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## THE COMMITMENT OF THE MENTALLY ILL IN VIRGINIA

WILLIAM A. WRAY

### PROBLEM IN GENERAL

One of the most distasteful and yet one of the most important and responsible fields requiring the intelligence and training of the lawyer is that covering the commitment of citizens to institutions for the mentally ill, epileptic, mentally deficient, and the inebriate. Comparatively few attorneys with the exception of Circuit, Corporation, Trial Justices, or County Court judges have been involved with initial mental patient commitment proceedings in Virginia until 1958. Section 37-62.1 of the 1950 Code of Virginia enacted during the 1958 session of the Virginia Legislature states:

In any proceeding for commitment under this article, the judge upon whose warrant such proceeding is being held shall ascertain if the person whose commitment is being sought is represented by counsel. If such person is not represented by counsel such judge shall appoint an attorney at law to represent such person in such proceeding. For his services rendered in connection with the proceeding for commitment such attorney shall receive a fee of ten dollars to be paid as a part of the fees and expenses of commitment as provided in § 37-75 of the Code of Virginia.

It is arguable that this new addition to the Virginia Code makes it mandatory that those persons whose mental competency is legally questioned by society be represented by counsel at proceedings held to determine such persons' mental condition. Since more Virginia lawyers will necessarily be involved in commitment proceedings before commissions authorized to hear such cases, a thorough analysis of the Virginia procedure governing mental commitments is appropriate.

To date very little concerning the interpretation of the statutes covering mental commitment has been handed down by the Virginia Supreme Court of Appeals, and there are relatively few case precedents on this subject in Virginia. The Supreme Court of Oregon in the case of *Wells v. Ellison*,<sup>1</sup> very adequately stated the care that should be given insanity adjudication procedure:

If there is any class of cases which should be conducted with the utmost care to observe all of the requirements of the statute, it is the cases conducted for the purpose of determining the sanity of a citizen.

Corpus Juris Secundum, *Insane Persons*, Section 14, page 68, similarly makes the following statement:

Proceedings for an adjudication of insanity or mental incompetency are required to be in strict compliance with the statutory requirements, a judgment declaring defendant to be a person of unsound mind being void in the absence of such compliance. A determination of insanity can be made only in the manner prescribed, and incompetency can be determined only in a proceeding brought for that purpose. Such statutes have been required to be strictly construed.

Due to numerous social, economic, and legal disadvantages of a citizen being adjudged mentally incompetent, it seems only just that society and our courts should require thorough, complete commitment statutes with strict interpretation thereof. The Virginia Mental Hygiene and Hospitals Department has reported that the State's mental institutions had an average daily population of 13,823 in the year ended June 30, 1958. The daily average figure was 13,710 in the previous year; thus the population of Virginia's mental hospital system has apparently begun another upward trend. The fact that so many of our citizens are committed annually to mental institutions further substantiates the need for a thorough analysis of our mental patient commitment statutes.

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<sup>1</sup> 133 Ore. 155, 289 Pacific 511 at 512 (1930).

It is important to note before going further that the Virginia statutes governing the commitment of mental patients, sections 37-61 through 37-225 do not now use the term "insane" to refer to all types of mental incompetency. The statutes use primarily the terms "mentally ill", "mentally deficient", "epileptic", "inebriate", and "feeble-minded". "Mentally ill" means any person *afflicted with mental disease* to such an extent that for his own welfare or the welfare of others, or of the community, he requires care and treatment. "Insane" means a person *who has been adjudicated legally incompetent* by a court of record or other constituted authority because of mental disease. "Mentally deficient" means any person afflicted with mental defectiveness *from birth or from an early age* to such extent that he is incapable of managing himself and his affairs, who for his own welfare or the welfare of others or of the community requires supervision, control or care and who is not mentally ill or of unsound mind to such an extent as to require his commitment to an institution for the mentally ill. "Feeble-minded" means a person who has been *adjudicated legally incompetent* by a court of record or other constituted authority because of intellectual defect. The term "inebriate" refers to those persons addicted to alcohol or habit-forming drugs while "epileptic" refers to one who is subject to a chronic nervous disease, characterized by fits attended by convulsive motions of the muscles and loss of consciousness.<sup>2</sup>

Although Section 37-180 provides generally that all of the provisions relating to the mentally ill shall apply to the mentally deficient, epileptic and inebriate and vice versa, there are some specific phases of procedure which differ depending upon whether a person is suspected of being either mentally ill, mentally deficient, epileptic or inebriate.

