A Study of

COMMITMENT LAWS AND THE RIGHTS OF COMMITTED PERSONS

With Recommendations for Amending Minnesota Statutes

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December 15, 1948

Study By Eugene Heck
Under the direction
of F. M. Rarig, Jr.

INTRODUCTION

On May 15, 1947, Governor Youngdahl appointed an Advisory Council on Mental Health "for the purpose of getting expert advice and counsel in connection with the many problems of mental health that will arise in the crucial months ahead".

The Council undertook to review the recommendations of the various state departments responsible for the care of the mentally ill and to submit to the Governor broad recommendations for improving the state's services for the mentally ill. It was felt that its report would be incomplete unless it included recommendations for amending the laws relating to commitment and the rights of committed persons, so that those laws might be kept abreast with its other recommendations for the improvement of the state's facilities for the care of the mentally ill. In the spring of 1948 the Council decided to undertake a special study of those laws, and requested Mr. Frank Rarig, a member of the Council, to assume the major responsibility for the preparation of the report.

The Minnesota Unitarian Conference Committee on Mental Hospitals was very interested in the problem and was planning to make a study of it. When the Unitarian Committee learned that the Governor's Advisory Council was going to undertake a study of the laws relating to commitment it offered to merge its efforts with those of the Governor's Advisory Council. This offer was accepted and the Unitarian Conference Committee made available a grant of funds which was used for paying part of the salary of a research assistant, stenographic personnel, and other miscellaneous costs.

It was evident that the funds available from the Unitarian Committee would not be sufficient to finance the entire study and an application was made to the Minnesota Mental Health Authority for a grant of $600 to be used solely

in paying the stipend of the research assistant. The application was approved and a grant of $600 was made available. Mr. Eugene Heck, a senior law student at the University of Minnesota, was employed to do the research work on the recommendation of Professor Horace E. Read of the Minnesota Law School faculty. Mr. Heck made a very comprehensive study not only of the laws of Minnesota but of the laws of many other states. He read the available literature in the field both legal and medical and submitted a very comprehensive and carefully annotated report.

Because of the length of the report several summaries were prepared and distributed to interested individuals. Those summaries reflect the thinking of various groups that were consulted, and the final summary which was included as Section V of the Council's report to the Governor was amended to conform to the recommendations of the Advisory Council. A limited number of copies of this complete, unabridged report are being reproduced so as to preserve the results of the basic research work done by Mr. Heck. The recommendations do not conform exactly to the final recommendations of the Advisory Council, and the reader is referred to the Council's report to Governor Youngdahl dated January 10, 1949, for accurate information as to the final recommendations of the Council on this subject.

I. STIGMA

CAUSES

Attached to mental diseases is a stigma whose existence is mainly the result of ignorance and the historical association of mental diseases with supernaturalism, immorality, criminality, and pauperism.[1] Tending to perpetuate that

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1. See Weihofen and Overholser, Commitment of the Mentally Ill, 24 Tex. L. Rev. 307, 309-10 (1946); Vogel, Our Inadequate Treatment of the Mentally Ill as Compared with Treatment of Other Sick People, 56 Pub. Health Rep. 1943 (1941) Williams, Legislation for the Insane in Massachusetts, with Particular Reference to the Voluntary Admission and Temporary Care Laws, 173 Boston M. & S. J. 723-4 (1915); Gray, Insanity, and Its Relations to Medicine, 25 Am. J. Insanity 145, 153-4 (1868)

stigma are judicial commitment procedures which are analogous to criminal prosecutions,[2] and statutory language which has connotations of criminality.[3]

Mental disorders were once looked upon as divine or demoniacal visitations; and many people considered them to be divine retribution for moral perversion.[4] As recently as 1911 a brochure written by an English physician (Williams, Demoniacal Obsession and Possession as Causes of Insanity) ". . . . vigorously defended the belief in demoniacal possession as the cause of mental illness and advocated exorcism as its cure."[5]

Until the nineteenth century the indigent dangerous insane were treated as criminals while the indigent harmless insane were treated as paupers and petty thieves.[6] That attitude is eloquently illustrated by the first state statutes enacted to provide for the insane. For example, New York law stated, "Whereas, There are sometimes persons who by lunacy or otherwise are furiously mad or are so far disordered in their senses that they may be dangerous to be permitted to go abroad; . . . Be it enacted that it shall and may be lawful for any two or more justices of the peace to cause such person to be apprehended and kept safely locked up in some secure place, and, if such justices shall find it necessary,

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2. See Weihofen, Commitment of Mental Patients - Proposals to Eliminate Some Unhappy Features of Our Legal Procedure, 13 Rocky Mt. L. Rev. 99, 108 (1941); Vogel, supra note 1, at 1941-3; Hamilton, Kemof, Scholz, and Caswell, A Study of the Public Mental Hospitals of the United States 1937-39, Pub. Health Rep. Supp. No. 164-49 (1941); Deutsch, The Mentally Ill in America 430 (1937).

3. E. g., "The judge shall then inform him that he is charged with being insane, and inform him of his rights to make a defense to such charge . . . ." N. M. Stat. Ann. Sec. 37-203 (1941)

4. See Gray, supra note 1, at 153-4.
5. Deutsch, supra note 2, at 3.
6. See Weihofen and Overholser, supra note 1, at 309-10.

to be chained . . ."[7] When in 1797 the General Court of Massachusetts wished to provide care for the insane, it amended an existing act, which provided for the commitment of undesirables to the "House of Correction," so as to include "lunatic persons" within its purview. The act was entitled, "an act for suppressing and punishing rogues, vagabonds, common beggars, and other idle, disorderly, and lewd persons, and also for setting the poor to work."[8]

Unfortunately, the terminology of the commitment statutes and the commitment procedures in many states tend to perpetuate the connotations of criminality. The mentally ill may be apprehended by a sheriff, detained in a jail while awaiting a judicial hearing on the "charge of insanity", and if "convicted" may be manacled and transported to the hospital by the sheriff.

PRACTICAL EFFECTS OF THE STIGMA

The stigma retards both the mentally ill and their families from seeking treatment before the disease reaches advance stages.[9] It accounts for much of the public indifference to mental hygiene problems and thus hinders progress in that field.[10]

RECOMMENDATIONS

A public relations program designed to inform the public that a mental disease is an ailment and not a sin or crime is necessary. It should emphasize the curability of mental diseases, and the advisability of early treatment. People must be made to realize that mental hospitals can be equipped to cure mental illnesses and are not merely institutions of detention.

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7. Laws of N. Y., 1788 c. 31.

8. The Charters and General Laws of the Colony and Province of Massachusetts Bay, 1628-1779 page 334. Laws of Mass., 1797 c. 62, sec. 3.

9. See note 2 supra.

10. See Vogel, supra note 1, at 1943-4.

Statutory terms bearing connotations of criminality should be eliminated. For example, the term "convalescent leave" should be substituted for "parole".

Use of alternative methods of admission (voluntary admission for example) which minimize the judicial element as far as "due process" requirements will permit, should be encouraged.

II. PROCEDURES USED IN THE UNITED STATES FOR OBTAINING ADMISSION TO MENTAL HOSPITALS

Mentally ill[11] persons may enter mental hospitals either voluntarily or under compulsion of law.

A. VOLUNTARY ADMISSION

Forty-two states have enacted voluntary admission laws which enable a mentally-ill individual to obtain treatment without undergoing the inconveniences and humiliation entailed in the judicial commitment procedures.

