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Administrative Discharge Procedures for Involuntary Civilly-Committed Mental Patients: An Alternative

Historically, state practices governing institutionalization of mental patients have escaped serious challenge. Sparked, however, by a rising societal concern for individual rights1 and an increasing recognition of the pervasiveness of mental illness,2 litigators and commentators are now demanding a more critical examination of the treatment of mental patients. In accord with these realizations, this note will focus on involuntary, civilly-committed patients in state mental hospitals and will examine both highly protective systems recently enacted by some states as well as failures of discharge procedures in others. An alternative system, providing a second level of administrative review, with some improvements on judicial review, will be recommended for those states which currently maintain inadequate procedures and which realistically cannot or will not bear the cost of more protective systems.

IMPORTANCE OF ADEQUATE DISCHARGE PROCEDURES

Most litigation involving the rights of involuntary civil patients focuses on the lack of due process in commitment procedures and on deprivations and abuses occurring within institutions.3 Discharge procedures are largely ignored because it is assumed discharges were relatively easy to obtain. Inadequate funding and understaffing often make speedy discharges the only realistic goal of mental institutions.4 Moreover, judicial relief is available in some states when an administrative discharge is refused. In addition, with a result completely inapposite to the state's avowed goal of protecting society, a patient can sometimes

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1 Developments in the Law: Civil Commitment of the Mentally Ill, 87 Harv. L. Rev. 1190 (1974) [hereinafter cited as Developments].
2 Psychiatrists predict that one in ten persons will be afflicted with a serious mental illness. R. Rock, M. Jacobson & R. Janopaul, Hospitalization and Discharge of the Mentally Ill 1 (1968) [hereinafter cited as Rock].
obtain administrative discharge merely by threatening to sue.⁵ Institutions often lack staff time to devote to courtroom adjudication as well as motivation to appear. Similarly, they seek to avoid potential adverse publicity. Thus, unless a patient is truly dangerous, the institution usually will not contest the suit.⁶ These factors combined with a high rate of discharge⁷ might make proposed changes in discharge statutes appear unnecessary. The following considerations, however, demonstrate a compelling need for revision.

Proper discharge procedures could provide a valuable check on inadequate commitment protections, or they might serve to remedy a judgmental error.⁸ In addition, within institutions tragically inadequate funding⁹ and non-compliance with standards of the American Psychiatric Association¹⁰ have produced a situation which cannot be remedied by stricter commitment standards. For example, due to understaffing in one Texas hospital, 45 people on a ward of 134 had never been diagnosed.¹¹ Individual discharges do not always occur as fast as national statistics indicate.¹² In some instances, patients were even found to have been purposely retained because they were good, low-cost workers.¹³

The possibility of a patient obtaining a “too easy” discharge, such as by merely threatening suit, is itself troubling. The discharge is

⁵ Rock, supra note 2, at 241.
⁶ Id. at 235.
⁷ Brakel, supra note 4, at 136. Statistics show that in one year there were 495,077 admissions and 525,584 discharges. U.S. DEP’T OF HEALTH, EDUCATION, & WELFARE, MENTAL HEALTH STATISTICS, CURRENT FACILITY REPORTS: PROVISIONAL PATIENT MOVEMENT AND ADMINISTRATIVE DATA, STATE AND COUNTY MENTAL HOSPITALS, UNITED STATES, JULY 1, 1968-JUNE 30, 1969, at 5.
⁸ Rock, supra note 2, at 214.
⁹ In a brief filed in the Wyatt case, the lawyer for the plaintiffs stated that Alabama had allocated more funds for a sports hall of fame, a junior-miss pageant, a swine and cattle show, and maintenance of the White House of the Confederacy than for mental health programs. Offir, Revolution in Bedlam, PSYCHOLOGY TODAY, Oct. 1974, at 64.
¹³ Rock, supra note 2, at 228; Goldman and Ross, The Patients Who Shouldn’t Be In, PARADE, Nov. 11, 1956, pt. I, at 11, 17.
granted "against medical advice," a designation which might prevent future voluntary commitment. On the other hand, if a dangerous patient is released without medical approval, the public is inadequately protected.

