id.* The amended statute provides that “a priority admissions framework” involves the evaluation of a number of factors “including but not limited to: (1) the length of time the person has been on a waiting list for admission . . . (2) the intensity of the treatment the person needs . . . (3) the person’s revoked provisional discharge status; (4) the person’s safety and safety of others in the person’s current environment; (5) whether the person has access to necessary or court-ordered treatment; (6) distinct and articulable negative impacts of an admission delay on the facility referring the individual for treatment; and (7) any relevant federal prioritization requirements.” *Id.*

33. TASK FORCE REPORT, *supra* note 28; DEP’T OF HUM. SERVS., TASK FORCE ON PRIORITY ADMISSIONS TO STATE-OPERATED TREATMENT PROGRAMS: DATA ON ADMISSIONS TO KEY PROGRAMS AND FACILITIES 4 (2023) [hereinafter TASK FORCE DATA ON ADMISSIONS], https://mn.gov/dhs/assets/priority-admissions-key-data_tcm1053-585905.pdf [<https://perma.cc/Y93V-GE8G>].

Hospitals criticized the law because prioritizing inmates for placement in mental health facilities led to bed shortages and longer wait times for other, non-incarcerated individuals seeking inpatient mental health care.³⁴ Hospital administrators argued that the law caused “more mentally ill and violent patients [to be] kept longer in hospitals where staff are less prepared to deal with possible flare-ups”³⁵ This initial opposition from hospitals began a fervent debate that continues to this day: what should the state do when there is limited space in psychiatric institutions, and should the state grant priority admission status to individuals who are being forced into treatment through the civil commitment process over those who seek treatment voluntarily?³⁶

i. The Department of Human Services Failed to Comply with the 48-Hour Law

Since its enactment, Minnesota’s Department of Human Services has struggled to comply with the requirements of the 48-hour law. When the law’s impact was reviewed by the state Office of the Legislative Auditor in 2015, it found that “about one-fourth of all individuals subject to the 48-hour law had not been placed within 48 hours of DHS’s notification of the order.”³⁷ Anoka-Metro Regional Treatment Center, Minnesota’s largest psychiatric hospital, reported that individuals referred to the center through the 48-hour law waited an average of 23.8 days in 2021, 35.9 days in 2022, and 41.9 days in 2023 before they were admitted to the treatment center.³⁸ Therefore, individuals covered under the 48-hour law were held in jail an average of 764.8 hours *longer* than they should have been under the statute. The state’s continued noncompliance resulted in some individuals spending hundreds of days in jail waiting to be transferred to a mental health facility.³⁹ In response to this noncompliance, multiple inmates sued the state

34. Chris Serres, *New Minnesota Law Pushes Mental Health System to a Crisis Point*, STAR TRIB. (Dec. 8, 2014), <https://www.startribune.com/new-minnesota-law-pushes-mental-health-system-to-a-crisis-point/275076241> [https://perma.cc/H9CZ-R2DQ] (“The law enables some inmates who are deemed by the courts to be mentally ill to be admitted ahead of hospital patients who may have been waiting weeks or months to get proper treatment.”).

35. *Id.*

36. *Id.*; Krauss, *supra* note 6.

37. OFF. OF THE LEGIS. AUDITOR, *supra* note 12, at xii.

38. TASK FORCE DATA ON ADMISSIONS, *supra* note 33, at 11.

39. Krauss, *supra* note 6 (“One Ramsey County jail inmate stayed there 264 days before being transferred to a state hospital Aug. 1 In Hennepin County, an inmate has waited 175 days for transfer since being ordered to a state hospital”).

for failing to transfer them to mental health facilities in a timely manner.⁴⁰

Anthony Swope was one such inmate-turned-plaintiff. Mr. Swope was charged with two counts of felony assault in 2022. A judge subsequently found him incompetent and ordered him to be civilly committed.⁴¹ This meant that Mr. Swope should not have spent more than 48 hours in a Minnesota jail before being transferred to a mental health facility. However, Mr. Swope was held for 57 days at the Scott County Jail.⁴² Mr. Swope eventually sued Jodi Harpstead, the Commissioner of the Minnesota Department of Human Services, for failing to comply with the 48-hour law.⁴³ The Court found that “[Mr. Swope] sat at the Scott County Jail, while in the Commissioner’s custody, receiving no treatment of any kind, with little to no oversight of his well-being, and his symptoms worsened. [Mr. Swope] was held without due process or treatment for 57 days (1,368 hours).”⁴⁴ Mr. Swope is only one of many civilly committed individuals forced to wait in jail without receiving mental health treatment due to the state’s failure to comply with the 48-hour law.⁴⁵

ii. Inmates Sued the State After Suspension of the 48-Hour Law

Inmates have continued to sue DHS even after the suspension of the 48-hour law, with some arguing that the suspension itself constitutes a violation of the rights of civilly committed inmates.⁴⁶ For example, John Schilz, an inmate, civil commit, and eventual plaintiff sued Harpstead arguing that the suspension of the 48-hour law is unconstitutional and that it gives DHS “unfettered discretion in the timing of transfer and effectively legalizes extrajudicial incarceration and punishment of vulnerable individuals who have not been convicted of any crime.”⁴⁷ As of August 6, 2023, Mr. Schilz was still being held in a county jail where he had been waiting for “more than 10 months to be transferred to a mental health facility.”⁴⁸

40. Krauss, *supra* note 6.

41. Swope Findings of Fact, *supra* note 1, at 1–2.

42. *Id.* at 2.

43. *Id.* at 1.

44. *Id.* at 14.

45. Krauss, *supra* note 6.

46. Schilz Complaint, *supra* note 5, at 2, 5–12.

47. *Id.* at 4.

