

Procedure for the Release of the Criminally Insane— A Suggested Approach*

It is a firmly established principle that one acquitted of a criminal charge by reason of insanity, and committed to a state mental hospital has the right to be released from confinement when sanity is restored.¹ However, state statutes governing release procedure are diverse in their approach, and all lack one or more of the essential elements of an ideal release statute. The purpose of this note is to suggest a uniform procedure for the release of the "criminally insane."² It is submitted that there are three elements essential to a model release statute, and these will be analyzed herein:

1) Mandatory commitment to a state mental hospital of one acquitted of a criminal charge by reason of insanity.

2) A specified minimum period of observation after commitment as a condition precedent to application for release. If the application is denied, re-application should be permitted only after a further specified minimum period has elapsed.

3) An exclusive procedure permitting release only with the approval and review of the committing court.

Specifically, the ultimate recommendation of this article will be the Model Penal Code Section 4.08 with slight modification.³ Certain of the statutory provisions in force will be examined and analyzed in an effort to support the stated recommendations.

I. MANDATORY COMMITMENT TO A STATE MENTAL HOSPITAL OF ONE ACQUITTED OF A CRIMINAL CHARGE BY REASON OF INSANITY

England,⁴ a minority of American states,⁵ and the Model Penal

* This note is an expansion of the article, *Procedure for the Release of the "Criminally Insane"*—*Missouri's Inadequacy*, St. Louis B.J., Oct. 1961, p. 11.

1. See, e.g., *State ex rel. Sundberg v. District Court of Hennepin County*, 185 Minn. 396, 241, N.W. 39 (1932); *Northfoss v. Welch*, 116 Minn. 62, 133 N.W. 82 (1911).

2. This term is not accurate, for one who has been acquitted on the grounds that he does not understand the nature and consequences of his act is not a criminal.

3. MODEL PENAL CODE § 4.08 (Tent. Draft No. 4, 1955).

4. Trial of Lunatics Act of 1838, 1 & 2 Vict. c. 14.

5. COLO. REV. STAT. ANN. § 39-8-4 (Supp. 1957); GA. CODE ANN. § 27-1502 (1953); HAWAII REV. LAWS § 258-39 (Supp. 1960); KAN. GEN. STAT. ANN. § 62-1532 (1950); MASS. ANN. LAWS c. 123, § 101 (1956) (only in the case of commitment after acquittal of murder); MICH. STAT. ANN. § 28-933(3) (1954) (only in the case of commitment after acquittal of murder); MINN. STAT. ANN. § 631.19 (Supp. 1961); NEB. REV. STAT. ANN. § 29-2203 (1958); NEV. REV. STAT. § 175.445 (1957); N. Y. CODE CRIM. PROC. § 454 (Supp. 1960); OHIO REV. CODE ANN. § 2945.39 (Baldwin 1958); WIS. STAT. § 957.11(3) (1955).

Code⁶ provide for the immediate commitment of one acquitted of a criminal charge by reason of insanity, without inquiry into his present mental condition. There is a split of authority regarding the constitutionality of mandatory commitment statutes,⁷ but a majority of the states which have passed on the question have upheld their validity.⁸

The mandatory commitment provision is founded on the presumption of *continuing insanity*. That is, the defendant's insanity when the act was committed, and introduced at the trial as an excuse for an otherwise criminal act, is presumed to continue, unless clearly shown to the contrary by him.⁹ In a Kansas¹⁰ case, defendant, on trial for murder, was found not guilty by reason of insanity and was immediately committed to the insane asylum. Thereafter, he challenged the mandatory commitment statute, asserting *inter alia*, that the presumption of continuing insanity unconstitutionally deprived him of a jury trial on the question of his sanity at the time of commitment. The court answered his challenge saying:

If the legislature in framing the law sought to give practical effect to the ordinary presumption [of continuing insanity] referred to which so well accords with ordinary observation and experience, no good reason is perceived why it could not do so, leaving a reasonable opportunity for a future determination of the question whether and when the detention should cease.¹¹

Apparently mandatory commitment without further inquiry into the individual's then existing mental condition is not a denial of due process so long as ultimate judicial determination of sanity is provided for by statute. However, the statute is unconstitutional if subsequent judicial inquiry into the inmate's mental condition is prohibited.¹² Proponents of the mandatory commitment provision

6. Section 4.08, (Tent. Draft No. 4, 1955).

7. ANNOT., 145 A.L.R. 892 (1943).

8. *Ibid.*

9. *In re Brown*, 39 Wash. 160, 81 Pac. 552 (1905).