In 1938 voluntary admissions constituted 15.1% of the total admissions in Minnesota, 17.4% in New Jersey, 22.7% in Utah, 25.3% in Kansas, 30.8% in Wisconsin, 39.2% in West Virginia, and 7.2% of all admissions throughout the United States.[12]

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11. Unless the contrary is stated, "mentally ill" will be used to designate those individuals who have not been convicted of or charged with a crime.

"Mentally ill person means any person of unsound mind and in need of treatment, control or care." 2.Minn. Stat. sec. 525.749 (1947) as amended Laws of Minn., 1947 c. 622, sec. 1.

12. Hamilton, Kempf, Scholz, and Caswell, supra note 2 at 50.

The Minnesota statute compares favorably with voluntary admission statutes enacted in other states. It provides:

> "Any person desiring to receive treatment at a state hospital or institution may be admitted to such hospital or institution upon his application, in such manner and upon such conditions as the director may determine. The superintendent of such hospital or institution shall detain such person during the time of such treatment as though he had been committed. If any person in writing demands his release, the superintendent of such hospital or institution may detain such person for three days after the date of such demand for release. If such superintendent deems such release not to be for the best interest of such person, his family, or the public, he shall, within said three days, file a petition for the commitment of such person to such hospital or institution in the probate court of the county wherein such hospital or institution is located." 2 Minn. Stat. 525.75 (1945) as amended Laws of Minn., 1947 c. 622, sec. 2.

Although some states permit "voluntary" admission of a minor upon application by his parent or guardian,[13] such a provision would apparently be unconstitutional in Minnesota. In the recent case of In re Wretlind,[14] the Minnesota supreme court stated, "Notice in commitment proceedings is not always practicable where the person sought to be committed is violently and dangerously insane. But those types of insanity or feeble-mindedness which

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13. E. g., Ariz. Code sec. 8-210 (Supp. 1945); Cal. Welf. & Instit. Code sec. 6602 (1944); Del. Laws 1945, c. 219, sec. 1; Mich. Stat. Ann. sec. 14.809 (1) (Supp. 1947) (written permission of a probate judge is also required); Nev. Laws 1947, c. 257, sec. 16 (a); N. Y. Mental Hygiene Law sec. 71; Ore. Comp. Laws sec. 127-214 (Supp. 1943); 1 Wis. Stat. sec. 51.10 (1947)

14. 32 N. W. 2d 161 (1948).

manifest themselves in harmless symptoms lend themselves to the orderly processes of a formal hearing and adjudication; and in such cases the constitutional mandates must be strictly observed by giving the person under inquiry not only adequate notice of the fact of a hearing and the purpose thereof, but also every opportunity to be heard before the order of commitment is issued. . . While the foregoing cases involve proceedings relative to the competency of adults, because of the humanitarian as well as the constitutional doctrines upon which they rest, they must be equally applicable to proceedings involving the competency of minors, who are ordinarily totally incapable of asserting or protecting their rights . . . . neither the child nor her mother or stepfather, who were adversary parties herein, could by their appearance in court, give the court jurisdiction over the child's person or waive her constitutional right to due process."[15]

B. COMPULSORY HOSPITALIZATION LAWS

In contrast to the voluntary admission laws are the compulsory hospitalization (commitment) statutes. 1. The necessity for such statues, 2. the inherent medical-legal nature of the commitment process, 3. the various types of commitment procedures, 4. the procedures recommended by medical men, 5. the obstacles hindering adoption of those recommendations and, 6. the specific recommendations for Minnesota will be discussed in the following sections of this report.

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15. Id at 167. Emphasis supplied.

1. Necessity for Commitment Laws

Compulsory hospitalization statutes, (generally known as commitment statutes), are necessary to protect both the mentally ill and the public.

Unlike individuals suffering from organic diseases, the mentally ill are often unwilling or unable to understand the need for treatment and consequently refuse to consent to hospitalization even when it is advised by their families and physicians.[16]

Obviously, the community must be protected against those mentally ill individuals who are nuisances or are dangerous.

2. The Medical-Legal Nature of the Commitment Process

The main purpose of the commitment procedure is the primarily medical function of providing care and treatment for the mentally ill. But since that procedure often involves detaining the patient against his will or the will of his family, it is necessary, both for the protection of the allegedly mentally ill person and satisfaction of the "due process" clauses of the federal and state constitutions[17] to provide for judicial review or authorization of the commitment.

3. Types of Commitment Procedures

Examination of the various states' mental hygiene laws reveals that every state has at least one commitment procedure, with many states having alternative procedures. These procedures vary greatly from state to state,

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16. See Weihofen and Overholser, supra note 1, at 307; Parsons, Administrative Practices Dealing with the Admission of Persons to Hospitals for Mental Diseases, Pub. No. 9 of the American Association for the Advancement of Science 309,310-1 (1939).

17. ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . . "U. S. Const. Amend. XIV, sec. 1.

"No person shall be . . . deprived of life, liberty, or property without due process of law." Minn. Const. Art. 1, sec. 7.

differing mainly: (a) in the extent to which they require judicial review or authorization of commitment, (b) in the time for obtaining judicial review or authorization and (c) in the characteristics of the judicial process. The variances are largely caused by: (a) the different conceptions of what constitutes "due process", (b) the degree to which "railroading" of a normal person is feared,[18] and (c) the type of care and treatment (hospitalization for an indefinite period of time, temporary hospitalization for observation, or temporary hospitalization in emergencies) the procedure is intended to make available.

There are three basic types of commitment procedures: (a) judicial commitment - in the great majority of states an allegedly mentally ill person may be hospitalized for an indefinite period of time only after his mental health has been investigated by a court or commission and a judicial decree ordering commitment has been issued; (b) commitment by medical certification - a few states, however, permit the superintendents of mental hospitals to admit and detain allegedly mentally ill persons upon medical certification of the illness; but then the patient or someone in his behalf may demand and receive as a matter of right, a judicial hearing; (c) temporary commitment - in addition many states provide for temporary hospitalization in emergencies or for observation (generally temporary commitment for observation requires a court order but temporary commitment in emergencies does not).

(a) judicial commitment - although many states permit temporary commitment without a court order, the great majority of states require a judicial order as a pre-requisite to indefinite hospitalization. Generally, such

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18. Fear that a normal person may be railroaded into a mental hospital has caused some states to require elaborate judicial procedures for the ascertainment of sanity. See Weihofen, supra, note 2, at 99. For example, in Texas no one may be committed for more than 90 days without a jury trial. Tex. Stat., Rev. Civ. art. 31930-2 (Supp. 1943). And in many states a jury trial may be had on request. E.G., Ky. Rev. Stat. sec. 202.080 (1946); Mich. Stat. Ann. sec. 14.811 (Supp. 1947); 1 Wis. Stat. sec. 51.03 (1947).

order may be obtained only after:

(1.) an application for commitment has been filed with a court,

(2.) notices of the pending hearing is served upon the allegedly mentally ill individual[19] or upon some other person[20] if such notice would be ineffective or detrimental.

(3.) the individual's sanity is investigated by the court assisted by one or more physicians at a hearing (a few states require the individual's presence at the hearing;[21] but some states allow the individual to be examined

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19. E.g., Conn. Gen. Stat. sec. 1731 (1930); Ky. Rev. Stat. sec. 202.060 (1946) ("if of legal age . . . The parents of the defendant, if living, if their residence be known to the petitioner, or if there be neither parent nor guardian whose residence is known to the petitioner, then some near relative, if his residence is known to the petitioner, shall also be notified of the proceedings."); N. M. Stat. Ann. secs. 37-202-3, 37-207 (1941); Ore. Comp. Laws Ann. sec. 127-206 (Supp. 1943).