48. Krauss, *supra* note 6.

Additionally, Mr. Swope and others facing similar circumstances have continued to try to litigate their cases since the suspension of the 48-hour law. On September 8, 2023, a Ramsey County judge ordered that six cases, including Mr. Swope's and Mr. Schlitz's, be consolidated and assigned to a single judge.⁴⁹ However, on October 20, 2023, the Ramsey County District Court granted Defendant Harpstead's motion to temporarily stay the proceedings.⁵⁰ According to the Ramsey County district court judge, the temporary stay was granted because there is currently "a putative class-action now pending in federal court that raises very similar, if not the same, due process claims under Minnesota's Constitution that are alleged by the Plaintiffs" in *Swope v. Harpstead*.⁵¹ In that case, *Dalen v. Harpstead*, Harpstead filed a motion to dismiss, and the temporary stay granted in *Swope v. Harpstead* remained in place until the federal court ruled on Harpstead's motion.⁵²

On January 16, 2024, the federal court granted in part Defendant Harpstead's motion to dismiss, stating that "Mr. Dalen has Article III standing to bring this case, his federal claims are not plausibly alleged, and they will be dismissed without prejudice for failure to state a claim."⁵³ In issuing its order, the court gave Mr. Dalen the opportunity to file an amended complaint that "cure[s] the dismissal-worthy problems."⁵⁴ Following this order, Mr. Dalen did not file an amended complaint and the court dismissed his complaint *with* prejudice on February 7, 2024.⁵⁵ Mr. Dalen filed an appeal of this decision to the Eighth Circuit Court of Appeals on

49. Order to Consolidate at 1, *Swope v. Harpstead*, No. 70-CV-22-2496 (Minn. 1st Jud. Dist. Ct. Sept. 8, 2023) ("District Court files *Sweigert v. Harpstead*, 19HA-CV-23-2461; *Conway v. Harpstead*, 62-CV-23-3160; *Hasan v. Harpstead*, 27-CV-23-9514; *Yanez v. Harpstead*, 14-CV-23-2295; *Schilz v. Harpstead*, 72-CV-23-135; as well as any additional cases that may be filed in any District court in Minnesota asserting the same claims against the Commissioner of the Minnesota Department of Human Services, in her individual and official capacities, are consolidated into file *Swope v. Harpstead*, 70-CV-23-2496.").

50. Order to Stay at 3, *Swope v. Harpstead*, No. 70-CV-23-2496 (Minn. 1st Jud. Dist. Ct. Oct. 20, 2023).

51. *Id.* at 4.

52. *Id.* at 6 ("[T]his Court grants the motion to stay until further order of the Court. Whether it is appropriate to continue this stay is dependent upon the scope and breadth of the *Dalen* Court's decision related to the pending motion to dismiss.").

53. Ct. Docket at Entry 42, Opinion and Order at 2, *Dalen v. Harpstead*, No.0:23-cv-01877 (D. Minn. Jan. 16, 2024).

54. *Id.* at 29.

55. Ct. Docket at Entry 45, Order, *Dalen v. Harpstead*, No.0:23-cv-01877 (D. Minn. Feb. 7, 2024).

March 7, 2024.⁵⁶ After a series of hearings, the Eighth Circuit affirmed the dismissal of Mr. Dalen’s complaint on the same grounds, finding that Mr. Dalen’s complaint failed to plead sufficient facts regarding his claims that DHS showed a “deliberate indifference to serious medical needs,” that DHS’s “failure to transfer him from jail to a treatment facility was punitive,” and that DHS “unreasonabl[y] restrain[ed]” Mr. Dalen while he was in jail awaiting treatment.⁵⁷ While Mr. Dalen had recently been admitted to a state-operated treatment facility when his attorney filed the amended complaint, as of July 2023 there were still forty-five civilly committed individuals waiting in jails to be transferred to mental health institutions.⁵⁸

Since the *Dalen* dismissal, the stay in Mr. Swope’s class action case was lifted. The case proceeded on January 22, 2024.⁵⁹ While Defendant Harpstead filed a motion to dismiss on March 12, 2025, no ruling has yet been issued.⁶⁰

Moreover, after the initial order dismissing Mr. Dalen’s case was handed down in federal court, the Scott County District Court reviewed Commissioner Harpstead’s motion to dismiss in *Swope v. Harpstead*.⁶¹ On February 22, 2023, Commissioner Harpstead’s motion to dismiss was denied, as the court found that:

[T]he Petition pled sufficient facts to survive Defendant’s Motion to Dismiss/Demurrer because the Petition pleads facts indicating the failure of Defendant to perform an official duty imposed by law, that said law is unambiguous and mandatory, that Plaintiff has suffered a public wrong due to Defendant’s failure to perform that has specifically injured him, and that there is no other adequate legal remedy.⁶²

Since Defendant’s initial motion to dismiss was denied, Defendant has repeatedly failed to successfully appeal the district court’s order.⁶³ As of March 2025, Mr. Swope’s case is still pending.

56. Docket at Entry 49, *Dalen v. Harpstead*, No. 0:23-CV-01877 (D. Minn. Mar. 7, 2024).

57. Ct. Docket at Entry 60, *Dalen v. Harpstead*, No. 0:23-CV-01877 (D. Minn. June 21, 2023).

58. TASK FORCE REPORT, *supra* note 28, at 23 fig.1.

59. Notice of Remote Hearing with Instruction, *Swope et al. v. Harpstead* No. 70-cv-23-2496 (Jan. 22, 2024).

60. Motion to Dismiss, *Swope et al. v. Harpstead* No. 70-cv-23-2496 (Mar. 12, 2025).

61. Order Denying Motion, *Swope v. Harpstead*, No. 70-cv-22-13153 (Feb. 22, 2023).

62. *Id.* at 16.

63. Appellate Court Order, *Swope v. Harpstead*, A23-0594 (June 13, 2023); Supreme Court Order, *Swope v. Harpstead*, A23-0594 (July 10, 2024).