## METHODS OF COMMITMENT

There are generally four ways a person in this State can be legally committed to a State mental institution.

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<sup>2</sup> Code of Virginia § 37-1.1 (1950).

### I. *Voluntary Commitment*

According to Section 37-113, if an individual is in the early stages of being *mentally ill* and such person is desirous of submitting himself to treatment at a State institution, he may do so under certain conditions. First, the person desiring commitment must be a legal resident of Virginia. Secondly, he must voluntarily make written application for commitment or voluntarily allow such application to be submitted by another. By voluntary is meant to have at the time of the application for treatment, a. the mental competency to understand that he or another is applying for his commitment to a State mental institution for treatment and, b. the desire to receive such treatment. Thirdly, such voluntary applicant may be admitted as long as his commitment does not deprive any person of care or treatment who has been committed for treatment in that hospital or other institution for the mentally ill. This last condition seems to be within the discretion of the superintendent of the State hospital or colony to which the application is made.

Those persons who would qualify under the Code's definition of *mentally deficient* may voluntarily be committed to a State institution by authority of Section 37-216 if the application is made by such person's parent or legal guardian. It is assumed on the basis of Section 37-180 that the person gaining commitment under Section 37-216 must be a legal resident of Virginia; that his parent or legal guardian understands and is desirous of having such person committed to a State institution for treatment, and that the admission of such person to a State hospital will not deprive of care any person who has been committed for care and treatment in the hospital applied to or other institution for mentally deficient.

It is also assumed on the basis again of Section 37-180 and Section 32-373, that those persons who would qualify as *in-ebriate* or *epileptic* may voluntarily gain admittance to a State institution subject to the aforesaid conditions outlined under Section 37-113. Section 32-373 which provides for the voluntary commitment of *alcoholics* states:

Any person who, through the excessive use of alcoholic beverages has become unable to care for himself,

his family or his property, or has become a burden on the public, may voluntarily request direct admission to the hospital and clinic facilities established under §32-370. Admission to these facilities may be made also on application to the Division under the Department of Health and by courts of competent jurisdiction of the Commonwealth.

There is nothing in the Code that states the length of time a voluntary mentally ill or mentally deficient patient may receive treatment in a State hospital; but again it is assumed that such patient may receive treatment as long as such person, or in the case of mental deficiency, such person's parent or legal guardian desires further treatment, and the superintendent of the State hospital in which such person is receiving treatment is of the opinion that such person's residence does not deprive others previously committed.

## II. *Commitment for Observation*

A citizen of this State may be committed against his will to a mental institution without being adjudicated mentally incompetent under certain circumstances. Section 37-99 provides:

The judge of any circuit or corporation court or any judge of a county or municipal court upon written request of any respectable citizen accompanied by the certification of a duly licensed physician, who shall, if practicable, be the person's family physician, upon forms prescribed by the State Hospital Board, may commit to any State Hospital for observation as to his mental condition, any suitable person in his county or city *who is not inebriate or drug addict*. Such person *shall be entitled to be represented by counsel, at his own expense, at the hearing before the judge, and to have a physician of his own choice summoned, as provided in 37-64*. *A Commitment under this section shall not be deemed a final adjudication of the mental condition of the person committed, and shall not affect any right or privilege theretofore possessed by such person under the laws of this Commonwealth.* (Emphasis added.)

According to the above statute there is no such thing as having an inebriate or drug addict committed to a State hospital against his will merely for purposes of observation. Evidently, any patient of a State hospital who has gained admittance to such hospital as an inebriate or drug addict, has been legally adjudicated either voluntarily or involuntarily as an inebriate or drug addict.