Equally troubling is the phenomenon of institutionalization: a psychological reaction involving an increased dependence on the security and routine of the institution. While the patient remains in the hospital, community and family connections disappear and unused skills deteriorate. In other words, chances for release decrease as the length of commitment increases. The resulting passivity may help to explain the lack of discharge litigation, as patients must generally initiate their own suits.

**STATE DISCHARGE PROCEDURES**

Limited commitment, a model adopted in at least ten states, best protects a patient's right to liberty. Under such a scheme, the original commitment is statutorily limited to a period believed sufficient to effect improvement (usually six months). If, at the end of that period, the staff believes further commitment necessary, there must be a judicial hearing in which the state bears the burden of justifying extended hospitalization. Recommitment is usually limited to a year.

Less protective are periodic examinations required in more than thirty states. Although under this system patients are committed and released through judicial and administrative procedures, the hospital is also required to conduct periodic examinations (from every six months to "as frequently as practicable") to determine if the patient meets statutory standards for release. Even though some type of examina-
tion is guaranteed, making it less likely that patients will be “lost.”21 Opportunities to contest the institutional decision remain inadequate. Moreover, periodic examination requirements are sometimes simply ignored.22

Many states do not provide either alternative. Instead, administrative release procedures must be initiated by a doctor or someone working with the patient.23 Most statutes leave the initial release decision to the discretion of the hospital superintendent or his designated representatives.24 If an administrative discharge is denied or never sought, several judicial remedies are available. All states grant review of original commitments and the right to petition for habeas corpus.25 Additionally, 37 states and the District of Columbia26 provide a judicial hearing to contest continuing detention. Procedural requirements and guarantees range from requiring the patient to secure a physician’s certification of sanity27 to guaranteeing a free, independent psychiatric examination.28

This note is addressed to states29 without a statutory right to a judicial hearing as well as to those with an inadequate review of denials of administrative discharge. Despite the availability of judicial review and habeas corpus, such a hearing is constitutionally required under the due process clauses of the fifth and fourteenth amendments.30 Arguably, a second-level administrative review may more satisfactorily protect all interests than the judicial hearings presently utilized by many states.

21 Rock, supra note 2, at 225.
22 Id. at 218–19.
23 Brakel, supra note 4, at 136; Rock, supra note 2, at 52, 232. Some provide this in addition to the schemes discussed above. See Developments, supra note 1, at 1379 n.11.
25 Review is a natural part of the judicial procedure. Habeas corpus is available either at common law or by statute. Brakel, supra note 4, at 139. For habeas corpus provisions, see Developments, supra note 1, at 1381 n.22.
26 See Developments, supra note 1, at 1379–80 n.15.
27 See Developments, supra note 1, at 1380 n.21.

The patient or a relative may request that the patient be examined by a physician from the hospital. If the superintendent believes the patient should remain hospitalized and the doctor who examined the patient agrees, the patient cannot obtain court review. A patient is permitted to employ an outside physician at his own expense and an indigent patient may request the state to provide an outside physician. . . . [But] even if the patient is able to find a doctor to support him, the court may, under the statutes, simply dismiss the petition without a hearing.

Id.
29 Alabama, Arkansas, Montana, Nebraska, New Jersey, Oregon, Pennsylvania, Virginia, and Wyoming (New York and North Carolina also do not permit patients to request a hearing but there patients are committed under the more protective limited commitment system).
30 U.S. Const. amends. V & XIV.
Such an administrative system should be considered because it would protect both patients denied administrative discharges and those too passive to initiate any action on their own behalf. This administrative procedure would also be less costly and time-consuming than theoretically more protective schemes such as limited commitment and periodic examination.

CONSTITUTIONAL RIGHT TO A HEARING

Analogous Right-to-Hearing Decisions

Recent Supreme Court decisions require an administrative or judicial hearing whenever a government agency, federal or state, makes any determination that inflicts a "grievous loss" upon an individual. Since public mental hospitals are units of a state agency (the department of mental health), the requisite state action is easily found in a superintendent's determinations.