C. Commonly Proposed Solutions

While there is cross-coalitional agreement that the lack of mental health care for the civilly committed in Minnesota jails is a problem, there is not similar agreement regarding the best solution. Some leaders suggest expanding the role of jails in providing mental health care, which would allow the state to keep civilly committed individuals in jails for longer periods of time, under the rationale that the civilly committed are receiving “adequate” care while they wait to be placed in an institution.⁶⁴ Another popular proposed solution is to expand the capacity of mental health care facilities in the state⁶⁵ by building more physical facilities, adding beds to existing facilities, and increasing staffing at existing and new facilities.⁶⁶ This solution is often rooted in the belief that “deinstitutionalization,” or “the emptying of state psychiatric hospitals that began in the 1950s,” directly led to homelessness (because the formerly institutionalized had nowhere to go) which then led to the mass incarceration of those same individuals.⁶⁷ This hypothesis that individuals with mental illness have been functionally relocated from state mental health institutions to jails and prisons is often referred to as the “New Asylums” Theory.⁶⁸

i. Minnesota’s Priority Admissions Task Force

When the 48-hour law was suspended in May of 2023, the Minnesota Legislature created a task force, the Priority Admissions Task Force, to “study” the 48-hour law.⁶⁹ According to the task

64. See DEPT OF HUM. SERVS., PRIORITY ADMISSION TASK FORCE MEMBER RECOMMENDATIONS 4, https://mn.gov/dhs/assets/priority-admission-task-force-member-recommendations-part2_tcm1053-592546.pdf [https://perma.cc/HS26-GQZC] (“Incentivize jails to provide prompt treatment that meets the standard of care for psychiatric/SUD treatment. . . . Create funding and partnership between the state and criminal justice system where the state could provide the resources to jails to help manage and care for such individuals.”).

65. See Krauss, *supra* note 6 (“Attorney Dan Gustafson, whose firm is handling multiple lawsuits over 48-hour law violations, said he thinks the solution is obvious. ‘We need more mental health facilities,’ he said.”); Feshir, *supra* note 17 (noting that Hennepin County Sheriff Rich Stanek similarly argues that jails are inappropriate facilities for mental health treatment).

66. See Krauss, *supra* note 6; Feshir, *supra* note 17.

67. Alisa Roth, *The Truth About Deinstitutionalization*, ATLANTIC (May 25, 2021), <https://www.theatlantic.com/health/archive/2021/05/truth-about-deinstitutionalization/618986/> [https://perma.cc/3N58-85GZ].

68. *Id.* (“When the hospitals were shut down, the story goes, patients were discharged with no place to get psychiatric care. They ended up on the streets, eventually committing crimes that got them arrested. As a result, jails and prisons essentially became the new asylums.”); BEN-MOSHE, *supra* note 26, at 15.

69. *Priority Admissions Task Force*, DEPT OF HUM. SERVS., <https://mn.gov/dhs/partners-and-providers/news-initiatives-reports->

force's webpage, its job is to "evaluate the impact of priority admissions . . . on the ability of the state to serve all individuals in need of care in state-operated treatment programs," "develop policy and funding recommendations for improvements or alternatives to the current priority admissions requirement," and "identify and recommend options for providing treatments to individuals . . . who require treatment at state-operated treatment programs."⁷⁰ The task force is made up of seventeen members including DHS Commissioner Jodi Harpstead, Minnesota Attorney General Keith Ellison, and a variety of individuals from legal, medical, law enforcement, mental health advocacy, and criminal legal reform advocacy backgrounds, as well as one "member of the public with lived experience directly related to the Task Force's purposes."⁷¹

The task force published its final report and recommendations to the state legislature on February 12, 2024.⁷² The task force's recommendations include "[i]ncreas[ing] capacity" of mental health treatment facilities, "[p]rovid[ing] funding to administer mental health medications to individuals in custody," changing the criteria for who gets "priority admission" to mental health facilities status, and "[i]ncreas[ing] access to services provided in the community," among other recommendations.⁷³

Overall, the task force's report emphasizes two main avenues of solutions to the problem: increasing the capacity of mental health institutions and expanding the role of jails in providing mental health care to civilly committed inmates while they await institutionalization.⁷⁴ While the report does contain a recommendation section on "[i]ncreas[ing] access to services provided in the community," the first specific recommendation in this section is to "expand access to Intensive Residential Treatment Services (IRTS) level of care to allow locked programing and expand the length of treatment beyond 90 days."⁷⁵

The sixth recommendation section in the report is titled "Administer Medication in Jails."⁷⁶ The section begins with the statement: "Jails are not a replacement for mental health hospitals or secure treatment facilities, and it is not our recommendation that

workgroups/behavioral-health/priority-admissions-task-force/
[<https://perma.cc/Z85M-2T4J>] (click "About the task force").

70. *Id.*

71. *Id.* (click "Task force members").

72. TASK FORCE REPORT, *supra* note 28.

73. *Id.* at 8.

74. *Id.*

75. *Id.* at 30.

76. *Id.* at 31.

they become so.”⁷⁷ However, the task force continues to provide many recommendations that would expand the role of jails in providing mental health care, including expanding state capacity to administer forced medication.⁷⁸ The report even states that the task force’s recommendations regarding the administration of medication *in jails* “has the possibility to significantly prevent the need for hospitalization of some individuals.”⁷⁹ This assertion appears to be in direct contradiction with the report’s statement stating they do not see jails as “a replacement for mental health hospitals.”⁸⁰

ii. An Abolitionist Approach: Decarceration and
Deinstitutionalization

Some argue that the solution to this problem is expanding the capacity of mental health facilities and institutions or making “improvements” to the mental health care offered by jails to lessen the need to transfer civilly committed inmates to existing facilities; however, abolitionists disagree.⁸¹

A school of abolitionist thought—led primarily by Liat Ben-Moshe, a disability scholar and associate professor of Criminology, Law, and Justice at the University of Illinois, Chicago—argues that neither jails nor institutions are safe or just places for those with mental illnesses.⁸² Ben-Moshe and others draw on the history of asylums and state institutions to argue that institutionalization is itself a form of incarceration, that both systems operate through carceral logics (defined as “the system of thinking that makes punitive systems possible” by categorizing as bad, dangerous, or guilty), and that it is a false choice to force individuals into either jails or institutions.⁸³

Ben-Moshe also refutes the “new asylums” thesis,⁸⁴ arguing that “deinstitutionalization did not lead to homelessness and

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. BEN-MOSHE, *supra* note 26, at 16 (“[C]alling for certain populations to be released from jails and prisons often sends them to be reincarcerated in other institutions or by other means, including by forced drugging or by indefinite detention in detention centers, psychiatric hospital, or psych forensic units.”).