10. *In re Clark*, 86 Kan. 539, 121 Pac. 492 (1912). In *State v. Toon*, 172 La. 631, 135 So. 7 (1931), the court said in dicta that one who is successful in establishing the defense of insanity cannot object to the presumption of continuing insanity.

11. *In re Clark*, *supra* note 10 at 546, 121 Pac. at 495.

12. See, *e.g.*, *Underwood v. People*, 32 Mich. 1 (1875) (statute held unconstitutional because the mandatory commitment provision excluded the inmate from initiating further investigation and judicial determination of his sanity). Release from commitment could be achieved only "when prison inspectors summon . . . the circuit judge of the circuit from which he is sent, and the medical superintendent of the Kalamazoo insane asylum, who are thereupon to examine into his

contend that it adds to the public's peace of mind and safety without unduly abridging the individual's rights.¹³ Thus the comments to the Model Penal Code point out that, "It not only provides the public with the maximum immediate protection, but may also work to the advantage of mentally diseased or defective defendants by making the defense of irresponsibility more acceptable to the public and to the jury."¹⁴ Finally, mandatory commitment, considered alone, is only a slight inconvenience to one who successfully established the defense of insanity, since he would otherwise incur criminal penalties for his act. Therefore, it is submitted that a mandatory commitment provision is an essential element of a model release statute.

condition, and if they certify he is not insane, the governor is to discharge him." *Id.* at 2. The statute was struck down in the following language:

In the first place the prisoner is sent into confinement without any legal investigation into his condition at that time, when he may be perfectly sane, and when, having been acquitted, he is entitled to all the privileges of any innocent man. There may be a very long interval between the offense and the trial.

Having been so secluded, he is excluded from the right, and all others are excluded from the power of resorting to any effectual means, or any means whatever, of securing a judicial inquiry into his sanity. Neither judge nor expert has any power under our constitution to select his own means and process of inquiry, and pass *ex parte* upon the liberty of citizens. The proceedings contemplated by this statute are not only inquisitorial and *ex parte*, but the officers selected, who are undoubtedly as fit as any one to conduct such inquiries, have no power to act until the inspectors choose to call them. It practically leaves the liberty of the person confined to depend upon the uncontrolled pleasure of the inspectors. A more dangerous scheme, and one more entirely opposed to the constitutional provision securing to every one [*sic*] the protection of due process of law, could hardly be devised. (*Id.* at 5).

13. S. Rep. No. 1170, 84th Cong., 1st Sess. 13 (1955) (amending the District of Columbia Code):

[T]he Committee is of the opinion that the public is entitled to know that, in every case where a person has committed a crime as a result of a mental disease or defect, such person *shall* be given a period of hospitalization and treatment to guard against imminent recurrence of some criminal act by that person.

The Committee believes that a mandatory commitment statute would add much to the public's peace of mind, and to the public safety, without impairing the right of the accused. Where accused has pleaded insanity as a defense to a crime, and the jury has found that the defendant was, in fact, insane at the time the crime was committed, it is just and reasonable in the Committee's opinion that the insanity, once established, should be presumed to continue and that the accused should automatically be confined for treatment until it can be shown that he has recovered.

14. MODEL PENAL CODE § 4.08, comment (Tent. Draft No. 4, 1955).

II. SPECIFIED MINIMUM PERIOD OF OBSERVATION AS A CONDITION TO APPLICATION OR RE-APPLICATION FOR RELEASE

The requirement of a statutory observation period¹⁵ is founded on the premise that a period of surveillance and examination between commitment and release is vital to the public interest. Furthermore, it provides the only basis by which intelligent and rational disposition can be made of applications for release. Professor Weihofen comments that:

In the discussion at the 1955 meeting of the American Law Institute, there was mentioned an Oregon case, in which the state hospital doctor testified that in his opinion the girl who had killed her lover had done so because he had jilted her for another, and that she was not insane. The jury found her insane, and sent her to the hospital. The doctor stood by his judgment and promptly released her as sane.¹⁶

A specified observation period would eliminate this all too frequent occurrence that Weihofen mentions, whereby one who has successfully established the defense of insanity based on the testimony of private psychiatrists, is released immediately after commitment on the testimony of the same state psychiatrists who testified that the defendant was sane at the trial. During this proposed observation period further examination and evaluation of the patient's mental condition should be made, and these findings should be considered along with the testimony presented at the trial in passing on the release application.