Upon first glance the "losses" involved in previous right-to-hearing cases differ conceptually from the loss resulting from an incorrect discharge determination. The parolee whose "conditional liberty" is revoked, and the welfare recipient whose benefits are terminated experience an immediate deprivation. Because the patient remains in the same situation when the state's justification for detention no longer exists, his loss appears less severe. Upon closer examination, however, the analogy strengthens. The right to liberty attaches when the justification for confinement, such as the need for treatment, no longer exists. Therefore, if the superintendent erroneously retains a patient in an institution when he actually meets the statutory criteria for release, the patient is being deprived of liberty beginning with the incorrect determination.

At least one court has implicitly relied on similar reasoning. The district court in *Ackies v. Purdy*, citing prior right-to-hearing cases,

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36 *Developments*, supra note 1, at 1386.
granted a bail hearing to a defendant detained prior to trial despite the lack of change in physical circumstances. The distinction between remaining in custody and losing welfare benefits was either ignored or deemed unimportant. The stakes are higher and a hearing even more important for a mental patient facing a potentially indeterminate stay than for a defendant who will eventually have a trial.

Distinguishing Rights Accorded Detained Prisoners

Although the right to a parole hearing has not been accorded to detained persons most similarly situated to institutionalized mental patients, prisoners eligible for parole, several important distinctions may be drawn between the two groups. An initial parole board determination affects only a privilege accorded by the state. In contrast, a superintendent's determination might abridge a patient's right to liberty, which, under Goldberg v. Kelly, requires greater protection.

The potential parolee already enjoys a more advantageous situation because his application is considered by several board members. Although some commentators lament the qualifications and potential social biases of parole boards, a decision is reached by combining the qualities and opinions of several board members. A mental patient, on the other hand, is subject to the judgment and prejudices of a single individual. Parole decisions are also more closely regulated by statute. The possibility of an indeterminate stay increases the importance of a correct determination for a mental patient. Thus, the denial of parole hearings is not a barrier to the right to a hearing for mental patients.

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89 See 1 PLI, Prisoners' Rights 203 (1972) [hereinafter cited as Prisoners' Rights]; Menechino v. Oswald, 430 F.2d 403 (2d Cir. 1970), cert. denied, 400 U.S. 1023 (1971).
90 Prisoners' Rights, supra note 39, at 271; The Parole-Release Decision, supra note 32, at 714.

Under Goldberg, the right to a hearing depends on the degree of loss rather than on the distinction between a right and a privilege. Nevertheless, the deprivation of a right remains more likely to satisfy the "grievous loss" standard.

41 The Parole-Release Decision, supra note 32, at 714.
44 Prisoners' Rights, supra note 39, at 292.
45 The doctor, often the real decisionmaker, is not always as qualified as may be supposed. Some doctors may suffer from an "institutional myopia," basing their judgments solely on the patient's adaptation to the hospital.
46 See Scarpa v. United States Bd. of Parole, 477 F.2d 278 (5th Cir. 1973).
Standards Mandating the Right to a Hearing

Some courts require a hearing when an individual might be injured by a governmental body or when an agency determination directly affects the legal rights of an individual. If a discharge determination were examined under such standards, a hearing would be required.

In other cases, the individual interest is balanced against the burden imposed on the government. Under such scrutiny, the patient's right to liberty would rank high as a protected interest while the government interest in discharge determinations, consisting of three conflicting goals, is more complex than in previous right-to-hearing cases. The government must limit costs while fulfilling its responsibilities: first, to a non-criminal who has merely deviated from a vaguely defined norm; and second, to the public who should be protected. Satisfactory resolution demands that commitment and discharge standards be narrowly drawn (a mandate also required by soaring hospital costs) while standards and procedures also must accurately identify dangerous persons. For such a complex decision, a hearing should be a minimal requirement.