82. Liat Ben-Moshe, UNIV. OF ILL. CHI., <https://clj.uic.edu/profiles/ben-moshe-liat/> [<https://perma.cc/3ZRN-7XVE>]; BEN-MOSHE, *supra* note 26, at 159.

83. BEN-MOSHE, *supra* note 26, at 159; Emma Peyton Williams, *The Carceral Logic of the Family Policing System*, UPEND MOVEMENT, <https://upendmovement.org/carceral-logic/> [<https://perma.cc/8ARU-GCQZ>].

84. BEN-MOSHE, *supra* note 26, at 135–37 (explaining that Ben-Moshe’s “new

increased incarceration. Racism and neoliberalism did, via privatization, budget cuts in all service/welfare sectors, and little to no funding for affordable and accessible housing and social services while the budgets for corrections, policing, and punishment (of mostly poor people of color) skyrocketed.”⁸⁵ Moreover, Ben-Moshe cautions that the new asylums theory is often used “as rationalization for the creation of new jail facilities (for ‘the good of those with mental health differences) or of psychiatric wards within existing jails and prisons. As many activists forewarn, . . . these will likely increase the scope of incarceration.”⁸⁶ Therefore, Ben-Moshe argues for *both* decarceration and deinstitutionalization.⁸⁷ She defines deinstitutionalization as “the movement of people with psychiatric and intellectual or developmental disabilities from state institutions and hospitals into community living and supports. Deinstitutionalization is also the accompanying closure of carceral locales, the shuttering of large, mostly state-sponsored/funded, institutions and hospitals for people with intellectual and psychiatric disabilities.”⁸⁸ Ben-Moshe’s theory of deinstitutionalization as a form of decarceration, and her argument that neither jails *nor* mental health institutions are safe or just places for those who find themselves under civil commitment, justifies this Note’s argument: for a better solution to the problems the 48-hour law sought to address, Minnesota should look beyond expanding the institutionalization system and the role of jails in providing mental health care.

II. Analysis

A. *The Suspension of the 48-Hour Law Presents Minnesota with an Opportunity to Invest in Non-Carceral Mental Health Treatment*

The suspension of the 48-hour law presents the state with an opportunity to invest in non-carceral mental health treatment for those who were previously covered under the 48-hour law.⁸⁹ Since

asylums” thesis refers to messages from popular media that “mass closure of psychiatric hospitals in the United States led to waves of homelessness and to prisons becoming the new asylums”).

85. BEN-MOSHE, *supra* note 26, at 3.

86. *Id.* at 15.

87. *Id.* at 281 (“Institutionalization is state-sponsored violence against people with disabilities, many of whom are currently people of color and elderly.”); *id.* at 8.

88. *Id.* at 3–4.

89. See Krauss, *supra* note 6 (indicating some attorneys litigating 48-hour violation cases believe the solution is “more mental health facilities”); Feshir, *supra*

the suspension of the 48-hour law, two paths forward have been commonly proposed, but both present serious constitutional problems. Specifically, both (1) expanding mental health services inside jails to postpone the need to transfer civilly committed inmates and (2) expanding the institutionalization and civil commitment system by increasing the capacity of psychiatric facilities are approaches that threaten the constitutional right to due process and the constitutional protection against false imprisonment.

First, the solution to this problem is not to expand the role of jails in providing mental health care. Jails, by their nature, are inadequate sites for providing mental health care as the jail environment is directly counterproductive to the goals of mental health care.⁹⁰ Therefore, relegating civilly committed individuals to the inadequate mental health care provided by jails infringes on their rights to due process.⁹¹ Moreover, the state's aim in "providing access to necessary [mental] health care" in jails is to allow the state to keep civilly committed individuals in jails for longer periods.⁹² This practice directly infringes upon the rights of civilly committed individuals to be free from false imprisonment.⁹³ Additionally, from a policy perspective, the role of jails in providing mental health care should not be expanded because doing so will further enlarge our system of mass incarceration.

Second, expanding psychiatric treatment facility capacity to house the civilly committed population is not an adequate solution to the problems the 48-hour law sought to address. Civil commitment, otherwise known as institutionalization, itself poses serious constitutional problems—especially for those who are civilly committed and have not been convicted of a crime.⁹⁴ Instead of building out a more expansive involuntary psychiatric treatment

note 17 (quoting Hennepin County Sheriff Rich Stanek, who argues DHS officials should provide additional beds for mentally ill individuals in medical facilities).

90. BEN-MOSHE, *supra* note 26, at 8.

91. *Id.* at 8; Swope Findings of Fact, *supra* note 1, at 1–2 (“[Mr. Swope] was held without due process or treatment for 57 days.”).

92. TASK FORCE REPORT, *supra* note 28, at 31.

93. BEN-MOSHE, *supra* note 26, at 8.

94. See Cynthia A. Frezzo, *Treatment Under Razor Wire: Conditions of Confinement at the Moose Lake Sex Offender Treatment Facility*, 52 AM. CRIM. L. REV. 653, 653 (2015); Alexander Tsesis, *Due Process in Civil Commitments*, 68 WASH. & LEE L. REV. 253 (2011); Susan Hawthorne & Amy Ihlan, *Rethinking Civil Commitment: The Radical Resources of the Ethics of Care*, 1 PUB. PHIL. J. 1 (2018); O'Connor v. Donaldson, 422 U.S. 563, 576 (1975) (“In short, a State cannot constitutionally confine without more a nondangerous individual who is capable of surviving safely in freedom by himself or with the help of willing and responsible family members or friends.”).

system, Minnesota should consider solutions that decrease the rate of civil commitment overall and favor mental health treatments that are grounded in community care and preserving individual liberty.