Statutes not providing for notice have been held invalid. In the matter of Lambert, 134 Cal. 626, 66 Pac. 851 (1901); People ex rel. Sullivan V. Wendel, 68 N. Y. Supp. 948 (Sup. C. 1900) (court implied due process defect might be cured by providing for notice to some one on behalf of allegedly mentally ill person). Smoot, The Law of Insanity, sec. 157.

20. E.g., "The Court. . . may dispense with . . . personal service . . . or may direct substituted service to be made upon some person to be designated by it. The court shall state in a certificate . . . its reason for dispensing with personal service of such notice . . . in such cases the court shall appoint a guardian ad litem to represent such mentally diseased person upon such hearing, and in other cases it may appoint such guardian ad litem." Mich. Stat. Ann. sec. 14.811 (Supp. 1942). Wisconsin allows the judge to dispense with notice when it would be "injurious or without advantage to the patient". Notice "may" be given to others. 1 Wis. Stat. sec. 51.02. Provision for discretionary notice, however, in a 1941 Illinois amendment caused the Attorney General to recommend a veto, which was acted upon by the Governor. For criticism of this action, see Illinois Legislative Council, Pub. No. 52, Commitment to Mental Hospitals 35 (1942), and Veto of the Illinois Mental Health Bill, 36 Ill. L. Rev. 747 (1942)

21. E.G., Idaho Code Ann. sec. 64-202-7 (1932); N. M. Stat. Ann. sec. 37-202-4 (1941) (". . . if the patient is too ill to appear in court or if it would be detrimental to the mental or physical condition of the patient, the judge may hold the necessary hearing at the bedside of the patient.); S. C. Code sec. 6229 (1942).

"in or out of court,"[22] or allow the judge to dispense with the individual's presence at the hearing whenever he thinks it advisable, or whenever doctors certify that the individual's presence would be injurious to him.[23] Massachusetts even permits the judge to commit an individual without seeing him)[24] and

(4.) a judicial decree ordering commitment has been issued.

Minnesota commitment proceedings are commenced by the filing of a petition in the court of the county of the patient's settlement or presence.[25] In Ramsey County the petition is filled out and filed by the county attorney at the request of the petitioner who may be any "reputable resident"[26] of the county. The court commissioner performs that function in Hennepin County. After filing "the court may, if it determines that the best interest of the patient, his family, or the public is thereby served, direct the sheriff, or any other person, to take the patient into custody and confine him for observation and examination, in any licensed hospital or any other place or institution consenting to receive him."[27] In Ramsey County the patient is customarily detained at Ancker Hospital while awaiting the judicial hearing. General Hospital or some other local hospital is used for the same purpose in Hennepin County. The patient must be examined by the court "at such time and place . . . as the court determines;"[28] and notice

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22. E.g., Mass. Ann. Laws C. 123, sec. 51 (1942); 1 Wis. Stat. sec. 51.02 (2) (1947).

23. E.g., Ky. Rev. Stat. sec. 202.130 (1946); Mich. Stat. sec. 14.811 (Suppl. 1947).

24. E.g., Mass. Ann. Laws c. 123, sec. 51 (1942) ("Said judge shall see and examine the alleged insane person, or state in his final order the reason why it was not considered necessary or advisable to do so.")

25. 2 Minn. Stat. sec. 525.751 (1945) as amended Laws of Minn., 1947, c. 622, sec. 3.

26. Ibid.

27. Ibid.

28. 2 Minn. Stat. sec. 525.752 (1945) as amended Laws of Minn., 1947, c. 622, sec. 4.

of the hearing must be served upon the patient and such other persons as the court determines.[29] At the hearing the court must be assisted by two doctors appointed for that purpose.[30] If the allegedly mentally ill person is financially unable to afford an attorney, and if he requests counsel or is held for observation, the court must appoint counsel for him. "In all other cases the court may appoint counsel . . . if it determines the interest of the patient requires counsel."[31] Ramsey County customarily appoints someone to act as both attorney and guardian ad litem. The petitioner is represented by the county attorney.[32]

In Ramsey County the complete hearings are held at Ancker Hospital; while in Hennepin County the court commissioner,[33] the two examining doctors, and the patient's attorney "visit" the patient at General Hospital and then adjourn to the court commissioner's office where the hearing is completed and final disposition of the case is made. Those patients who are sent to the University Hospital are returned to the county of origin for a final judicial hearing. If the judge or court commissioner presiding at the hearing finds that the patient is mentally ill, a warrant of commitment "committing the patient to the custody of the superintendent of the proper state hospital, or to the superintendent . . . of any private licensed hospital for the care of mentally ill persons," is issued to the "sheriff or any other person,[34] and the patient is then delivered to the proper hospital." Thus the filing of a petition

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29. Ibid
30. Ibid
31. 2 Minn. Stat. sec. 525.751 (1945) as amended Laws of Minn., 1947, c. 622 sec. 3.
32. Ibid
33. "The court commissioner may act upon a petition for the commitment of a patient when the probate judge is unable to do so." 2 Minn. Stat. sec. 525.763 (1945) as amended Laws of Minn., 1947, c. 622, sec. 10.

34. 2 Minn. Stat. sec. 525.753 (1945) as amended Laws of Minn., 1947, c. 622, sec. 5.

and issuance of a court order are the only pre-requisites to temporary detention of a mentally ill person. Filing of a petition, service of notice upon the patient, appointment of counsel for the patient in some cases, examination of the patient by a court assisted by 2 doctors and issuance of a warrant of commitment are the pre-requisites to commitment for an indefinite period of time.

While this type of procedure affords maximum protection against commitment of normal people, it has disadvantages which have prompted several criticisms:

(1) The judicial nature of the process has connotations of criminality which gives rise to a stigma making the patient's family reluctant to seek hospitalization.[35]

(2) The prolonged judicial procedure enhances the suffering of the patient and his family.[36]

(3) The delay in obtaining hospitalization and the elements of the judicial procedure may aggravate the patient's condition.[37]

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35. Weihofen, supra note 2, at 108; Hamilton, Kempf, Scholz, and Caswell, supra note 2, at 48-9; Deutsch, op. cit. supra note 2, at 430.

36. Weihofen, supra note 2, at 105-6; Deutsch, op. cit. supra note 2, at 430.

37. Kansas Legislative Council, Psychiatric Facilities in Kansas: Objectives of a State Program 5 (1946); Deutsch, op. cit. supra note 1, at 430; Myers, Commitment Laws in California and elsewhere, 39 California and West Med. 313, 317 (1933); Blumer, The Commitment, Detention, Care and Treatment of the Insane in America, 50 Am. J. Insanity 538, 539-40 (1894).

Among the features considered most objectionable are compulsory service of notice upon the alleged mentally ill person, compulsory attendance of the mentally ill person at the judicial hearing, detention of the mentally ill person in jail while awaiting the hearing or transportation to a mental hospital, and use of police officers to apprehend and transport him.

In an attempt to circumvent many of these disadvantages New York adopted alternative commitment procedures which allow commitment without a court order when immediate treatment is needed, but require a court order and an opportunity for a judicial hearing if the patient is to be detained longer than the stated statutory period.[38]

The New York Mental Hygiene Law allows temporary commitment on certification by a health officer or 2 physicians.