In addition to the balancing test, courts also consider the impact of the determination. For example, in Hannah v. Larche, a citizen demanded a chance to appear before a presidential commission created to report violations of the Civil Rights Act of 1957 and recommend program changes to the President and Congress. A hearing was not required because the Commission's "function [was] purely investigative and fact-finding . . . . It [did] not make determinations depriving anyone of his life, liberty, or property." A due process hearing was required in Jenkins v. McKeithen involving a labor commission charged with investigating criminal activities, "exercis[ing] a function very much akin to making an official adjudication of criminal culpability." This "purpose" standard, when applied to a discharge determination which might result in unconstitutional detention, also strongly mandates a

\footnotesize{\begin{itemize}
\item See note 18 supra & text accompanying.
\item See cases cited note 32 supra.
\item Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886, 895 (1961) (hearing refused because the government's right to exclude aliens was "absolute" while the individual interest was "small").
\item 363 U.S. 420 (1960).
\item Id. at 441.
\item 395 U.S. 411 (1969).
\item Id. at 427.
\item If the patient is no longer in need of hospitalization, but he is detained because of an incorrect adjudication, his detention is unconstitutional under O'Connor.}

hearing.

**Inadequacies of Judicial Review and Habeas Corpus**

Appeal of the original commitment, a right granted by all states,\(^{58}\) does not satisfy the hearing requirement.\(^{67}\) In some states, the trial judge's decision is conclusive,\(^{58}\) and the validity of continuing detention may not be challenged.\(^{69}\)

Under some statutes, a habeas corpus hearing might supply adequate protection while in other states, an additional hearing would be required. Early statutes provided only for a review of the original commitment,\(^{60}\) but most states now grant a right to contest continuing detention.\(^{61}\) The writ, however, is an extraordinary remedy, sometimes available only after all state remedies have been exhausted and other statutory requirements satisfied.\(^{62}\) Unless a maximum waiting period is specified,\(^{63}\) such petitions are also subject to the delay characteristic of the judicial system. Even if a petition is granted, the ensuing hearing may not incorporate many of the protections guaranteed in a criminal trial. Moreover, the only remedy may be the reopening of sanity proceed-

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56 See note 25 supra.

57 In some states, the appellate court may choose not to review even the trial judge's discretion. See Dixon v. Jacobs, 427 F.2d 589 (D.C. Cir. 1970); Clendening v. McCall, 145 Ohio St. 82, 60 N.E.2d 676 (1945). Contra Covington v. Harris, 419 F.2d 617 (D.C. Cir. 1969) (review available).

58 E.g., IND. ANN. STAT. § 4-22-1-14 (Code ed. 1974).

59 The review on appeal is limited to the normal determination of questions of law. Rock, supra note 2, at 52; Graham v. Squier, 132 F.2d 681 (9th Cir. 1942), cert. denied, 318 U.S. 777 (1943).


In Ex parte Clarke, 86 Kan. 539, 121 P. 492 (1912), a provision requiring a superintendent's certificate was upheld because the legislature had a valid goal in allowing the superintendent to determine who was going to court. See Comment, Release Procedures Under the Pennsylvania Mental Health and Mental Retardation Act of 1966, 5 DuQ. L. Rev. 496, 499 (1967).

63 E.g., CAL. WELF. & INST'NS CODE § 5276 (West Supp. 1972) (within two judicial days of petition); DEL. CODE ANN. tit. 16, § 5126(b) (1975) (within five days after petition).
ings,\textsuperscript{64} requiring the patient to undergo a second hearing.

Prior decisions also suggest that review and habeas corpus alone supply less protection than is constitutionally required for they can only free a patient after an erroneous administrative determination resulting in a period of unconstitutional detention. Despite the availability of a post-termination review, welfare recipients are entitled to a prior hearing so they will not be erroneously deprived of their benefits.\textsuperscript{65} Similarly, revocation hearings are required even though, after reincarceration, the prisoner has a right to review and to petition for a writ of habeas corpus.\textsuperscript{66} Detained defendants also have a right to a bail hearing.\textsuperscript{67}

**Problems Inherent in the Judicial System**

Assuming that a discharge hearing is required, a procedure should be designed to adequately protect the patient's rights while minimizing the burden on the state. In reality, a balanced program may more likely be implemented than limited commitment, which provides greater protection but at a higher cost because of the judicial procedures required.