Civilly committed inmates who have sued Commissioner Harpstead and DHS for violating the 48-hour law, and later for suspending it, have not challenged their civil commitment or the system itself.⁹⁵ However, the arguments they have offered in their suits, specifically their arguments regarding due process and false imprisonment, can be applied to the civil commitment system more generally and serve to question the constitutionality of broadly implemented civil commitment.

Overall, conducting a due process and false imprisonment analysis highlights the flaws of the civil commitment system and shows that the problems that the 48-hour law tried and failed to address cannot be fully solved by expanding the role of jails in providing mental health care or by expanding the civil commitment system.

B. Expanding the Role of Jails in Providing Mental Health Care is Not a Solution to the Lack of Mental Health Care for Civilly Committed Inmates

i. Forcing Civilly Committed Inmates to Receive Mental Health Care in Jail Violates Their Due Process Rights

Forcing civilly committed inmates to receive mental health care inside of jails violates their due process rights because the state is required to provide adequate mental health care to those it places under civil commitment and jails are incapable of providing that mental health care.⁹⁶ The Minnesota Priority Admissions Task Force itself recognizes that “[p]roviding access to necessary health

95. *See, e.g.*, Schilz Complaint, *supra* note 5 (claiming that DHS Commissioner Harpstead violated Plaintiff’s procedural and substantive due process rights by failing to transfer him from jail to a mental health facility within forty-eight hours, that DHS Commissioner Harpstead violated Minnesota’s separation of power doctrine by seeking to eliminate DHS’s obligation to transfer civilly committed inmates within forty-eight hours, and that Commissioner Harpstead’s failure to transfer Plaintiff within forty-eight hours constituted intentional and negligent infliction of emotional distress and false imprisonment); Swope Findings of Fact, *supra* note 1 (denying Defendant’s motion to dismiss where Plaintiff claimed that DHS Commissioner Harpstead violated Plaintiff’s due process rights and committed false imprisonment by failing to comply with the 48-hour law).

96. BEN-MOSHE, *supra* note 26, at 8; Swope Findings of Fact, *supra* note 1, at 1–2.

care to individuals in custody is a constitutional right.”⁹⁷ Additionally, the task force pointed out that “two federal courts have indicated that a civilly committed person’s inability to challenge a DHS determination that a person does or does not fall within criteria of the Priority Admissions Law could violate the Fourteenth Amendment’s procedural due process protections.”⁹⁸ In addition to the federal courts mentioned by the task force, a Minnesota state court has also held that when a civilly committed individual is not provided adequate mental health care by the state, their due process rights have been violated.⁹⁹ The task force went as far as to say that, if mental health institution capacity is not increased, “people will continue to be held in jail without due process.”¹⁰⁰ These concessions show that Minnesota leaders are aware that the current system violates the due process rights of civilly committed individuals.

Jails are not a place of healing, recovering, or care—by design.¹⁰¹ Jails not only fail to address the mental health struggles that people come into the system with, but jails *create* additional or worse mental health struggles as individuals spend more time behind bars.¹⁰² Thus, they both fail to address the problem *and* they ensure its continuation, all while violating the due process rights of civilly committed individuals.

One reason why jails or correctional facilities can never provide adequate healthcare is because jails and prisons are disabling *in and of themselves*.¹⁰³ The prevalence of suicide inside jails provides insight into the disabling nature of correctional facilities and why they are antithetical to the goals and aims of mental health care and treatment. Both in Minnesota and nationally, suicide is the leading cause of jail inmate death.¹⁰⁴ However, while “nationally, suicides account for 31% of jail deaths . . . suicides accounted for 60% of deaths in Minnesota jails”

97. TASK FORCE REPORT *supra* note 28, at 31.

98. *Id.* at 18–19 (first citing *Chairse v. Dep’t of Human Services*, 23-CV-355, at 11–12 (D. Minn. Sept. 14, 2023); and then citing *Dalen v. Harpstead*, 23-CV1877 (D. Minn. Jan. 16, 2024)).

99. Swope Findings of Fact, *supra* 1, at 14 (“[Mr. Swope] was held without due process or treatment for 57 days.”).

100. TASK FORCE REPORT *supra* note 28, at 28.

101. BEN-MOSHE, *supra* note 26, at 8.

102. *Id.*

103. *Id.*

104. E. ANN CARSON, BUREAU OF JUST. STATS., U.S. DEP’T OF JUST., MORTALITY IN STATE AND FEDERAL PRISONS 2001–2019 – STATISTICAL TABLES (Dec. 2021).

from 2015 to 2020.¹⁰⁵ The data on inmate suicide shows that jails cannot be relied upon as places where individuals can become mentally stable or healthy because the environment itself is harmful to inmates' mental health.¹⁰⁶ Liat Ben-Moshe explains in her book *Decarcerating Disability* that jails both contribute to the pervasiveness of mental illness and exacerbate the mental illnesses that inmates struggled with prior to their incarceration:

[T]he prison environment itself is disabling so that even if an individual enters prison without a disability or mental health diagnosis, she is likely to get one—from the sheer trauma of incarceration in enclosed, tight spaces with poor air quality and circulation; to hard labor with toxic conditions and materials; to circulation of drugs and unsanitary needles as well as the spread of infectious diseases, some of which result from environmental toxins related to the sites on which prisons are built; to lack of medical equipment and medication, or at times overmedication.¹⁰⁷