Some jurisdictions¹⁷ prescribe a further minimum period as a condi-

15. See, *e.g.*, *In re Slayback*, 209 Cal. 480, 288 Pac. 769 (1930). The Supreme Court in this case justifies this section of the statute by saying that:

Insanity takes so many different forms and its manifestations are so varied and uncertain that it is often impossible for the most skilled alienist or astute judge to detect its existence or to predict the time of its recurrence, when the patient appears to be for the time free from the affliction. The restraint and detention imposed is not, as we have seen, for the purpose of inflicting punishment upon a defendant, but to permit a sufficient length of time to elapse to enable those who may be called upon to pass upon the sanity of the patient to intelligently give their judgment as to whether or not he has recovered his reason. The Legislature has fixed the time as one year [amended to 90 days]. Perhaps a lesser or greater time would serve the same purpose but the legislature was in as good a position to judge of the time required as are the courts. No definite showing has been made that the time so fixed is an unreasonable time, and, as the matter is one primarily for the Legislature, we see no reason to overturn their action. *Id.* at 491, 288 Pac. at 774.

16. WEIHOFFEN, *THE URGE TO PUNISH* 122-23 (1956).

17. See, *e.g.*, CAL. PEN. CODE ANN. § 1026a (Deering 1959) (90 days minimum confinement—one year must elapse before subsequent application); IND. ANN. STAT. § 9-1705 (1956) (2 year minimum confinement—5 years must elapse before

tion to subsequent application for release, after denial of an earlier application. This prevents the persistent patient from unduly burdening the authorities with unwarranted and unjustified applications. Also, this period allows for further examination and re-evaluation of the patient, during which any significant changes will be recognized. The hospital authorities should release a patient when he has recovered,¹⁸ and it is hoped that their decision to release will not be influenced by public opinion against an unpopular patient.

In order to eliminate the arbitrary and illogical practices examined above, a model release statute should provide a specified minimum observation period both upon commitment and prior to re-application for release where an earlier request has been denied.

III. EXCLUSIVE PROCEDURE PERMITTING RELEASE ONLY WITH THE APPROVAL OF THE COMMITTING COURT

Varied means of processing applications for release of patients are in effect throughout the states. The decision to discharge is given either to the committing court or some other designated court in slightly more than one-half of the states.¹⁹ A few states permit release without court approval upon the decision of the hospital staff or an administrative board.²⁰ Indeed, in some states release can only

subsequent application); WIS. STAT. § 51.11 (8) (1957) (if first application for release is unsuccessful, hearing on subsequent application can be compelled only after one year from any proceeding); IOWA CODE ANN. § 229.36 (1946) (6 months minimum confinement—6 months must elapse before subsequent application); ME. REV. STAT. ANN. c. 27 § 134 (1954) (one year must elapse before subsequent application); UTAH CODE ANN. § 77-24-16 (1953) (1 year minimum confinement—1 year must elapse before subsequent application).

18. WEIHOFFEN, MENTAL DISORDER AS A CRIMINAL DEFENSE 384 (1954).

19. CAL. PEN. CODE ANN. § 1026 (Deering, 1960); COLO. REV. STAT. ANN. § 39-8-4 (Supp. 1957); CONN. GEN. STAT. § 54-38 (1958); DEL. CODE ANN. tit. 11, § 4702 (1953); D. C. CODE ANN. § 24-301 (1961); HAWAII REV. LAWS § 258-39 (Supp. 1960); ILL. REV. STAT. c. 38 § 592 (1957); IND. ANN. STAT. § 9-1705 (1956); IOWA CODE ANN. § 229.31 (Supp. 1960); KY. REV. STAT. ANN. § 202.280 (1955); LA. REV. STAT. ANN. § 28.96 (Supp. 1960); ME. REV. STAT. ANN. c. 27, § 120 (1954); MD. ANN. CODE art. 59, § 42 (1957); MINN. STAT. ANN. § 631.19 (Supp. 1961); N. J. REV. STAT. ANN. § 2:190-17 (Supp. 1951); N. Y. CODE CRIM. PROC. § 454; OHIO REV. CODE ANN. § 2945.39 (Baldwin 1958); PA. STAT. ANN. tit. 50, § 1301 (1950); R. I. GEN. LAWS ANN. c. 26, § 3-5 (1956); S. C. CODE § 32-932 (1952); UTAH CODE ANN. § 77-24-15 (1953); VT. STAT. § 4808 (1958); WASH. REV. CODE ANN. § 10.76.070 (1956); W. VA. CODE ANN. § 6198 (1955); WIS. STAT. § 957-11 (1955).