Under previous right-to-hearing decisions a judicial hearing is not required.\textsuperscript{68} Although a judicial hearing is usually presumed to offer the best protection of individual rights,\textsuperscript{69} the lack of judicial expertise in understanding mental illness and deficiencies in present judicial discharge procedures\textsuperscript{70} suggest an administrative system may better serve both the patient and the state.

**Personal Barriers**

Mental patients seldom resort to the courts for a variety of reasons. Because of lack of education or the debilitating effects of drugs,\textsuperscript{71} a patient may be incapable of understanding possible court remedies. The cost might also be prohibitive.\textsuperscript{72} Moreover, courtroom formality, de-

\textsuperscript{64} The Expanding Role, supra note 62, at 528.
\textsuperscript{66} Morrissey v. Brewer, 408 U.S. 471 (1972).
\textsuperscript{70} Note, supra note 15, at 219.
\textsuperscript{71} Developments, supra note 1, at 1398.
\textsuperscript{72} Id.
signed to heighten respect, may, for a person who has lost self respect and confidence, evoke fear. Institutionization may compound this fear and rob a patient of the initiative required to begin court proceedings. Finally, patients may be reluctant to agitate within the institutional community because of possible hostility or even punishment from the staff. These problems are presently partially solved only by those states which require automatic judicial review.

**Statutory Barriers**

In addition to internal inhibition, statutory requirements often impede the vindication of a patient's rights. Jurisdiction is sometimes limited to the committing court. When the institution is not located near that court, a patient with little money (or without personal control over his estate) may face severe logistical problems. Furthermore, complications arise once a patient reaches the courthouse. Some judges burdened by overcrowded dockets may be inclined to dismiss mental patients' petitions as frivolous. Even if a hearing is granted, crowded dockets may force patients to wait several months in the institution. There are, of course, no special provisions for release pending trial because the patient is still under his original commitment order.

Procedural rules further complicate the discharge process. In most states, the patient bears the burden of proving his own sanity. With "clear and convincing evidence" he must overcome two presumptions: that the adjudicated insanity continues to the present time and that the hospital staff is correct in its refusal to discharge. Additionally, patients may have trouble obtaining evidence as even the right to talk

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74 See text accompanying note 15 supra.


77 B. ENNIS & L. SIEGEL, RIGHTS OF MENTAL PATIENTS 46 (1973) [hereinafter cited as ENNIS & SIEGEL].

78 Landever, supra note 75, at 469.

79 Developments, supra note 1, at 1382; Overholser v. O'Beirne, 302 F.2d 852 (D.C. Cir. 1962).


82 Comment, supra note 80, at 279.

to "outside people" is sometimes severely limited by hospital rules.84

Patients must also contend with such vague standards as "mental illness,"85 a term courts have struggled with for years in the context of the insanity plea. Statutes requiring a demonstration of restoration to sanity86 are also unrealistic in light of the present state of legal psychiatry. Indeed, even a "normal person" would be hard-pressed to affirmatively show that he was legally sane.87 Discharge decisions are also based on "unwritten standards" extraneous to the patient's mental health, such as availability of work and willingness of friends and family to care for him.88 Even if the patient fulfilled the criteria required in the state statute, his release might be withheld if he could not show someone or something was waiting for him.89

**Inadequate Safeguards**

With a paternalistic desire to minimize the trauma and publicity of a formal trial,90 legislators denied mental patients many of the safeguards guaranteed in a criminal trial. For example, although the patient has notice since he or a friend must initiate the judicial procedure,91 the patient is sometimes denied an opportunity to be heard.92