Therefore, because jails cannot, by their nature, provide adequate mental health care, civilly committed individuals are denied due process when they are forced to receive “[mental] health care” inside of jails.¹⁰⁸ Simply expanding the role of jails in this endeavor by providing them with more funding cannot solve the problem of inadequate mental health care for civilly committed individuals.

ii. Forcing Civilly Committed Inmates to Receive Mental Health Care Inside of Jails Violates Their Right Against False Imprisonment

Those who have been civilly committed have not been convicted of any crime; therefore, forcing them to languish in jails until a bed is available in a psychiatric treatment facility constitutes false imprisonment. The Minnesota legislature has defined false imprisonment as “knowingly lacking lawful authority to do so, intentionally confin[ing] or restrain[ing] . . . any other person without the person’s consent.”¹⁰⁹ Because civilly committed individuals have not committed any crime, the state does not have

105. Brandon Stahl, *KARE 11 Investigates: Minnesota Jail Failures Costing Taxpayers Millions*, KARE 11 NEWS (Oct. 29, 2021), <https://www.kare11.com/article/news/investigations/jail-failures-costing-millions/89-519c65ec-0b35-4912-8966-b764e8bd2b5c> [https://perma.cc/F3RC-HXAY].

106. BEN-MOSHE, *supra* note 26, at 147–51.

107. *Id.* at 8.

108. TASK FORCE REPORT, *supra* note 28, at 31.

109. MINN. STAT. § 609.255 subd. 2. (2023).

the “lawful authority” to hold these individuals in jail for indefinite periods.¹¹⁰

Several civilly committed inmates have filed suit against DHS Commissioner Jodi Harpstead alleging false imprisonment.¹¹¹ While their cases have yet to be resolved, the State’s and DHS’s refusal to promptly remove civilly committed individuals from jail constitutes false imprisonment. A similar case that arose in Washington state is illustrative on this point. In *Trueblood v. Washington State*, the court found as follows:

Our jails are not suitable places for the mentally ill to be warehoused while they wait for services. Jails are not hospitals, they are not designed as therapeutic environments, and they are not equipped to manage mental illness or keep those with mental illness from being victimized by the general population of inmates. Punitive settings and isolation for twenty-three hours each day exacerbate mental illness and increase the likelihood that the individual will never recover.¹¹²

The civil commitment process serves as a way to protect those with severe mental illness from being unfairly punished by the criminal legal system.¹¹³ Thus, the state’s choice to imprison civilly committed individuals not only constitutes false imprisonment, but runs counter to the entire purpose of the civil commitment system itself.¹¹⁴

iii. Forcing Civilly Committed Inmates to Receive Mental Health Care Inside of Jails Will Expand the Carceral System and Exacerbate Mass Incarceration

From a policy perspective, the state should not expand the role of jails in providing mental health care to civilly committed inmates. Not only are jails innately incapable of providing adequate mental health care, but expanding the role of jails in this way will enlarge the carceral system and exacerbate mass incarceration because it

110. *Id.*

111. Schilz Complaint, *supra* note 5, at 2; Swope Findings of Fact, *supra* note 1, at 1–2.

112. *Trueblood v. Wash. State Dep’t of Soc. & Health Servs.*, 101 F. Supp. 3d 1010, 1013 (W.D. Wash. 2015), *vacated and remanded*, 822 F.3d 1037 (9th Cir. 2016).

113. NAT’L ALL. ON MENTAL ILLNESS, UNDERSTANDING THE MINNESOTA CIVIL COMMITMENT PROCESS 1 (2021) [hereinafter NAMI], https://namimn.org/wp-content/uploads/sites/48/2021/04/NAMI_CivilCommitmentMarch2021OP-1.pdf [https://perma.cc/GHC5-H6AF]; TASK FORCE REPORT *supra* note 28, at 27.

114. NAMI, *supra* note 113, at 1, 28–29.

will result in civilly committed inmates spending *more* time in jail.¹¹⁵

Expanding the role of jails in providing mental health care to civilly committed inmates would qualify as what abolitionist scholars sometimes call a “reformist reform.”¹¹⁶ Abolitionist and scholar Ben-Moshe describes reformist reforms as “situated in the discursive formation of the system as is, so that any changes made within or against this existing framework.”¹¹⁷ Generally, however, abolitionists do not oppose all reformist reform efforts, so long as they are “concrete and direct” and do not inadvertently make total abolition less possible in the future.¹¹⁸ Legal scholar Amna A. Akbar, in her Yale Law Review Feature titled “Non-Reformist Reforms and Struggles over Life, Death, and Democracy,” explains that “non-reformist reforms aim to undermine the prevailing political, economic, social order, construct an essentially different one, and build democratic power toward emancipatory horizons. They seek to redistribute power and reconstitute who governs and how.”¹¹⁹ Overall, “[n]on-reformist reforms imagine a different

115. See MINN. DEPT. OF HUM. SERVS., DRAFT RECOMMENDATIONS FOR PRIORITY ADMISSIONS TASK FORCE (2023), https://mn.gov/dhs/assets/draft-recommendations_tcm1053-604889.pdf [<https://perma.cc/QT5K-GELX>] (highlighting the importance of individuals with mental illness being “treated in the least restrictive setting when receiving services in and discharging to the community”); see also MINN. DEPT. OF HUM. SERVS., PRIORITY ADMISSION TASK FORCE MEMBER RECOMMENDATIONS, *supra* note 64; Feshir, *supra* note 17 (describing how, as a result of the 48-hour rule, many mentally ill Minnesotans “languish in jail longer than they should” before being placed in a psychiatric facility).