> "The . . . physician in charge of any state hospital . . . or of any licensed private institution for the care and treatment of the mentally ill, may, when requested by a health officer, receive . . . in such hospital . . . as a patient for a period not exceeding sixty days . . . any person who needs immediate care and treatment because of mental derangement . . . Such request for admission of a patient based upon a personal examination shall be in writing and shall be filed at the hospital or institution at the time of his reception, together with a statement in a form prescribed by the commissioner giving such information as he may deem appropriate. . .
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> "Unless the patient shall sign a request to remain as a voluntary patient . . . the health officer making application shall cause

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38. N. Y. Mental Hyg. Law secs. 72, 73, 74, 75.

such patient to be examined by one or two certified examiners,[39] and if found mentally ill the director or the physician in charge shall cause him to be duly admitted under the provisions of sections seventy-three or seventy-four of this act, or, if found sane, shall cause him to be removed therefrom before the expiration of said period of sixty days . . . A report of the admission of a patient for observation under the provisions of this section together with copy of the statement of health officer shall be mailed to the department within ten days after such admission." N. Y. Mental Hyg. Law, sec. 72.

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39. A certified examiner is:

"1. A reputable physician, a graduate of an incorporated medical college, duly licensed to practice medicine in this state, who shall have been in the actual practice of his profession for at least three years at the time of his certification as such, shall be and become a certified examiner. A person who shall have had full two years of post graduate study in psychology at an incorporated university or college and three years of actual clinical experience at the time of his certification as such, shall be and become a certified psychologist. Certified examiners and certified psychologists shall be authorized to act as such when the facts of their qualifications shall have been certified by a judge of a court of record in a form prescribed by the commissioner. The original certificate shall be filed in the office of the clerk of the county in which the certified examiners and certified psychologists reside, and a certified copy thereof filed and recorded in the office of the department of mental hygiene and its receipt for such filing and recording duly acknowledged. Persons who now are duly certified medical examiners in lunacy or in mental defect or psychologists, pursuant to the former provisions of this chapter or of the mental deficiency law, are hereby continued as certified examiners and psychologists, respectively, without compliance with the provisions of this section. The department shall keep a list of all certified examiners and psychologists.

2. The commissioner may revoke or suspend the license of any certified examiner or certified psychologist if, after notice and a hearing he determines that the licensee has violated any provisions of this chapter or has violated any law in the course of his acts as a certified examiner or certified psychologist, or has made a material misstatement in his application for such license, or has been guilty of fraudulent or dishonest practices, or has demonstrated his incompetency or untrustworthiness to act as a certified examiner or certified psychologist. If any person aggrieved shall file with the commissioner a verified complaint setting forth facts tending to show sufficient ground for the revocation or suspension of the license of any certified examiner or . . . psychologist . . ." the commissioner may revoke the license after a proper hearing. N. Y. Mental Hyg. Law sec. 19.

Registration of physicians qualified to examine patients for commitment is a common requirement.

> ". . . in a case where the condition of such person is such that it would be for his benefit to receive immediate care and treatment, or where there is no other proper place available for his care and treatment, or if he is dangerous by virtue of his mental condition so as to render it necessary for public safety that he be immediately confined, he shall be . . . received by such institution upon a certificate, executed by two certified examiners after examination and upon a petition . . . By virtue of such certificate and such petition, such mentally ill person may be retained in such institution for a period not to exceed ten days, from and inclusive of the date of the certificate . . . The director or person in charge of any such institution may refuse to receive such mentally ill person upon such certificate and petition, if in his judgment the reasons stated in the certificate are not sufficient or the condition of the patient is not of such character, as to make it necessary that the patient should receive immediate treatment." N. Y. Mental Hyg. Law, sec. 75.

Patients committed under the above provisions cannot be detained longer than sixty days and ten days respectively unless they sign requests to remain as voluntary patients or unless further detention is ordered by the court. That order may be obtained in the following manner. A verified petition accompanied by a certificate made by 2 certified examiners must be filed with the court.[40] Notice of the petition must be served upon the allegedly mentally ill person unless in the opinion of the judge such notice would be "ineffective or detrimental" or if "the certified examiners state in writing, under oath," that personal service upon the mentally ill person would, in their opinion, be detrimental to such person. Whether or not personal service is dispensed with, if the petition is made by a person other than the nearest relative, notice must be served upon the nearest relative known to be within the county; otherwise upon the person with whom the allegedly mentally ill person resides or at whose home he may be, or in their absence, upon a friend of the allegedly mentally ill person; and if there be no such person or persons, such service must in writing

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40. Id. Sec. 74 (1).

be dispensed with.[41] Upon the demand of any relative or near friend in behalf of the alleged mentally ill person, the judge must, or he may upon his own motion, issue an order directing a hearing. He must hear the testimony introduced by the parties and examine the alleged mentally ill person if deemed advisable, in or out of court, and render a decision in writing as to the need of such observation. Such examination of the patient is optional with the judge. If it is determined that the person is in need of observation, the judge must forthwith issue his order directing the patient's admission to a mental hospital.[42] Whether or not a hearing is demanded the judge may immediately commit the allegedly ill person for a sixty day period of observation.[43] If the superintendent of the institution to which the patient has been committed for observation "finds that such patient is in need of continued care and treatment", he may "file in the office of the county clerk, a certificate setting forth his findings and the need for the continued care and treatment of such patient. Upon the filing of such certificate, the order theretofore made by the judge becomes a final order and such patient must thereafter remain in such institution, or any other institution to which he may be transferred, until his discharge in accordance with the provisions of this chapter."[44]

When the patient is incapable of making voluntary application, but does not object to hospitalization he may be admitted to a mental hospital ". . . on a verified petition made as required by section seventy-four, accompanied by a certificate executed by a certified examiner on a form prescribed by the

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41. Id. sec. 74 (3)

42. Id. sec. 74 (5)

43. Id. sec. 74 (4)

44. Id. sec. 74 (7)

commissioner and dated not more than ten days before the date of admission." He may not be "detained therein more than sixty days if he, or any person in his behalf, shall make written request for release, unless the director or physician in charge thereof shall deem such detention necessary, and shall so certify, after due notice of such application is given or dispensed with as provided with respect to notice of application for an order in subdivision three of section seventy-four, to a judge of a court of record, who may in his discretion, forthwith, issue an order certifying such person to such institution for care, custody and treatment." (N. Y. Mental Hyg. Law, sec. 7)

(b) Commitment by medical certification - - using a procedure praised by men who have administered it,[45] and by the Committee on Forensic Psychiatry of the Group for the Advancement of Psychiatry,[46] a few states permit the superintendents of the mental hospitals to admit and detain mentally ill persons for an indefinite period of time without court order upon the presentation of an application and the certification of 2 physicians.[47] Unwarranted detention is

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45. Dr. Hilding Bengs, Director of the Pennsylvania Bureau of Mental Health, Dr. Arthur P. Noyes, Superintendent of the Norristown State Hospital (Pennsylvania) Dr. H. K. Petry, Superintendent of the Harrisburg State Hospital (Pennsylvania) Dr. George H. Preston, Maryland Commissioner of Mental Hygiene, and Dr. Arthur H. Ruggles, Superintendent of the Butler State Hospital, Providence, Rhode Island praise this type of procedure. See letters in appendix and see Comment, Analysis of Legal and Medical Considerations in Commitment of the Mentally Ill, 56 Yale L. J. 1178, 1191 note 60 (1947)

46. Group for the Advancement of Psychiatry, Rep. No. 4, (April 1948).

47. Maryland, New Hampshire, Pennsylvania, Rhode Island and Vermont require the certification of two physicians, Louisiana requires certification by the coroner and one other physician. In Pennsylvania and Vermont both the application and the physician's certification must be notarized by a judge or magistrate; and in New Hampshire, the certificates must be notarized by a "judge of the superior or probate court, a county commissioner, mayor, or city clerk, or a justice of the municipal court of a city, or one of the selectment of a town, or the town clerk."