20. Release by the hospital authorities: ARK. STAT. ANN. § 59-242 (Supp. 1959) (the 1959 supplement changed the release authority from the committing court to the superintendent of the hospital). See ARK. STAT. ANN. § 59-242 (1947). It is now apparently a civil release procedure. See ARK. STAT. ANN. § 59-235 (1947); FLA. STAT. ANN. § 394.22 (Supp. 1957); GA. CODE § 27-1503 (1953) (Section pro-

be accomplished by a special act of the legislature or by an order of the governor.²¹ However, in about one-sixth of the states²² no particular statutory provision exists providing for the release of patients committed upon acquittal of a criminal charge. In these states release is generally accomplished either by writ of habeas corpus or through procedures available to patients committed under civil commitment proceedings.

Several states have taken the position that control over the discharge of the prisoner should be vested exclusively in the committing court,²³ but this position has been sharply criticized.²⁴ Its advocates, however, believe that the committing court is the agency best fitted to review release petitions. Their view is that the judiciary's full

vided that criminally insane were to be discharged as all other mental commitments pursuant to § 35-202 (1953) which placed the supervision of release in the administrative agency of the Board of Control of Eleemosynary Institutions. This section was repealed by Acts 1960, pp. 837-54 and codified as Chapters 88-16 wherein it is provided that the right of release is vested in the superintendent of the hospital. The superintendent must, however, notify the court which ordered the involuntary hospitalization.); MISS. CODE ANN. § 6916 (1952); NEB. REV. STAT. § 83-340 (1958); N. M. STAT. ANN. § 34-2-10 (1953); N. D. REV. CODE § 25-03-15 (Supp. 1961); OKLA. STAT. ANN. tit. 43A, § 73 (Supp. 1961); VA. CODE ANN. § 19.1-239 (Supp. 1960). Release by an administrative agency: IDAHO CODE ANN. § 66-337 (Supp. 1961); KAN. GEN. STAT. ANN. § 62-1532 (1950).

21. MASS. ANN. LAWS c. 123, § 101 (1956). In the case of murder or manslaughter only the governor with the advice and consent of the council can discharge the person—section held constitutional and does not deprive person of a judicial remedy, Robert J. Golden, 341 Mass. 672, 171 N.E.2d 473 (1961). In all cases other than murder or manslaughter release is vested in the committing court. See MASS. ANN. LAWS c. 278 § 13 (1956); MICH. STAT. ANN. § 28.933 (1954) (commitments of those acquitted of murder may be released only on order of the governor. All other commitments, release is by certification from superintendent to the court or by habeas corpus. MICH. STAT. ANN. § 28.967 (1954).) No person acquitted of a capital felony on ground of mental disorder shall be discharged unless by act authorizing his discharge by the General Assembly. No person acquitted of a crime of a lesser degree than a capital felony and committed to the hospital shall be discharged except by order from the Governor. N. C. GEN. STAT. § 122-86 (1958); N. H. REV. STAT. ANN. § 607:4 (1955).

22. Alabama, Alaska, Arizona, Missouri, Montana, Nevada, Oregon, Tennessee, Wyoming.

23. See, *e.g.*, CAL. PEN. CODE § 1026a (Supp. 1961); COLO. REV. STAT. ANN. § 39-8-4 (Supp. 1957); D. C. CODE ANN. § 24-301 (Supp. VIII, 1960); IND. ANN. STAT. § 9-1705 (1956); KY. REV. STAT. ANN. § 202.280 (1955); LA. REV. STAT. ANN. § 28.96 (Supp. 1960); MD. ANN. CODE art. 59, § 14 (1957); MINN. STAT. ANN. § 631.19 (Supp. 1957); N. J. REV. STAT. ANN. § 2-190-17 (Supp. 1951); N. Y. CODE CRIM. PROC. § 454 (Supp. 1960); PA. STAT. ANN. tit. 50, § 1301 (1930); TEX. CODE CRIM. PROC. ANN. art. 932b, § 6 (Supp. 1960); VT. STAT. § 4808 (1958); W. VA. CODE ANN. § 6198 (1955); WASH. REV. CODE ANN. § 10.76.070 (1956); WIS. STAT. § 957.11 (1955).