116. CRITICAL RESISTANCE, REFORMIST REFORMS VS. ABOLITIONIST STEPS TO END IMPRISONMENT (2021), https://criticalresistance.org/wp-content/uploads/2021/08/CR_abolitioniststeps_antiexpansion_2021_eng.pdf [<https://perma.cc/43UZ-KTNT>] (referring to efforts to make jails and prisons more “rehabilitative” or spending more money to allow jails and prisons to provide special services and resources as “reformist reforms”). See Rachel Kushner, *Is Prison Necessary? Ruth Wilson Gilmore Might Change Your Mind*, N.Y. TIMES (Apr. 17, 2019), <https://www.nytimes.com/2019/04/17/magazine/prison-abolition-ruth-wilson-gilmore.html> [<https://perma.cc/9TRS-H4MU>] (quoting Ruth Wilson Gilmore) (“So many of these proposed remedies don’t end up diminishing the system. They regard the system as something that can be fixed by removing and replacing a few elements. . . . Instead of trying to fix the carceral system, [Gilmore] is focused on policy work to reduce its scope and footprint by stopping new prison construction and closing prisons and jails one facility at a time, with painstaking grass-roots organizing and demands that state funding benefit, rather than punish, vulnerable communities.”).

117. LIAT BEN-MOSHE, *The Tension Between Abolition and Reform*, in THE END OF PRISONS 87 (Mechthild E. Nagel & Anthony J. Nocella II eds., 2013).

118. *Id.* at 86–87 (citing Bonnie Burstow’s keynote speech at the 2009 PsychOut conference).

119. Amna A. Akbar, Feature, *Non-Reformist Reforms and Struggles over Life, Death, and Democracy*, 132 YALE L. REV. 2497, 2507 (2023).

horizon that should be realizable for the improvement of humanity and are not limited by a discussion of what is possible at present.”¹²⁰

Expanding the role of jails in providing mental health care to civilly committed inmates qualifies as a reformist reform because it requires putting *more* money into jails and correctional facilities. Such a “solution” would expand the carceral state because it would lead to more people being employed by the carceral state, and the carceral state would have more power over the lives of our community members because it would serve as the primary health care provider for these individuals.¹²¹

Additionally, expanding the role of jails in this way is a reformist reform because:

The unequivocal claims that the ‘mentally ill’ do not belong in prison or jail only leave the carceral logic intact and gives it more credence, as there are now clearer divisions among those who truly belong and those who do not belong under carceral regimes. In other words, if the ‘mentally ill’ do not belong in prison, surely others do.¹²²

Therefore, if Minnesota values shrinking mass incarceration and the carceral state more broadly, it should not expand the role of jails in providing mental health care.

C. Expanding the Institutionalization System Is Not a Solution to the Lack of Mental Health Care for Civilly Committed Inmates

Many believe that the problem that the 48-hour law sought to address would be solved by expanding the capacity of psychiatric treatment facilities. They argue if there were simply “more beds” available for the civilly committed population, the state would be able to transfer civilly committed inmates from jails to the psychiatric treatment facilities within 48 hours.¹²³ However, Minnesota should not rely on expanding the institutionalization system to solve the problems that sought to be addressed by the 48-hour law. Expanding the institutionalization system should be

120. BEN-MOSHE, *supra* note 117, at 87.

121. *Id.*; see MINN. DEP’T OF HUM. SERVS., DRAFT RECOMMENDATIONS FOR PRIORITY ADMISSIONS TASK FORCE, *supra* note 115; (recommending providing additional funding to jails); see also MINN. DEP’T OF HUM. SERVS., PRIORITY ADMISSION TASK FORCE MEMBER RECOMMENDATIONS, *supra* note 64.

122. BEN-MOSHE, *supra* note 26, at 17; CRITICAL RESISTANCE, *supra* note 116 (critiquing “[l]egislative and other efforts to single out some conviction categories as ‘exceptions’” because “[t]his strategy entrenches the idea that anybody ‘deserves’ or ‘needs’ to be locked up. Prioritizing only some people for release justifies expansion”).

123. Feshir, *supra* note 17 (citing the Hennepin County Sheriff’s belief that “DHS officials need to secure funding to open up more beds for people with mental illness”).

approached with skepticism because institutionalization can violate individuals' rights to due process and can qualify as false imprisonment.¹²⁴

Expanding the institutionalization system will not solve the problem that the 48-hour law sought and ultimately failed to address.¹²⁵ This is because institutionalization is not all that different from jail and prison.¹²⁶ For many scholars and abolitionists, this is the problem with the solution posed by believers of the "new asylums" theory (that deinstitutionalization caused mass incarceration so institutions should be rebuilt and expanded in order to transfer inmates to mental health facilities); they argue that more institutionalization cannot be the solution when that system is also fraught with injustice, neglect, and abuse.¹²⁷ As journalist Alisa Roth wrote in her piece in *The Atlantic*, "[i]t's easy to think that if people with mental illness could be housed and treated in asylums or similar institutions, they wouldn't be policed and incarcerated at such high rates. But it's important to remember that those hospitals had deteriorated to conditions shockingly similar to today's worst correctional facilities."¹²⁸

While civil commitment has been upheld as constitutional many times, including by the Supreme Court of the United States, the constitutionality of broadly-implemented civil commitment should be reexamined.¹²⁹

i. Institutionalization Can Violate the Due Process Rights of the Civilly Committed

Institutionalization can violate the due process rights of civilly committed individuals because institutionalization can fail to provide the adequate mental health care to which civilly committed individuals are entitled. Ben-Moshe explains in *Decarcerating*

124. Tracz, *supra* note 26.

125. Krauss, *supra* note 6.

126. BEN-MOSHE, *supra* note 26, at 146; Roth, *supra* note 67. The Prison Industrial Complex is defined as "the profit-driven relationship between the government, the private companies that build, manage, supply, and service prisons, and related groups (such as prison industry unions and lobbyists) regarded as the cause of increased incarceration rates especially of poor people and minorities and often for nonviolent crimes." *Prison industrial complex*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/prison%20industrial%20complex> [https://perma.cc/WM6K-LT8Y].

127. BEN-MOSHE, *supra* note 26, at 146; Roth, *supra* note 67.

128. Roth, *supra* note 67.

129. *Kansas v. Hendricks*, 521 U.S. 346, 365–66 (1997); *United States v. Comstock*, 560 U.S. 126 (2010).