It is important to note that under Section 37-99 it is not mandatory that the defendant be represented by counsel. Such person has the right at his own expense to be represented by an attorney if he so desires, but it is not the duty of the judge to insure representation by counsel. Likewise, paragraph (b) of Section 37-61.1, which gives authority to commit persons mentally ill or mentally defective for purposes of observation provides:

In any proceeding for commitment under the provisions of this article, the person whose commitment is being sought shall have the right to be represented, at his own expense, by counsel, of his choice. The judge upon whose warrant such proceeding is being held shall explain to the person being examined, if he is of such age and mental condition as to be able to understand, the nature and effect of the proceeding, that he has a right to be represented by counsel, and that he may have summoned a physician of his choice as provided by § 37-64.

Section 37-99 also gives the defendant the right if he so desires to have a physician of his own choice summoned, as provided in Section 37-64. The purpose such physician would serve under hearings authorized under Section 37-99 quoted *supra* is not clear. Section 37-64 gives the defendant the right under certain circumstances in *general commitment proceedings* to have a physician of his own choice sit as a member of the commission deciding the mental competence of the defendant. However, in hearings and commitments authorized under Section 37-99, the judge alone is given the power to decide whether or not the defendant will be committed for purposes of observation. Therefore, any physician summoned under Section 37-99 would evidently only be in a position to give his opinion by testimony to the judge determining whether or not the

defendant should be committed to a State hospital for observational purposes.

If a defendant be committed for observation, he cannot be legally detained for a period in excess of forty-five days.<sup>3</sup> However, if the person so committed makes application for further care and treatment as a voluntary patient subject to the provisions of Section 37-113 discussed previously, he may remain in the State hospital to which he was committed as a voluntary patient. Also, by authority of Section 37-102, a person admitted for observation may be committed as mentally ill, epileptic, or mentally deficient by the judge or trial justice originally acting in the case, upon the duly sworn certificate of the superintendent of a State hospital and one or more physicians of the hospital staff who have made a careful psychiatric study to determine his mental condition, that the patient is mentally ill, epileptic, or mentally deficient. It should be noted that it might be possible under commitments of this nature that the defendant be legally adjudicated mentally incompetent without representation by counsel which seems mandatory under Section 37-62.1 previously mentioned. It should also be pointed out that the judge in cases of this kind may commit, but is not compelled nor is it mandatory for him to commit persons as mentally incompetent under these circumstances.

### III. *Admission and Detainment on Petition and Certificate*

Section 37-103 of the Code of Virginia (1950) provides:

The superintendent of any State hospital or colony for the care and treatment of the *mentally ill* may, without an order of a judge or justice, receive into his custody and detain temporarily in the hospital or colony for the care and treatment of the mentally ill, a person whose case is certified by two licensed physicians, neither of whom is in any manner related to or connected by marriage with him or has any interest in his estate, after careful personal examination and inquiry,

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<sup>3</sup> Code of Virginia, § 37-100 (1950).



whose mental condition is found to be such that it would be for his safety and benefit to receive proper hospital care and treatment, and upon a written petition to the superintendent of the hospital or institution made by some responsible person or persons. (Emphasis added.)

The preceding statute pertains specifically to those persons classified as mentally ill. Section 37-104 states that Section 37-103 *supra* does not apply to inebriates or drug addicts. However, since Section 37-180 states generally that all of the provisions relating to the mentally ill shall apply to the mentally deficient and epileptic, it is assumed that a mentally deficient or epileptic person can be committed to a State hospital under this method. Section 37-106 provides that any person committed to a State hospital on certificate of two physicians may not be detained in excess of forty-five days. However, if a person admitted under Section 37-103 is found to be mentally ill, epileptic, or mentally deficient, the superintendent of the hospital or colony to which the person has been admitted shall notify the judge for the county or city from which the person was received.<sup>4</sup> It shall then be the duty of the judge or justice upon the receipt of the notification and order of commitment to execute the order.<sup>5</sup> It should be noted that Section 37-109 states that if the person "is found to be mentally ill, epileptic or mentally deficient" the superintendent should notify the judge. The inclusion of the terms mentally deficient and epileptic provides strength to the assumption that the mentally deficient and epileptic as well as the mentally ill may be committed on petition and certificate of two physicians.