prevented by requiring the superintendent to either discharge the patient upon request or immediately institute proceedings for judicial commitment. Although it would seem that there would be a great demand for discharge, Dr. Frederick C. Redlich, Assistant Professor of Psychiatry and Mental Hygiene of the Yale University Medical School,has stated that most committed patients believe that they should remain in the hospital and do not resist proper care and treatment.[48] Dr. Redlich's statement is substantiated by information from those states which have adopted the "medical commitment" procedure. In Rhode Island, for example, ". . . resort to the court is not used once in four or five years."[49] and in Maryland,". . . well over ninety percent of /the/ patients never appear in court . . ."[50]

In order that the reader may gain a more detailed comprehension of this type of procedure a few of the medical commitment statutes will be quoted:

> La. Gen. Stat. Ann. sec. 3938.12 (Suppl. 1947). "Coroner's commitment. Upon the application of a near relative, or in the absence of relatives, a near friend, curator or other responsible citizen, accompanied by a certificate signed by the coroner and one other qualified physician, stating that a person is mentally ill, mentally defective, epileptic or inebriate, and is in need of observation or care in a mental hospital, the superintendent or chief officer of such hospital may receive such mental patient for such care and treatment as may be necessary.
>
> The application required by this section shall be the form prescribed by the department. Such form shall give the name, sex and residence of the person to be committed. It shall also state the reason why hospital care is needed, and shall give any other information which the department may deem requisite. The

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48. Comment, Yale L. J. supra note 36 at 1199, note 104.

49. Id. at 1199, note 105. See note 45 supra.

50. Ibid.

coroner and the other qualified physician who sign the accompanying certificate shall certify that they are not related by blood or marriage to the patient or the applicant or applicants; that they are not connected, except in a professional capacity, with the hospital where the patient is to be committed; that they have examined the patient within three days of the date of the application; that the patient is in need of observation for mental disease and hospital care. The certificate shall further state the facts and sources of information and personal observations upon which their opinion is based. The patient shall be admitted to the hospital not longer than fourteen days from the date of the examination of the patient by the coroner and physician, subject to the provisions of this section."

Md. Ann. Code art. 59, sec. 34 (Supp. 1942). "No person shall be committed to or confined as a patient in any institution, public, corporate or private, or almshouse or other place for the care and custody of the insane or idiotic except upon the written certificates of two qualified physicians of the State of Maryland made within one week after separate examination by them of said alleged lunatic and setting forth the insanity or idiocy of such person and the reason for such opinion. No certificate shall be of force which shall be presented for the commitment of any patient more than thirty days after date of examination.

34A. In addition to the methods otherwise provided by law for the commitment of lunatic or insane persons, such persons may be committed to institutions in accordance with the provisions of this section.

Whenever any person is shown to be a lunatic or insane by the certificates of two qualified physicians, as provided in Section 34 of this Article, the Superintendent, chief officer, or physician in charge of any State or licensed private institution for the care, custody or treatment of insane persons, or if such person is a veteran of any war, military occupation or expedition, the official in charge of any United States Veterans Hospital, within the exterior geographical boundaries of the State of Maryland, may receive and retain such person as a patient upon the written request of any member of his family, or near relative or friend, or the person with whom he resides, or an officer of any charitable institution or agency; provided, however, that such person, or anyone in his behalf, may make a request in writing to said Superintendent, chief officer, or physician for the discharge of such person and such request shall be complied with unless said Superintendent, chief officer, or physician shall

be of the opinion that the mental condition of such person requires his further detention, in which event said Superintendent, chief officer, or physician shall retain the custody of such person and shall forthwith file a petition, in accordance with Section 22 of this Article, for the purpose of having the sanity of such person determined, and if the Court shall commit such person to that or some other suitable institution, as provided by said section, he shall be confined thereafter until he shall have recovered, or shall be discharged in due course of law. The provisions of this Article relating to the discharge of recovered patients and to the payment of the expenses of maintaining persons in State institutions shall be applicable to persons entering such institutions under the provisions hereof.

Court costs incident to a proceeding under the provisions of this section, including the fees of the jury, court stenographer and bailiffs, shall be paid by the alleged insane person in whose behalf the proceeding is instituted. If such person has no property or estate the costs shall be paid (a) by the County or Baltimore City, as the case may be,which pays or is responsible for the payment for the maintenance of said person at such institution, or (b) if neither a county nor Baltimore City pays or is responsible for the payment for the maintenance of such person, the court costs shall be paid by the county or Baltimore City in which such person had his residence prior to his confinement.

22. Any person confined in any State or licensed private institution for the care, custody or treatment of insane persons, and any veterans of any war, military occupation or expedition confined in any United States Veterans Hospital within the exterior geographical boundaries of the State of Maryland, or anyone in his behalf, including the Superintendent, chief officer, or physician in charge of such institution, may file a petition in the Circuit Court for any county or a Court of law in the City of Baltimore, requesting that the person so confined be brought before said Court for the purpose of having the sanity of such person determined, and the Court shall forthwith proceed to hear and determine the matter; provided, however, that if the person so confined, or anyone in his behalf, shall pray a jury trial, the Court shall empanel a jury of twelve men to be selected by the Court from the jurors then in attendance upon said Court, or if the Court is in recess, the jurors shall be selected from those in attendance at the term of Court at which said petition is heard. Any party in interest shall have the right to process to compel the attendance of witnesses. If the Court or jury, as the case may be, shall determine that

such person is insane or is suffering from a mental disease, the Court shall order said person committed to the institution from which he immediately came, or to some other suitable institution, otherwise he shall be discharged."

N. H. Rev. Laws c. 17, sec. 11 (1942).
"11. Authority to Cause Commitment. Subject to the provisions of section 18, the parent, guardian, or friends of any insane person or the board of selectmen in towns or chief of police or his deputy in cities or board of county commissioners in counties may cause said insane person to be committed to the hospital, with the consent of the trustees, and there supported on such terms as they may agree.

18. Physicians' Certificates. No person shall be committed to the state hospital, except as otherwise specially provided, without the certificate of two reputable physicians that such person is insane, given after a personal examination made within one week of the committal. Such certificate shall be accompanied by a certificate of a judge of the superior or probate court, a county commissioner, mayor, or city clerk, or a justice of the municipal court of a city, or one of the selectmen of a town, or the town clerk, certifying to the genuineness of the signatures and the respectability of the signers. The physicians making such examination shall be legally registered to practice medicine in this state, and in the actual practice of their profession at the time of said examination and for at least three years prior thereto. They shall act jointly in making such examination, and their certificate shall bear the date thereof. Neither of said physicians shall be a relative of the person alleged to be insane, or an official of the institution to which it is proposed to commit him. The certificate of insanity shall be in the form prescribed by the commission of lunacy and shall contain the facts and circumstances upon which the judgment of the physicians is based.

Pa. Stat. Ann. tit. 50, sec. 42 (Supp. 1947)
"42. Whenever it shall appear that any person is mentally ill, or in such condition as to be benefited by or need such care as is required by persons mentally ill, the superintendent of any hospital for mental diseases may receive and detain such person, on the written application of any relative or friend, or the legal guardian of such person or any other responsible citizen, and on the certificate of two qualified physicians that said person is mentally ill and is in need of treatment and care in a hospital for mental diseases.

The application aforesaid shall be, in form, prescribed by the department, and shall state the name, sex, and residence of the patient, the opinion that said patient is mentally ill and that care in such a hospital is necessary for his benefit, and the facts on which the said opinions are based, and such other facts or information as may be required by the department. If the facts called for, or any of them, are unknown to the applicant or applicants, it shall be so stated in the application.