Disability how examining our nation's past history of mass institutionalization shows that, while it may look like institutionalization is effective from the outside, institutions still often fail to provide adequate mental health care to those on the inside, thereby denying civilly committed individuals their due process rights.¹³⁰

Psychiatric hospitals in the 1950s and 1960s were warehouses for people with mental health diagnoses; indeed, the people who resided there were less visible to those outside these institutions. But that does not mean that these were places of quality care and treatment or that those receiving psychiatric services consented, in the broadest sense of the word, to having their freedom taken and to be confined in these enclosures. During this time, the United States did not have to contend with extreme variances in behavior or thought, as many people experiencing mental illness were 'out of sight, out of mind' to the public eye. But it does not logically follow that people who were placed in psychiatric facilities were better off, in the "good old days" of mass confinement in the field of mental health and developmental disability, than they are now.¹³¹

ii. Institutionalization Can Constitute a Violation of a
Civilly Committed Individual's Right Against
False Imprisonment

As previously stated, the Minnesota legislature has defined false imprisonment as follows: "[w]hoever, knowingly lacking lawful authority to do so, intentionally confines or restrains . . . any other person without the person's consent."¹³² Institutionalization can constitute false imprisonment because people are confined and restrained without their consent.¹³³ Moreover, civil commitment can constitute false imprisonment because courts often extend individuals' terms of civil commitment repeatedly, such that individuals can be committed—and stripped of much of their liberty and autonomy—indefinitely.¹³⁴ While the Minnesota civil commitment statute requires that an individual's initial commitment is not to exceed six months, the average total

130. BEN-MOSHE, *supra* note 26, at 4.

131. BEN-MOSHE, *supra* note 26, at 146.

132. MINN. STAT. § 609.255 subd. 2. (2023).

133. See Frezzo, *supra* note 94, at 654, 666, 667.

134. See Tracz, *supra* note 26, at 137; Frezzo, *supra* note 94; NAMI, *supra* note 113, at 28 (noting that individuals who are civilly committed because they "ha[ve] mental illness and [are] dangerous to the public" can be civilly committed for an indefinite period of time).

commitment time in the Forensic Mental Health Program, the typical program to which a Minnesotan is civilly committed, is five to eight years.¹³⁵

Under influential precedents in U.S. constitutional law, as well as in the popular imagination, physical confinement in a secure mental hospital or treatment facility can be characterized as a “massive curtailment of liberty.”¹³⁶ Under this view, civil commitment is the effective equivalent of incarceration under a potentially indefinite sentence. Understood in this light, involuntary treatment for mental illness, whether in the form of forced medication or mandatory participation in either inpatient or outpatient treatment programs, directly conflicts with the fundamental values of individual freedom, autonomy, and self-determination.¹³⁷

The civil commitment system grants the state enormous authority as it allows the state to order the confinement, punishment, and the forced treatment of individuals, sometimes indefinitely.¹³⁸ Civil commitment is a system that should be used sparingly, if at all, due to both the potential for indefinite confinement of those who are civilly committed and the similarities between institutions and jails.¹³⁹

D. Alternative Approaches Beyond Mass Institutionalization or Expanding the Role of Jails in Providing Mental Health Care

Considering the shortcomings of both mass institutionalization and relying on jails to provide adequate mental health care, Minnesota should consider non-carceral, community-based treatment options for the civilly committed population.

This strategy also has a basis in the law, as the Minnesota civil commitment statute provides that “the court is to consider ‘reasonable alternative dispositions’ including but not limited to, dismissal of the petition, voluntary outpatient care, voluntary admission to a treatment facility, appointment of a guardian or

135. MINN. STAT. § 253B.09, subd. 5 (2023); NAMI, *supra* note 113, at 28–29.

136. Hawthorne & Ihlan, *supra* note 94, at 2 (quoting *Humphrey v. Cady*, 405 U.S. 504, 509 (1972)); Tracz, *supra* note 26, at 149 (“[B]ecause the level of dangerousness must be great enough to outweigh the severe deprivations in individual liberty, very few people should be committable under the police power.”).

137. *Id.*

138. See Tracz, *supra* note 26, at 137; Frezzo, *supra* note 94; NAMI, *supra* note 113.

139. Roth, *supra* note 67; see Frezzo, *supra* note 94.

conservator, or release before commitment.”¹⁴⁰ “If the court finds that no suitable alternative to judicial commitment exists, the court is directed to commit the patient to the least restrictive treatment or an alternative treatment program which meets the patient’s treatment needs.”¹⁴¹

Mass institutionalization specifically presents logistical concerns, in addition to the ethical and constitutional concerns examined above. “The Department of Corrections has not collected reliable data from jails on the number of inmates assessed for mental illness. However, . . . surveys of sheriffs suggest that one-third of jail inmates may be on medications for a mental illness.”¹⁴² Choosing institutionalization as the answer to this problem requires continued reliance on the civil commitment process to determine who is mentally ill *enough* to be removed from jails and correctional facilities.

Conclusion

The suspension of Minnesota’s 48-hour law, which mandated that civilly committed inmates be transferred from jail to a mental health facility within 48 hours, presents the state with an opportunity to reexamine the role that jails play in providing mental health care and the civil commitment system overall. Commonly proposed solutions to the problems that the 48-hour law sought to address include expanding the role of jails in providing mental health care or expanding the capacity of mental health facilities in order to accommodate the civilly committed population. This Note argues that both of those solutions pose serious constitutional concerns regarding due process and false imprisonment. Accordingly, the state should consider solutions that decrease the size of the civilly committed population, and for those that remain in the civilly committed population, the state should prioritize non-carceral, community based mental health treatment.

140. Tracz, *supra* note 26, at 139; MINN. STAT. § 253B.09, subd. 1(a) (2023).

141. *Id.* at 141.

142. OFF. OF THE LEGIS. AUDITOR, *supra* note 12, at ix.