Another point worth mentioning is the fact that Section 37-109 fails to state by what procedure the patient shall be ascertained mentally incompetent after his initial admission to the hospital or colony on petition and certification of two physicians. This is one of the many weaknesses of the sections of the Code covering commitment proceedings which necessitate the application of Doubtful Legal Procedures.

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<sup>4</sup> Code of Virginia, § 37-109 (1950).

<sup>5</sup> Code of Virginia, § 37-110 (1950).

#### IV. *General Commitment*

By "general commitment" is meant the adjudication and commitment of a person against his will to a colony or hospital as being mentally ill, mentally deficient, epileptic or inebriate.

##### A. Mentally Ill

Upon the receipt of a written complaint and the information of any respectable citizen alleging a person to be mentally ill, any circuit or corporation judge, or any trial justice when such person alleged to be mentally ill is in his county or city, shall issue his warrant ordering such person to be brought before him.<sup>6</sup> Also, the judge or justice has the authority under Section 37-61 to issue the warrant on his own motion.

The office of the Attorney General of Virginia, ruling on the effect of not issuing a warrant as prescribed under Section 37-61, stated on December 20, 1957:

It is manifest from the language italicized that this provision of the Virginia Code contemplates the issuance of formal process, i.e., a warrant, for the arrest of any person who is alleged, in the written complaint and information of any respectable citizen, to be mentally ill, epileptic, mentally deficient or inebriate; or who is believed by the specific judge or justice to be in such condition. Other of the general provisions relating to the commitment of mentally ill, epileptic, mentally deficient or inebriate, persons prescribe that the warrant of arrest shall be a part of the report of the commission; that one of the forms which the State Hospital Board is required to prepare for use—to the exclusion of all other forms in commitments and admissions shall be that of the warrant of arrest; . . . In light of the foregoing, I am of the opinion that the provision of Section 37-61 of the Virginia Code relating to the issuance of a warrant of arrest is mandatory and that the specified judge or justice is required

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<sup>6</sup> Code of Virginia, § 37-61 (1950).

to issue such warrant . . . I am of the opinion that the statutory procedure for the commitment of mentally ill, epileptic, mentally deficient or inebriate persons must be strictly followed and that no valid commitment may be made without compliance with the mandatory requirement for the issuance of a warrant of arrest prescribed in Section 37-61.<sup>7</sup>

Synonymous with the above opinion is the holding in the case of *Mallory v. The Virginia Colony For The-Feeble-minded*, 123 Va. 205, one of the few decisions handed down by the Virginia Supreme Court of Appeals which sheds some light on the interpretation to be given the commitment statutes. In that case no warrant was issued for committing the alleged feeble-minded person nor was there any petition inaugurating the proceedings. The court held under these facts that there was not substantial compliance with the requirements of the statute, and that the order of court under which the defendant hospital justified its custody of the petitioner was null and void.

After requiring the issuing of a warrant ordering the appearance of the alleged mentally ill person, Section 37-62 requires the judge or trial justice to summon two licensed and reputable physicians. If practicable, one of the physicians should be the physician of the person alleged to be mentally ill, and the statute forbids either physician being in any manner related to the defendant or to have an interest in his estate. The two physicians and the judge constitute the commission to inquire into whether or not the defendant is mentally ill, and for that purpose the judge shall summon witnesses to testify under oath as to the condition of the defendant.

Section 37-63 states by what method the defendant is to be adjudged mentally ill:

The physicians shall, in the presence of the judge or justice, if practicable, by personal examination of such person, and by inquiry, *satisfy themselves and the judge or justice that the person being examined shows sufficient*

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<sup>7</sup> Kenneth C. Patty, Attorney General, State of Virginia, December 20, 1957.

*evidence* of being mentally ill, mentally deficient, epileptic, or inebriate to warrant his commitment to a State hospital for observation. (Emphasis added.)

The preceding statute requires not only that the two physicians be satisfied that there is sufficient evidence of mental incompetency to commit the person as incompetent but also that the judge be so satisfied. What happens when the two physicians are satisfied and the judge is not? According to the Code, no citizen can be committed as mentally incompetent unless by order of the judge. Obviously the defendant is not going to be committed as mentally incompetent if the judge is of the opinion that such person should not be committed regardless of what opinion the two physicians might have. There is definite disagreement among various trial justices in this State on the position of the judge or justice under these circumstances, but it is the opinion of the writer that a judge who disagrees with the two physicians as to the mental condition of the defendant, has a *right* not to commit but a *duty* to commit such defendant.