In the certificate, aforesaid, the physicians shall each state his residence, that he has resided in this State for at least three years; that he has been licensed to practice medicine in this State; that he has been in the actual practice of medicine for at least three years, or has had at least one year's experience as physician in a hospital for mental patients; that he is not related by blood or marriage to the patient, or to the applicant or any of the applicants; that he is not connected in any way as medical attendant, or otherwise, with the hospital to which application has been made for the admission of the patient; that he has examined the patient with care and diligence within one week; and that, in his opinion, the patient is mentally ill and in need of hospital care. He shall further state in said certificate the information, relative to the patient, given him by others, and the facts, as to the physical and mental condition and the behavior of the patient, which he has himself observed, on which he bases his opinion.

The aforesaid application and certificate shall be sworn to or affirmed before a judge or magistrate; and said judge or magistrate shall certify to the genuineness of the signatures, and to the standing and good repute of the signers of the certificate.

The certificate shall not authorize the admission of the patient unless the patient shall be admitted within two weeks of the date thereof." (1923, July 11, P.L. 998, art. III, Sec. 302.)

R. I. Gen. Laws c. 71, secs. 11-12 (1938).

"11. Insane persons may be removed to and placed in said Butler Hospital or any other curative hospital for the insane, of good repute, in this state, managed under the supervision of a board of officers appointed under the authority of this state, by their parents, or parent, or guardians, if any they have, and if not, by their relatives and friends; but the superintendent of said hospital shall not receive any person into his custody in such cases without a certificate from 2 practising

physicians in good standing, known to him as such, that such person is insane, and the state shall not be liable for the support of any such person except as provided in sec. 43 of this chapter.

12. Any person committed to the charge of any of said institutions for the insane as aforesaid, in either of the modes hereinbefore prescribed, may be lawfully received and detained in said institution by the superintendent thereof, and by his keepers and servants, until discharged in one of the modes herein provided; and neither the superintendent of such institution, his keepers or servants, nor the trustees or agents of the same, shall be liable, civilly or criminally, for receiving or detaining any person so committed or detained."

In Vermont the medical certification must be notarized by a judge or magistrate. If the allegedly mentally ill person appeals, he may not be admitted until the appeal is decided.

"4034. Physicians' certificate. A person, except as otherwise provided, shall not be admitted to or detained in a hospital for the insane as a patient or inmate except upon the certificate of such person's insanity made by two legally qualified physicians, residents of this state. Such certificate shall contain a statement that the physicians making the same are each legally qualified to practice as a physician in the state, and the reasons for adjudging such person insane. The physicians making such certificate shall not be members of the same firm; and neither shall be an officer of a hospital for the insane in this state, nor a member of the state board of supervisors of the insane.

4035. Oath; certificate of magistrate. Such physicians shall subscribe and make oath to such certificate before a magistrate authorized to administer oaths. The magistrate shall append thereto his jurat and certify therein that such physicians are of unquestionable integrity and skill.

4036. Certificate; when made. Such certificate shall be made and sworn to not more than twenty days before the admission of the insane person to the hospital for the insane, unless a longer time is required to dispose of an appeal taken from the decision of the physicians as provided by law, and shall be in the hands of the proper officer of such hospital at the time such insane person is received therein.

4037. Examination; penalty. Such certificate of the physicians shall be given only after a careful examination of the supposed insane person made not more than five days previous to making the certificate; and a physician who signs a certificate without making such previous examination, if the person is admitted to a hospital for the insane upon the certificate, shall be imprisoned not more than two years or fined not more than one thousand dollars, or both.

4042. Commitment pending appeal or without certificate; penalty. When an appeal is taken from the decision of such physicians as provided in the preceding section, such alleged insane person shall not be received in a hospital for the insane while the appeal is pending before the probate court. A trustee or other officer or employee of a hospital for the insane who receives or detains a person in such hospital whose insanity is not attested by a legal certificate, if one is required by law, which has not been appealed from, or a person who is not committed by a proper court, shall be imprisoned in the state prison not more than three years."

Del. Rev. Code as amended Laws of Del., 1939 c. 134. Sec. 3074 (1935) Insane Persons; How Admitted;- - - No person shall be received as a patient for permanent detention in the Delaware State Hospital at Farnhurst, except as follows: a certificate shall be made and signed by at least two physicians, residents of this State, who have been actively engaged in the practice of medicine for at least five years theretofore and who shall be residents of the same State and County as the alleged insane person, which said certificate shall be filed with the Superintendent of said Hospital. Said certificate shall be made within one week after the examination of such person and within two weeks of the time of the filing of the same with the said superintendent. Such certificate shall be signed by said physicians, who shall also make affidavit to the truth of the facts and statements therein contained, which affidavit may be made before any officer authorized to administer oaths within the State of Delaware."

Anyone who does not object may be committed upon petition and medical certification in Oklahoma and California.

(c) Temporary commitment - - - the third type of commitment procedure is temporary commitment. Used in emergencies or when observation is desired, this procedure is an auxiliary to the other methods previously discussed. Here too some states require court orders while others do not.

Immediate admission to a mental hospital upon application and medical certification of an emergency is necessary to give prompt treatment and prevent detention in jails (assuming that a mental hospital is available). Twenty-two states have adopted emergency commitment procedures. Since the procedure may be used only when immediate hospitalization is clearly necessary, and since the period of detention is temporary (ranging from two to sixty days), a few states require a court order. Of course, if prolonged detention is necessary, judicial commitment must be obtained.

The temporary commitment procedure for observation is generally similar to the regular judicial commitment procedure for indefinite hospitalization except that the judge specifies a limited period of hospitalization varying from ten to ninety days.

Although Minnesota does not have a temporary commitment statute, an allegedly mentally ill person may be apprehended and temporarily detained upon filing of the petition and issuance of a court order.[51]

The period of detention may be extended by subsequent court orders which postpone the hearing.

The temporary commitment laws of New York were discussed in preceding sections. Other states provide:

> Kentucky Revised Statutes 1946.
> "203.030 (1) The superintendent of any state institution, except those designated for the care of the criminal insane, shall, when requested by a health officer, receive and care for any person who needs immediate care and treatment because of mental derangement other than drug addiction or drunkedness. Such patient shall be received for a period not exceeding ten days from and inclusive of the date of request. The request for admission shall be based on a personal examination, and shall be filed at the institution at the time of his reception.

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51. In Minneapolis the allegedly mentally ill person is occasionally detained in local hospitals until further treatment becomes unnecessary. Commitment is thus avoided in many cases.

> 203.030 (2) If the superintendent and clinical director, or a staff physician acting in the latter capacity, find a patient to be a suitable person for care and treatment, they, or either of them, shall file a petition in the proper court for an inquest concerning the sanity of the patient as provided in K. R. S. Chapter 202 . . ."
>
> "202.130 No inquest shall be held unless the defendant is in court except when it appears from the oath or affidavit of 2 regular practicing physicians that they have examined him and that they believe that his condition is such that it will be unsafe or unwise to bring him into court, or except upon the presentation of an affidavit from the superintendent and clinical director, or a staff physician acting in the latter capacity, of the institution to which the defendant has been committed . . . /under 203/030 . . . that the defendant is insane."

Massachusetts allows the superintendents to admit and temporarily detain, upon written request of a "physician, sheriff, deputy sheriff, state police officer, police officer, or any agent of the institutions department of Boston", or upon certification by two physicians, any person who is dangerously insane or in need of immediate care and treatment. The state police or other specified officials must apprehend and deliver dangerous persons or persons in need of emergency treatment to the superintendents when requested by an applicant or certifying physician.