24. Note, 68 YALE L.J. 293, 302 (1958).

power of review should be exercised to insure uniformity and consistency in decisions and, furthermore, because courts are the agencies most skilled in resolving conflicting evidence. Moreover, the committing court possesses the full background and history of the case, and because of its familiarity with the patient, it is best qualified to evaluate his present condition. Another reason frequently suggested for placing exclusive release control over a patient in the committing court is that since the committing court rendered judgment in the first instance, it should have the opportunity to modify that judgment in the light of later developments.²⁵

In states which have no statutory provision for the release of those previously adjudged criminally insane, the burden of passing on the application generally falls upon the superintendent of the hospital. Jurisdiction, when the patient files a writ of habeas corpus demanding his release, is in the appropriate court in the county where the hospital is located. For example, in Missouri²⁶ one acquitted of a criminal charge by reason of insanity is committed to a state hospital if not fully recovered at the time of the trial. The patient may be released when his condition warrants it, and this is determined and ordered by the hospital superintendent.²⁷ This procedure is designed for and made expressly applicable to persons hospitalized under civil commitments.²⁸ In addition, a patient unable to convince the superintendent of the desirability of his release may file a writ of habeas corpus returnable in the circuit court of the county where the institution is located.²⁹ Currently, when the procedure applicable to persons civilly committed is utilized by a party committed as a result of a criminal trial, the courts are without jurisdiction to interfere.³⁰ The circuit court of the county where the institution is located has jurisdiction over the habeas corpus proceedings, and therefore the committing court usually is without jurisdiction.³¹

The results achieved in those states where the director of the mental institution is given the exclusive right to release demonstrate

25. *Martin v. United States*, 273 F.2d 775, 777 (10th Cir. 1960).

26. MO. REV. STAT. § 546.510 (1959).

27. MO. REV. STAT. § 202.070 (1959).

28. MO. REV. STAT. § 532.010; § 532.360; § 532.380 (1959).

29. MO. REV. STAT. § 532.030 (1959).

30. *Richey v. Baur*, 298 S.W.2d 445 (Mo. 1957).

31. Obviously Missouri law and that in those other states which lack specific release procedures for the criminally insane would have to be changed to meet the recommendations made herein. A recent decision of the Missouri Supreme Court, *Richey v. Baur*, *ibid.*, has recognized that a release procedure without necessity for judicial approval may be inadequate in certain situations, and has suggested that the General Assembly might well be called upon to enact legislation delineating a specific procedure to be followed when the commitment is of one whose acquittal was based solely on the grounds of insanity.

that this procedure is far from ideal. First, hospital staffs—under constant pressure from overcrowded facilities and lack of personnel—might tend to release prematurely.³² Second, conversely, is the possibility that psychiatrists, fearful of receiving bad publicity if a patient should have a relapse, might unjustifiably retain the person, prolonging confinement in abridgement of his civil liberties.³³ Also, it must be realized that there are many conflicting views and approaches in psychiatry—so many, in fact, that it led one extremist to state: “One would have supposed that this muddle in itself would have been sufficient to make of psychiatry a profession so utterly humble as practically never to be heard from.”³⁴ This division of opinion among psychiatrists, with the proverbial “battle of experts” occurring in most sanity hearings, requires a jurist to weigh and decide the ultimate facts and make the final evaluation in the light of the purposes of the law. One view advanced is that an administrative board, composed of psychiatrists, lawyers, civic leaders, clergymen, sociologists, criminologists and other experts would provide the ideal release authority.³⁵ This proposal fails to analyze the problem correctly. The issue is primarily factual, seeking proper application of the law, and having, secondarily, medical and social ramifications. This determination can be most satisfactorily resolved by minds keyed to a discipline advanced in the art of resolving the conflicting testimony present in a large majority of the hearings. Law is the discipline that has been the most successful in the development of that art. For these reasons and the further significant reason that the committing court alone is familiar with the case, the committing court should have exclusive authority to pass upon release petitions.

The exclusivity requirement proposed in this note is more stringent than that found in effect in jurisdictions which provide for release procedures to be handled exclusively by the committing court. For example, the recent controversial District of Columbia statute³⁶ states

32. Dession, *The Mentally Ill Offender in Federal Criminal Law and Administration*, 53 YALE L.J. 684, 696 (1944); Weihofen & Overholser, *Commitment of the Mentally Ill*, 24 TEXAS L.REV. 307, 333 (1946).