Another interesting question that might arise from Section 37-62 is whether or not the judge or justice must be present at the commitment proceedings. The statute seems to infer that the judge or justice must be present, if practicable. The question then arises as to when might it not be practicable for the judge to be present. Again, it is the writer's opinion that it is mandatory for the judge to be present at the proceedings unless extraordinary circumstances make it impossible for him to be present. However, it should be noted that under commitments on petition and certification of two physicians, discussed previously, it is not necessary that the judge or justice have anything to do with the original commitment of the defendant. Also, if the person committed on petition and certification of two physicians be later found mentally incompetent, then it shall be the duty of the judge to issue the commitment order. Under these circumstances, the judge might never see the defendant who is committed.

Even less clear are the solutions to the problems which would arise when the two physicians are in disagreement. Section 37-64 reads as follows:

If the two physicians summoned under Section 37-62 do not agree, a third physician shall be summoned. If the person being examined request it, there shall also be summoned a physician of his choice, who shall sit with and be a member of the commission; provided that the fee and expense of such physician shall be paid by the person being examined.

If the original two physicians disagree and the judge and the newly summoned physician agree with the one de-lieving the defendant mentally incompetent, there would result a 3 to 1 decision in favor of commitment. Therefore, unanimous agreement is evidently not required for general commitment. If the fourth physician by request of the de-fendant is summoned, then there could possibly result in a 3 to 2 decision for commitment. The statute is certainly lacking in clearness as to the procedural requirements to be met by the commission in deciding upon whether or not the defendant should be committed, a decision that would seem to be of such importance as to require unanimous agreement.

### B. Mentally Deficient

Any reputable citizen of this State may petition to have another person committed to a State hospital as mentally deficient, provided the petitioner states under oath the circum-stances indicating the person named is mentally deficient. The petition must be filed in the circuit court of the county or corporation court of the city, or with the judge thereof in vacation, or before any trial justice in the city or county in which such alleged mentally deficient person is found. The petition must also state the names and financial condition of the person, if any, having the custody or control, and on whom he is dependent, together with the names of the parents, or guardian of the defendant, if a minor; or of the next of kin, provided any person occupying any one of these relations to the person suspected of being mentally deficient be known to the petitioner to be living in the county or city in which the petition is filed.<sup>8</sup>

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<sup>8</sup> Code of Virginia, § 37-194 (1950).

After the filing of the petition it shall then be the duty of the judge to issue a warrant ordering such alleged mentally deficient person to be brought before him. Also, the judge or justice shall summon the custodian, if any, of the defendant together with the parent, guardian or next of kin of such person if they are found in the county or city having jurisdiction over the matter. The judge shall further summon such other persons as are deemed competent to testify to the condition and circumstances of the defendant, including one physician and a certified clinical psychologist, if practicable, and if not practicable, two physicians, and to enter or issue an order fixing the time and place for the examination of the defendant.<sup>9</sup>

In *Robinson v. Winstead*, 189 Va. 100, a commitment was challenged on the ground that the guardian of the alleged feeble-minded person was not summoned. The court held that the procedural requirement of summoning the guardian is mandatory and jurisdictional and that if not complied with, the commitment would be void.

The composition of the commission determining the mental condition of an alleged mentally deficient person is outlined in Section 37-196 as follows:

The judge or the justice and the certified clinical psychologist and the physician, or the two physicians, one of whom shall, when practicable, be the family physician, and neither in any manner shall be related to or have an interest in the estate of the alleged mentally deficient person's estate, shall constitute a commission to determine whether or not such person is mentally deficient as alleged and whether such person is under such proper supervision, care or control as to insure the welfare of himself, others or the community.

Again there is no provision for the degree of agreement required of the commission members in order to commit the alleged mentally deficient defendant.

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<sup>9</sup> Code of Virginia, § 37-195 (1950).