Very few states grant a right to counsel in discharge proceedings.93 Even if counsel is guaranteed, patients may have trouble finding a lawyer willing to represent them.94 Lawyers often believe that the determination of sanity is solely a medical question,95 or they may refuse to accept a case from a mental patient believing that it is probably frivolous or futile.96

At least as important as the right to counsel is the right to an

84 Id. at 655.
85 E.g., HAWAII REV. STAT. § 334-76 (1968).
87 Note, supra note 83, at 655-56.
88 ROCK, supra note 2, at 217-18.
89 Developments, supra note 1, at 1385.
90 In light of O'Connor v. Donaldson, 95 S. Ct. 2486 (1975), it is clear that such standards are no longer constitutionally acceptable. If a patient is not dangerous (the placement of the burden of proof is not specified), the hospital cannot retain him without treatment. The Court left undecided the question whether treatment justified the commitment and involuntary detention of a non-dangerous person.
91 Comment, supra note 80, at 1003.
94 Comment, supra note 80, at 1003.
95 ROCK, supra note 4, at 140.
96 ROCK, supra note 2, at 238.
97 BRADEN, supra note 4, at 139.
independent psychiatric examination. At present, however, few states provide a free examination. Advocates of this right claim that patients examined by an institutional psychiatrist are subject to biases which hinder a fair evaluation. The staff psychiatrist will have originally refused to release the patient or may have worked closely with the psychiatrist who made the original discharge decision. Furthermore, an institutional psychiatrist's judgment may be based on the patient's behavior within the institution rather than his mental condition demonstrated by psychological tests.

**Administrative Discharge Model**

*Defects in Present Administrative Discharge Procedures*

Although most statutes require the superintendent of the hospital to make discharge determinations, in reality this task is usually delegated to a doctor. Advocates of this system stress the importance of the familiarity, that staff members have with both the patient and his treatment program. However, such familiarity, even if shown to exist, may not be wholly advantageous. Because staff physicians may see patients individually as infrequently as twice a year, their decisions are often based on reports by nurses or aides with little or no psychiatric training. Moreover, the doctor often places undue emphasis on the patient's adjustment to the institution.

The power to deny release may also be used as a threat to force

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97 See text accompanying note 18 supra.
98 Brakel, supra note 4, at 149-52 (tables).
99 See note 45 supra.
100 Although behavior seems to be a logical factor in determining mental health, judging a patient by his reaction to the mental hospital may be very misleading. Some commentators assert it may be a sign of mental health to react with hostility toward the institution instead of accepting its routines passively. C. Newman, Sourcebook of Probation, Parole and Pardons 335 (3d ed. 1968) [hereinafter cited as Newman].
101 Rock, supra note 2, at 230.
102 Brakel, supra note 4, at 136; Newman, supra note 100, at 335.
104 In addition, empirical studies have not supported the accuracy of institutional decisions. One Veterans Administration study showed that patients judicially discharged contrary to the institutional judgment demonstrated a better rate of adjustment to the community than those administratively discharged. Shawver & Boquet, A Survey of Patients Discharged by Court Order, 33 Information Bulletin 29 (U.S. Veterans Administration, Department of Medicine and Surgery, Psychiatry and Neurology Service, Sept. 21, 1956). These statistics do not mean courts are the best place for discharge determinations; instead they merely indicate that the institutional judgment is not infallible. Rock, supra note 2, at 241.
105 See sources cited in note 4 supra.
compliance with hospital regulations. Such mistakes and abuses are not easily checked because of the low visibility of the institutional process. Further, the dispersal of authority results in a lack of uniformity in discharge standards even within a particular hospital.

Another deficiency in the present administrative discharge system is the lack of patient-initiated procedures. Although a patient may persuade his doctor to recommend a discharge, there is no formal provision for a patient himself to file a discharge application. Since there is no way to ensure consideration of a patient’s condition in those states where periodic review is not required, the tragedy of a "lost" patient is an ever present danger.