> Mass. Ann. Laws c. 123, secs. 77, 78, 79 (1942) Sec. 77. "Observation, Commitment for; Proceedings Thereafter.-- If a person is found by two physicians qualified as provided in section fifty-three to be in such mental condition that his commitment to an institution for the insane is necessary for his proper care or observation, he may be committed by any judge mentioned in section fifty, to a state hospital, to the McLean Hospital, or, in case such person is eligible for admission, to an institution established and maintained by the United States government, the person having charge of which is licensed under section thirty-four A, for a period of forty days pending the determination of his insanity. Within thirty days after such commitment the superintendent of the institution to which the person has been committed shall discharge him if he is not insane, and shall notify the judge who committed him, or, if he is insane he shall report the patient's mental condition to the judge, with the recommendation that he shall be committed as an insane person, or discharged to the care of his guardian, relatives or friends if he is harmless and can properly be cared for by them. Within the said forty days the commiting judge may

authorize a discharge as aforesaid, or he may commit the patient to any institution for the insane as an insane person if, in his opinion, such commitment is necessary. If, in the opinion of the judge, additional medical testimony as to the mental condition of the alleged insane person is desirable, he may appoint a physician to examine and report thereon.

In case of the death, resignation or removal of the judge committing a person for observation, his successor in office, or, in case of the absence or disability of the judge committing a person as aforesaid, any judge or special justice of the same court, shall receive the notice or report provided for by this section and carry out any subsequent proceedings hereunder.

Sec. 78. Temporary Care of Persons Violently Insane etc., without Order of Court. -- The superintendent or manager of any institution for the insane may without the order of a judge required by sections fifty and fifty-one, receive into his custody and detain in such institution for not more than five days any person whose case is certified to be one of violent and dangerous insanity or of other emergency by two physicians qualified as provided in section fifty-three by a certificate conforming in all respects to said section, which certificate may be filed with a judge, as the certificate required by section fifty-one. The officers mentioned in section ninety-five or any member of the state police shall, upon the request of the applicant or of one of the said physicians, cause the arrest and delivery of such person to such superintendent or manager. The person applying for such admission shall within five days cause the alleged insane person to be committed to or removed from the institution, and failing so to do shall be liable to the commonwealth, in the case of a state hospital, or to the person maintaining the institution, in the case of a private institution, for the expenses incurred and to a penalty of fifty dollars, which may be recovered in contract by the state treasurer, or the person maintaining the private institution, as the case may be.

Sec. 79. Temporary Care of Insane Persons Needing Immediate Care, etc. - - The superintendent or manager of any institution for the insane may, when requested by a physician, sheriff, deputy sheriff, member of the state police, police officer of a town, or by an agent of the institutions department of Boston, receive and care for in such institution as a patient, for a period not exceeding ten days, any person deemed by such superintendent or manager to be in need of immediate care and treatment because of mental derangement other than drunkenness. The physician shall be a graduate of a legally chartered medical school, shall be registered in accordance with chapter one hundred and twelve, or shall be a commissioned medical officer of the United States army, navy or public health service acting in the performance of his official

> duties, and personally shall have examined the patient within twenty-four hours of signing the request. Such request for admission of a patient shall be put in writing and be filed at the institution at the time of his reception, together with a statement in a form prescribed or approved by the department, giving such information as it deems appropriate. Any such patient deemed by the superintendent or manager not suitable for such care shall, upon the request of the superintendent or manager, be removed forthwith from the institution by the persons requesting his reception, and if he is not so removed, such person shall be liable to the commonwealth or to the person maintaining the private institution, as the case may be for all reasonable expenses incurred under this section on account of the patient, which may be recovered in contract by the state treasurer or by such person, as the case may be. The superintendent or manager shall either cause every such patient to be examined by two physicians, qualified as provided in section fifty-three, and cause application to be made for his admission or commitment to such institution, or cause him to be removed therefrom before the expiration of said period of ten days, unless he signs a request to remain therein under section eighty-six. The officers mentioned in section ninety-five or any member of the state police may transport the patient, or cause him to be transported, to the institution. Reasonable expenses incurred for the examination of the patient and his transportation to the institution shall be allowed, certified and paid as provided by section seventy-four."

Delaware permits admission to the "Psychiatric Observation Clinic of the Delaware State Hospital upon certification of one physician. The Clinic then reports its diagnosis to the "State Board of Trustees" of the "Hospital". The Board, in turn, appoints a six man jury (if a jury is requested) or a commission of two physicians who determine whether further detention is necessary. If the jury or commission so advises, the Board may admit the patient to the "Delaware State Hospital". "No investigation by the said Jury or Commission shall be had except in the presence of the said supposed insane person . . ." The Delaware hearing is conducted by hospital personnel but if the patient objects to its findings, he may appeal to a court.

Del. Rev. Code secs. 3072, 3074 (1935) as amended Laws of Del., 1939 c. 134:

"3072. Sec. 7. Psychiatric Observation Clinic; Patients; How Admitted; Duration of Observation:---The State Board of Trustees of the Delaware State Hospital at Farnhurst are hereby authorized to establish under the direction and supervision of the said State Hospital a psychiatric observation clinic for the observation, study, psychiatric diagnosis and treatment of persons suffering from mental and nervous diseases. Any physician licensed to practice medicine within this State, may, upon compliance with the rules and regulations of the said State Board of Trustees made from time to time, cause any patient under his care or treatment, who is suffering from mental or nervous disease, to be admitted to said Clinic for a period not to exceed four weeks at any one time for observation, study, diagnosis and treatment. Any patient so admitted shall remain in said Clinic for a further period or periods not to exceed four weeks' duration each, upon the request of the physician upon whose application such patient was admitted to said Clinic and with the approval of the said State Board of Trustees. Any person who shall be admitted into such clinic shall not be allowed to depart therefrom prior to the expiration of such four weeks period, or any extension thereof in case any such extension shall have been made, without the consent of the Superintendent of The Delaware State Hospital.

Upon the filing of such application it shall be the duty of the Psychiatric Observation Clinic of The Delaware State Hospital to observe and study the person mentioned in said certificate and report its findings to the State Board of Trustees of the said Hospital. If the report of the said Clinic shall be that the said supposed insane person should be admitted to the said Hospital because of mental diseases, the said State Board of Trustees are hereby authorized, empowered and directed to summon a jury of six responsible persons to determine whether such person is suffering from mental disease and shall be admitted to the said Hospital, if such jury shall be requested by any person related or connected with such supposed insane person by blood or marriage. If such jury shall not be requested, the State Board of Trustees shall appoint a commission consisting of two qualified and licensed physicians who shall determine whether such supposed insane person is suffering from mental disease and should be admitted into said Hospital, such report shall be sufficient for the commitment of such person, subject to the right of appeal hereinafter provided. No investigation by said Jury or Commission shall be had except in the presence of the said supposed insane person and the said Jury or Commission shall have power to take testimony and administer oaths.

> The said supposed insane person or any person related to or connected with him by blood or marriage, shall have the right to an appeal from the findings of said Jury or Commission to the Chancellor of the State of Delaware within ten days from the filing of the report of such Jury or Commission with the said State Board of Trustees. The members of said Jury or Commission shall receive such compensation as shall be fixed by general rule by the said State Board of Trustees. This Section shall not apply to or be construed to embrace commitments to said Hospital made by any Court of this State, as provided by law."

Dr. Frankwood E. Williams summarized the beneficial results of voluntary and temporary commitment laws as follows:[52]

(1) They tend to express in legal form the modern conceptions of mental disease; and without endangering the personal liberty of any individual; they emphasize his cause as a patient.