### C. Inebriates and Drug Addicts

A person who has become dangerous to the public or himself and is unable to care for himself or his property or family and has become a burden on the public through the use of alcohol or habit forming drugs, shall be brought before a commission *in the same manner and under the same process as is provided for commissions of the mentally ill*. Any person found to be in such condition can be committed to a State hospital for the mentally ill as an inebriate. Any person committed to a State hospital for the mentally ill as an inebriate may be detained at such institution until the superintendent of that institution shall declare such person cured and restored to his normal condition.<sup>10</sup>

By authority of Sections 37-157 through 37-175, inebriates and drug addicts may be committed against their will to private institutions or sanitariums. The complaint to initiate such commitment must be submitted by a relative of the defendant residing in the county, city or town wherein the defendant resides, and if none, then by two friends. If the defendant is found to be in need of treatment he can be committed for a period not exceeding four months unless he consents to further treatment. As far as can be determined from the wording of the Code, the commission with the authority to commit inebriates or drug addicts to a private institution shall consist of three justices of the peace or one trial justice and two justices of the peace. Also, the defendant's physician or a physician practicing in the vicinity of the court is to be summoned to aid in the determination of the defendant's condition.

The commitment to private hospitals or sanitariums does not apply to inebriates alone. Any person who is found to be mentally ill, mentally deficient or epileptic may also be committed to private institutions instead of a State hospital upon the request of relatives or friends.<sup>11</sup>

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<sup>10</sup> Code of Virginia, § 37-154 (1950).

<sup>11</sup> Code of Virginia, § 37-126 (1950).

### D. Epileptics

The Code defines "epileptic" to mean "mentally ill" or "demented epileptic",<sup>12</sup> and since the statutes do not prescribe any particular or distinct procedure for the commitment of persons as epileptic, it is assumed that the same procedure that governs the commitment of the mentally ill shall therefore apply to the alleged epileptic.

### RIGHT OF APPEAL

Any person in Virginia who is adjudicated mentally ill, mentally deficient, inebriate or epileptic has the right to appeal from such decision. Such person shall within fifteen days after his adjudication as incompetent have the right of appeal to the court of record of the county or city to which appeals in civil cases from any court not of record in the county or city are taken. Such appeals shall be tried in the county or city in which the commission is held. If the defendant so desires, he may appeal from the judgment of the court of record to the Virginia Supreme Court of Appeals.<sup>13</sup>

If a person is held in custody as mentally ill, mentally deficient, epileptic or inebriate, he may have the question of his mental condition and detention determined by the filing of a writ of *habeas corpus* with the circuit or corporation court in which the institution is located.<sup>14</sup>

### CONCLUSION

At one time in the history of Virginia the determination of insanity was primarily within the power of three justices of the peace sitting together as a commission. The Virginia Legislature has made substantial improvements in mental commitment procedure since that time (e.g., establishing the require-

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<sup>12</sup> Code of Virginia, § 37-178 (1950).

<sup>13</sup> Code of Virginia, § 37-71.1 (1950).

<sup>14</sup> Code of Virginia, § 37-122 (1950).



ment that counsel represent defendants in such proceedings) but even today the Code is in need of revision in order to abolish uncertainty and conflicting interpretation.

Laws are for the protection of the people and in order to serve that valuable purpose, they should not be ambiguous and incomplete. If any class of citizens deserves fairness and protection, it is the unfortunates who are of unsound mind. It is encouraging to note that the American Bar Foundation has been awarded a grant of \$88,910 from the National Institute of Mental Health to conduct an 18-month field survey in five major metropolitan areas of the United States. The survey will examine procedures in the involuntary commitment and discharge of patients of mental institutions. The main objective of the study is to determine whether the rights of the patient, his family and society are being properly protected and whether legislative changes should be recommended.<sup>15</sup>

A similar study in Virginia would be very valuable. It might prove shocking to the citizens of this State if the number of void commitments could be ascertained and published. It is therefore sincerely hoped for the best interest of the people of Virginia that considerable attention for the purpose of improvement will be given to commitment procedure in the near future by our legislators in order to insure fair treatment and complete protection to the mentally afflicted.

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<sup>15</sup> Virginia Bar News, Vol. VIII, No. 2, Page 5. February 1960.