Although defects in present administrative discharge processes are obvious, a strong argument can be made for their retention as a first level if supplemented by subsequent review. Since most patients are quickly and efficiently discharged, supplemental proceedings on behalf of the relatively few disappointed patients might feasibly be initiated by an official intermediary. Such a system, however, would be lacking in two respects. Under existing structures, the only possible decisionmakers would be the superintendent or a judge, both incorporating above-mentioned defects. In addition, society would still be endangered by premature releases granted patients threatening suit.

The proposed second level administrative proceeding could provide a convenient and relaxed forum at a relatively low cost due to the small number of cases requiring extended review. Similarly, the state would have an opportunity to justify continued detention without the time, cost, and publicity of a judicial hearing.

Second Level Administrative Review

Because of defects in both the judicial and administrative systems, a second level of administrative review might be more protective of

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106 Newman, supra note 100, at 335.
107 Id.
108 Usually the decision rests totally on the doctor’s discretion, but on one ward in a midwestern hospital, the patients vote on discharges at a group meeting. Rock, supra note 2, at 230.
109 Rock, supra note 2, at 225.
110 See text accompanying note 7 supra.
112 The decreased visibility might be similar to the situation in which a doctor makes his discharge decision. See text accompanying note 101 supra. The use of a panel, however, should reduce the possibility of arbitrariness.
patient's rights.

Working from office space within the institution, an ombudsman could initiate discharge proceedings, monitor and publicize substandard living conditions, and investigate patient grievances. Moreover, if a patient's first request for discharge were refused, the ombudsman could then begin proceedings for the second level of review.\(^{118}\)

Some statutes seek to involve lawyers, psychiatrists, and social workers, to assist courts with discharge determinations.\(^{114}\) Because courts normally defer to the expert panel's decision,\(^{115}\) it would serve efficiency to eliminate judicial participation by allowing a panel to bring its informed judgment to bear on the crucial determination.

Because relatively few patients will require a second level administrative hearing, strict procedures could be adopted to protect their rights without unduly burdening the state.

In order to reduce fear and create familiar surroundings, the hearing might be held in the hospital rather than in a courtroom.\(^{116}\) The resulting convenience as well as the reduction in time, cost, and publicity would also encourage hospital authorities to press more vigorously their view in contested cases. Before the hearing, the review panel should consider the hospital records as well as the superintendent's justification for continued hospitalization and social worker's reports on the patient's family, community, and availability of work.\(^{117}\) Since institutional doctors could no longer be considered neutral,\(^{118}\) the patient should also be afforded an independent psychiatric examination.\(^{119}\) The waiting period between the application and the hearing

\(^{113}\) An ombudsman should have legal training and at least some experience in social work. Although attracting such a person might prove costly for the state, the burden could be reduced by staffing the office with students in law or social science. Landever, supra note 75, at 496. The role would demand conscientious people who could work within the institution while monitoring its inadequacies. In order to escape staff identification with the institution, the independence of the role should be stressed.

\(^{114}\) The Expanding Role, supra note 62, at 533.

\(^{115}\) Special Committee to Study Commitment Procedures of the Association of the Bar of the City of New York, Mental Illness and Due Process 122–23 (1962).

\(^{116}\) In Great Britain, which established regional Mental Health Review Tribunals under the Mental Health Act of 1959, each panel has at least three members: a lawyer, usually as president; a doctor; and a lay member with experience in public affairs or social service. C. Greenland, Mental Illness and Civil Liberty 22 (1970).

\(^{117}\) The required interval following an unsuccessful hearing should be reasonably related to the time in which the patient is expected to improve. Developments, supra note 1, at 1392.

\(^{118}\) Such reports are utilized by the Mental Health Review Tribunals. Wood, Mental Health Review Tribunals, 10 Medicine, Science, and the Law 86, 88 (1970).

\(^{119}\) Sarzen v. Gaughen, 489 F.2d 1076, 1086 (1st Cir. 1973).

\(^{119}\) Dale v. Hahn, 440 F.2d 633, 638 n.10 (2d Cir. 1971).
should be limited to two weeks or less. During this time, the degree of formality should be chosen by the patient after reviewing his case with the ombudsman.