33. Overholzer, *The Place of Psychiatry in the Criminal Law*, 16 B.U.L. REV. 322, 326 (1936).

34. Hakeem, *A Critique of Psychiatric Approach to Crime and Correction*, 23 LAW & CONTEMP. PROB. 650, 659 (1958). For a discussion attempting to highlight the difficulties in the field of psychiatry due to divergent thought and semantic discrepancies see: Meyer, *The Riddle of Legal Insanity*, 44 J. CRIM. LAW, C. & P.S. 330 (1953-54).

35. Note, 68 YALE L.J. 292, 303 (1958).

36. D. C. CODE ANN. § 24-301 (1961). A strong attack is made on the District statute by Charles W. Halleck in *The Insanity Defense in the District of Columbia—A Legal Lorelei*, 49 GEO. L.J. 294 (1960-61).

that one excused from a criminal act by reason of insanity is to be committed to a mental institution. Thereafter, when the hospital superintendent is of the opinion that the patient is sane and no longer dangerous to himself or society, a written certificate stating this belief is filed in the committing court by the superintendent. The court may unconditionally discharge the patient if no objection is raised within fifteen days of the filing of the certificate. However, the court may, after notice, conduct a hearing and receive evidence of the patient's condition from the hospital psychiatrists. Moreover, the United States Attorney or Corporation Counsel for the District of Columbia may object to the release of a patient, whereupon a hearing is mandatory. After considering the evidence, the court will unconditionally release the patient if their interpretation of the evidence suggests that the patient has recovered.³⁷ The committing court is given jurisdiction only in cases where the patient is deemed to be sane by the superintendent; however, no provision gives the committing court jurisdiction of cases where the superintendent refused to certify a patient, or the patient believes he is being illegally restrained. The patient may then file a writ of habeas corpus, although the statute does not provide that it is specifically returnable at the

37. The statute reads, in part:

(d) If any person tried upon an indictment or information for an offense, or tried in the juvenile court of the District of Columbia for an offense, is acquitted solely on the ground that he was insane at the time of its commission, the court shall order such person to be confined in a hospital for the mentally ill. (e) Where any person has been confined in a hospital for the mentally ill pursuant to subsection (d) of this section, and the superintendent of such hospital certifies (1) that such person has recovered his sanity, (2) that, in the opinion of the superintendent, such person will not in the reasonable future be dangerous to himself or others, and (3) in the opinion of the superintendent, the person is entitled to his unconditional release from the hospital, and such certificate is filed with the clerk of the court in which the person was tried, and a copy thereof served on the United States Attorney or the Corporation Counsel of the District of Columbia, whichever office prosecuted the accused, such certificate shall be sufficient to authorize the court to order the unconditional release of the person so confined from further hospitalization at the expiration of fifteen days from the time said certificate was filed and served as above; but the court in its discretion may, or upon objection of the United States or the District of Columbia shall, after due notice hold a hearing at which evidence as to the mental condition of the person so confined may be submitted, including the testimony of one or more psychiatrists from said hospital. The court shall weigh the evidence and, if the court finds that such person has recovered his sanity and will not in the reasonable future be dangerous to himself or others, the court shall order such person unconditionally released from further confinement in said hospital. If the court does not so find, the court shall order such person returned to said hospital.

committing court.³⁸ This obvious deficiency should be eliminated by including a provision in the statute specifically providing for return of the writ at the committing court. This would insure that the committing court would be the final authority in all instances.

The Minnesota statute resembles the proposals of this note as closely as any statute in force in the United States.³⁹ In Minnesota the patient may be released from the hospital upon written certification of the patient's recovery by the hospital superintendent. Upon failure or refusal of the superintendent so to certify, the patient may petition the committing court for release.⁴⁰

Release, however, has been interpreted to be mandatory by the committing court if the superintendent presents a certificate, and so in this respect the court performs a ministerial function.⁴¹ Based on this judicial interpretation of the statute, the hospital superintendent should have been given the sole authority to discharge the patient. It is clear that this interpretation is not in harmony with the ultimate recommendation of this note. Specifically, the committing court should exercise its discretion in passing upon a patient who has been certified by the hospital superintendent. A combination of the District of Columbia's provision giving the committing court discretion to order a hearing on the question of the patient's sanity, and the Minnesota procedure permitting a patient to petition the committing court when the superintendent refuses to certify him, plus the added feature of the Minnesota statute that the statutory relief is exclusive, constitutes a model release statute. In effect, habeas corpus is not available to the patient, and this prevents the district or circuit courts for the county in which the hospital is located from taking jurisdiction—unless, of course, this happens also to be the committing court.

38. However, a state with the statute phrased in the terms of the District statute not providing for the return of the case to the committing court where the superintendent refuses to certify the patient's sanity would have to allow writs of habeas corpus returnable in the appropriate court of the county in which the patient is confined, in order not to deny due process. See *Northfoss v. Welch*, 116 Minn. 62, 133 N.W. 82 (1911).

39. MINN. STAT. ANN. § 631.19 (Supp. 1961).

40. If the defendant is found insane at the time of the act and then committed he may be liberated only upon the order of the court committing him whenever the superintendent of the hospital certifies to the court that in his opinion the defendant is wholly recovered and that no person will be endangered by his discharge. If the superintendent fails or refuses, a petition may be submitted to the court and the question decided by the court without regard to the superintendent's opinion. MINN. STAT. ANN. § 631.19 (Supp. 1961).

41. *State ex rel. Sundberg v. District Court of Hennepin County*, 185 Minn. 396, 401, 241 N.W. 39, 40-41 (1932). Olsen, J., concurring, felt that it was not mandatory upon the committing court to discharge the person upon mere presentation of the superintendent's certification of sanity, but does not elaborate.

Thus, exclusivity of authority to release the patient is vested in the court of original jurisdiction, the committing court.

The Model Penal Code⁴² seemingly attempted to achieve this result; however, the section has been construed so as not to deny the right to habeas corpus.⁴³

The question then arises: has the patient been denied his constitutional rights under the due process clause of the Fourteenth Amendment by granting exclusive jurisdiction to the committing court, or by abridging his right to habeas corpus, or both? The leading state case permitting abridgement of the right to habeas corpus is *State ex rel. Colvin v. Superior Court*.⁴⁴ The prosecuting attorney of King County, Washington, sought a writ of prohibition to restrain the superior court of Walla Walla County from discharging by a writ of habeas corpus, a party confined in the state penitentiary department for the criminally insane. The relator alleged that the Washington statute clothed the committing court with exclusive jurisdiction to entertain an application for discharge. The statute permitted the patient to apply to the physician in charge of the hospital for an examination of his mental fitness. Upon certification of his sanity, the patient could petition the committing court for release. The issue whether or not a writ of habeas corpus could legally be denied the petitioner was energetically argued to the court. Petitioner took the position that the statutory remedy was concurrent with habeas corpus. This argument was bottomed on the general rule that one restrained of his liberty may be released through a habeas corpus proceeding, notwithstanding a specific statutory remedy. The court held that the statutory remedy was exclusive, based on their understanding of the legislative intent in enacting the statute. Furthermore, the court distinguished the general rule relied on by the petitioner, stating that the statutory remedy is cumulative if the proceeding is administrative, and exclusive if the proceeding is judicial, when the fact to be ascertained is an individual's sanity.⁴⁵ The *Colvin* case cited an earlier Washington decision⁴⁶ that habeas corpus is unavailable until all statutory administrative remedies have been exhausted. There seems to be no doubt that so long as the petitioner has the right to eventual judicial determination of his cause, his right to habeas corpus may be substantially abridged.⁴⁷

42. MODEL PENAL CODE § 4.08 (Tent. Draft No. 4, 1955).

43. MODEL PENAL CODE § 4.08, comment 3 (Tent. Draft No. 4, 1955).

44. 159 Wash. 335, 293 Pac. 986 (1930).

45. *Id.* at 342-44, 293 Pac. at 989.

46. *State ex rel. Thompson v. Clifford*, 106 Wash. 16, 179 Pac. 90. (1919).

47. See, e.g., *Hodison v. Rogers*, 137 Kan. 950, 22 P.2d 491 (1933); *Ex parte Ostatter*, 103 Kan. 487, 175 Pac. 377 (1918); *In re Ingram* 82 So. 2d 788 (La. App. 1955).