At the hearing, protective safeguards should be applied. Counsel should screen information presented to the panel and assist the patient with the presentation of his case. Because strict judicial rules are inapplicable, counsel need not be an attorney but rather a friend or member of the ombudsman's staff. In accordance with the constitutional right to be present at such proceedings, a patient would have a right to appear and be heard. Before the patient could be excluded or evidence withheld from him, there should be a showing of serious potential harm. Even though a jury is not required, the panel itself would supply community judgment in a situation where standards are less definite than those in a criminal statute.

Because commitment is based on the assumption that hospitalization will cure mental illness or will restrain dangerous people from harming themselves or society, the state should bear the burden of affirmatively proving the necessity of continued treatment or retention. If, however, the patient bears the burden of proof, the standard should be reduced from requiring an exhibition of total recovery to demonstrating that "conditions justifying [the original] hospitalization no longer exist." In order to obtain the appropriate balance of burdens, the presumption of continuing mental illness should disappear...

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120 This constraint will not overburden the panel because it will handle few applications in a geographically limited area.
121 Most right-to-hearing cases have held the proceedings need not be quasi-judicial. E.g., Goldberg v. Kelly, 397 U.S. 254 (1970).
122 Most commentators agree there is a right to counsel. Sokol, supra note 61, at 118-20; Landever, supra note 75, at 466; Lessard v. Schmidt, 349 F. Supp. 1078, 1092 (E.D. Wis. 1972), vacated and remanded on other grounds, 414 U.S. 473 (1974); Heryford v. Parker, 396 F.2d 393, 396 (10th Cir. 1968).
123 ENNIS & SIEGEL, supra note 77, at 11.
125 Such a requirement, however, requires special policing. Exclusion in discharge proceedings could be other than physical. For example, if the patient has been drugged in the institution, he might not have recovered from the effects of the drugs. Lessard v. Schmidt, 349 F. Supp. 1078 (E.D. Wis. 1972), vacated and remanded on other grounds, 414 U.S. 473 (1974).
126 The panel may gain insight into the patient's possible reaction by studying his reaction to evidence at the commitment hearing. Developments, supra note 1, at 1395.
128 Developments, supra note 1, at 1391-92.
130 Barket, supra note 4, at 461.
131 After O'Connor v. Donaldson, 95 S. Ct. 2986 (1975), "mental illness without more" will not justify continued retention.
after a reasonable period of hospitalization. In addition, the state should provide evidence in its possession otherwise unobtainable by the patient.\textsuperscript{181}

Finally, the panel, with its combined experience and knowledge of the community, can deal creatively with a patient who no longer needs hospitalization, but does require some attention, as well as with someone who simply has nowhere to go.\textsuperscript{182} Thus, a patient would be fairly judged, without many of the problems inherent in the judicial system. As a result, the ultimate resolution of cases will be more satisfactory for both patients and hospital authorities.

\textbf{CONCLUSION}

Discharge procedures vary considerably among states. A few have adopted the highly protective limited confinement system. Many, however, retain paternalistic statutes for the disposition of the "insane," which deny even rudimentary due process. This note prescribes for such states, as a minimal and perhaps temporary measure, an administrative review system which will meet constitutional requirements while imposing less of a burden than judicial review of each patient's case. Constructive legislative action is urged in this unsettled area of the law which is so susceptible to neglect.

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\\textsuperscript{181} Note, \textit{supra} note 83, at 658.

\textsuperscript{182} As the abuses existing within institutions and the lack of after-care is brought to light, groups are strongly advocating community mental health programs. See Schumach, \textit{Localization of Mental Aid Urged by Carey Study Unit}, New York Times, Jan. 26, 1975, at 1, col. 4. See generally Chambers, \textit{Alternatives to Civil Commitment of the Mentally Ill: Practical Guides and Constitutional Imperatives}, 70 \textit{Mich. L. Rev.} 1108 (1972).