Under federal law habeas corpus will not be considered if the petitioner has failed to apply to or has been denied relief by the committing court, unless it is clear that the statutory remedy is inadequate or ineffective to test the legitimacy of his confinement.⁴⁸ In *Martin v. United States*⁴⁹ the court supported this position, stating:

The desirability of such procedure is apparent. The sentencing court is familiar with the case. The court in the district of confinement is unfamiliar with cases in which sentences have been imposed by other courts. The production of files, records, and witnesses is more convenient in the sentencing court. The court which heard the case and gave judgment thereon should have the opportunity and responsibility of hearing and determining attacks against the judgment.⁵⁰

Mr. Justice Vinson stated additional justification for the Federal rule in *United States v. Hayman*,⁵¹ stating:

[T]he few District Courts in whose territorial jurisdiction the major federal penal institutions are located were required to handle an inordinate number of habeas corpus actions . . . because of the fortuitous concentration of federal prisoners within the district.⁵²

For the impelling reasons herein presented, a model release statute must include an exclusive procedure, one that permits release only after review and approval by the committing court. Moreover, in order to remove the unjustifiable burden placed upon those district or circuit courts located in the same county as the mental institution, recourse to the writ of habeas corpus should be withdrawn.

THE MODEL PENAL CODE PROVISION AS A SUGGESTED STATUTE

The Model Penal Code Section 4.08⁵³ is carefully drafted and gives adequate coverage to each of the release recommendations considered in this note. The following pertinent sections illustrate the Code's comprehensiveness:

(1) When a defendant is acquitted on the ground of mental disease or defect excluding responsibility, the Court shall order

48. 28 U.S.C. § 2255 (1948), states:

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

49. 273 F.2d 775 (10th Cir. 1960).

50. *Id.* at 777.

51. 342 U.S. 205 (1952).

52. *Id.* at 213-14.

53. Tent. Draft No. 4 (1955).

him to be committed to the custody of the Commissioner of Correction [Mental Hygiene or Public Health] to be placed in an appropriate institution for custody, care and treatment.

(2) If the Commissioner of Correction [Mental Hygiene or Public Health] is of the view that a person committed to his custody, pursuant to paragraph (1) of this section, may be discharged or released on probation without danger to himself or to others, he shall make application for the discharge or release of such person in a report to the Court by which such person was committed and shall transmit a copy of such application and report to the district attorney of the county [parish] from which the defendant was committed. The Court shall thereupon appoint at least two qualified psychiatrists to examine such person and to report within sixty days, or such longer period as the Court determines to be necessary for the purpose, their opinion as to his mental condition. To facilitate such examination and the proceedings thereon, the Court may cause such person to be confined in any institution located near the place where the Court sits, which may hereafter be designated by the Commissioner of Correction [Mental Hygiene or Public Health] as suitable for the temporary detention of irresponsible persons.

(3) If the Court is satisfied by the report filed pursuant to paragraph (2) of this section and the testimony of the psychiatrists making such report, if the Court deems it advisable to hear their testimony, that the committed person may be discharged or released on probation without danger to himself or others, the Court shall order his discharge or his release upon probation, on such conditions as the Court determines to be necessary. If the Court is not so satisfied, it shall promptly order a hearing to determine whether such person may safely be discharged or released. Any such hearing shall be deemed a civil proceeding and the burden shall be upon the committed person to prove that he may safely be discharged or released. According to the determination of the Court upon the hearing, the committed person shall thereupon be discharged or released on probation on such conditions as the Court determines to be necessary, or shall be recommitted to the custody of the Commissioner of Correction [Mental Hygiene or Public Health], subject to discharge or release only in accordance with the procedure above for the first hearing. . . .

(5) A committed person may make application for his discharge or release to the Court by which he was committed, and the procedure to be followed upon such application shall be the same as that prescribed above in the case of an application by the Commissioner of Correction [Mental Hygiene or Public Health]. However, no such application by a committed person need be considered until he has been confined for a period of not less than six months from the date of the order of commitment, and if the determination of the Court be adverse to the application, such person shall not be permitted to file a further application until one year has elapsed from the date of any preceding hearing on an application for his release or discharge.⁵⁴

54. *Ibid.*

From this excerpt it is manifest that the recommendations of this note parallel the proposed provision, with the exception that the latter does not deny the right to habeas corpus. The comments to the Model Penal Code section indicate that the procedure is not exclusive of habeas corpus, and in this respect the Code should be changed to conform to the conclusions of this note.⁵⁵ The adoption of this construction in conjunction with the express provisions of the Code approaches the ideal procedure necessary to rational and constitutional treatment of patients excused from the consequences of an otherwise criminal offense by reason of insanity.

55. MODEL PENAL CODE § 408, comment 3 (Tent. Draft No. 4, 1955). "The proposed provision retains in the committing Court the exclusive power to discharge or release (*leaving aside habeas corpus*)." (Emphasis added.)