(2) They make it possible to provide early treatment, which is the most hopeful treatment;

(3) They protect the patient from himself and from unprincipled members of the community;

(4) They protect the family and community against the acts of the patient;

(5) They obviate in a large number of cases the delays, legal exactions, semi-publicity, and stigma of a legal declaration of insanity;

(6) They remove the hospitals from an isolated position in the community and make it possible for them to take their place as hospitals in fact as well as in name;

(7) They make possible a wider cooperation between the hospitals and the lay and the medical public.

Another important advantage is the fact that such laws also avoid the need for confining mental patients in jails while waiting for the court to act.

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52. See Williams, supra note 1, at 734.

The National Mental Health Foundation believes that temporary commitment for observation ". . . encourages early intensive diagnosis and treatment, [and] discourages a fatalistic attitude in the patient and his family concerning his illness. It provides a screening process for better placement of patients and keeps beds available for patients most apt to benefit or in the greatest need of facilities."

4. Recommendations of Medical Men

Medical men have constantly campaigned for simplified commitment procedures designed to make admission to mental hospitals as prompt and easy as "due process" requirements will permit.

In 1930 the Committee on Legal Measures and Laws to the First International Congress on Mental Hygiene made the following recommendations:

> "Admission to a mental hospital for treatment should be made as informal and easy as the Constitution and Laws of the country will permit. To this end, we further recommend . . . that the presence in court of the patient to be committed be not required, but within the discretion of the judge. . ."53

The Committee on Forensic Psychiatry of the Group for the Advancement of Psychiatry urges the adoption of procedures similar to those used in Louisiana, Maryland, New Hampshire, Pennsylvania, Rhode Island and Vermont.

> "The Committee believes that the certification by two physicians . . . is the ideal method of procedure. The Committee is unable to see any particular purpose in requiring the physicians to have certificates certified by a law judge or magistrate as required in Pennsylvania and New Hampshire. . .
>
> "The Committee believes that there is no need for the protection of the patient by the use of legal devices beyond the scope of habeas corpus and the provisions exemplified in the Maryland Law of 1944. [It] is . . . opposed to any procedure whereby the patient is served personal notice or required to appear in open hearings. The Committee does realize the need and usefulness of legal notice to kin and the practice of representation of the patient by proxy."54

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53. 1. Proceedings of the First International Congress on Mental Hygiene 61 (1932).

54. See note 46 supra.

Grover A. Kempf, Medical Director, United States Public Health Service, Associate Director, Mental Hospital Survey, recommends the enactment of a commitment law which requires judicial hearing only when requested by the allegedly mentally ill person or someone in his behalf.

(a) "For the admission of a patient when there is no definite emergency there should be a verified petition by any reputable citizen of the county filed with the county court or court of record, together with a certificate signed by two qualified medical examiners who have examined the patient within ten days of the date of filing the certificate. The verified copies of the petition and the medical certificate should be taken with the patient to the hospital.[55]

(b) The patient or someone in his behalf may demand a court hearing or jury trial before he is sent to a hospital or after he has been admitted to the hospital for temporary treatment.[56]

The judge of a court of record of the city or county should be empowered to appoint at State expense two qualified medical examiners to examine the person at the home or hospital or at the place most conducive to the health and comfort of the person. The opinion of the examiners should be submitted to the judge on special forms that are approved by the State mental hospital administration. The judge should have authority to set a date of hearing, call witnesses, and have the person brought before him if he deems it advisable. A medical certificate that it is inadvisable to have the person appear before the court should be sufficient evidence for the judge.

The notice of the hearing should be served on the nearest relative or friend or on the person himself in the discretion of the judge.[57]

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55. Kempf
56. Id. at 29.
57. Ibid.

(c) There should be legal provision for a rehearing within 30 days after legal commitment. When a person who has been duly committed to a mental hospital or when anyone in his behalf is dissatisfied with the decision of the judge, there should be a way to a rehearing of the case upon petition to a superior court. If the petition is approved the case would then be decided by jury in the legal manner prescribed by the State. However, there should be the proviso that anyone, except the committed person or his nearest relative or friend, who makes the appeal to the State supreme court for the rehearing should make a deposit or give bond for the payment of the costs of the rehearing and trial. The verdict of the jury should be final.[58]

It should be remembered that a writ of habeas corpus is always obtainable . . ."[59]

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58. Ibid.

59. Ibid. In many states the courts will not determine the question of sanity on a writ of habeas corpus; therefore some states specifically authorize the courts to determine that question upon issuance of a writ. E. g., Conn. Gen. Stat. sec. 1738 (1930). "All insane persons confined in an asylum in this state shall be entitled to the benefit of the writ of habeas corpus, and the question of insanity shall be determined by the court or judge issuing such writ, and, if the court or judge before whom such case is brought shall decide that the person is insane, such decision shall be no bar to the issuing of such writ a second time, if it shall be claimed that such person has been restored to reason. Such writ may be applied for by such insane person or on his behalf by a relative, friend or person interested in his welfare."

For the purpose of avoiding the stigma of a court hearing the National Mental Health Foundation, in its tentative proposals for a commitment law for rural areas advises adoption of a procedure, in which the commitment hearings are presided over by a District Public Mental Health Officer (an official appointed for that purpose.) The Foundation believes ". . . the attributes of any hearing, administrative or otherwise, besides the opportunity to hear and cross examine witnesses, is proper notice regarding the nature of the claims made, and the names of the parties who will appear in support of those claims. It is thought that the legal profession will have no objection to relieving courts of most commitments if essential guarantees for a fair hearing are maintained." Court hearings may be had if the patient or someone in his behalf so requests.

In the Foundation's procedure, the patient is first temporarily committed (after due notice and a hearing,) for observation and treatment. The Foundation states: "This sound principle encourages early intensive diagnosis and treatment, discourages a fatalistic attitude in the patient and his family concerning his illness. It provides a screening process for better placement of patients and keeps beds available for patients most apt to benefit or in the greatest need of facilities."

"If it is found after careful and thorough examination, of a person temporarily committed, that he is (1) mentally ill and in need of continued hospitalization and (2) that he either will benefit . . . because of continued. . . hospitalization or that hospitalization is necessary for his own protection or for the protection of the person and property of others, and these facts are certified by a qualified examiner and the hospital superintendent, commitment of the person to a state mental hospital shall be ordered after due notice and hearing by the District Public Mental Health Officer . . .

". . . at all such hearings the person supposedly in need of hospitalization shall have the right to hear all evidence presented, shall have the right

to representation by his attorney . . . and by a physician or a qualified examiner of his own choice. The person, the applicant, the superintendent, the person conducting the hearing or any interested party shall have the right to a record under oath of all proceedings at any hearing . . .

"Any person for whom application has been made to a state mental hospital may . . . demand . . . a court hearing . . .

". . . appeal from the . . . court shall be allowable as in all other cases . . .

"Admission shall be valid for six months only, at the end of which time a personal examination must be made . . . A written report by the hospital superintendent of such examination, the date thereof and the medical advisability for discharge or release on convalescent status of the patient shall be made to the District Public Mental Health Officer, the applicant, the patient's spouse, his family physician, and his guardian if any. The District Public Mental Health Officer shall designate a time (within 20 days of the superintendent's report) and place (preferably at the hospital where the patient is being cared for) /for another/ hearing . . . /as/ prescribed for the original commitment.

"In all commitments . . . the superintendent of the admitting hospital shall transmit a copy of the District Public Mental Health Officer's order, and a certification of the relevant dates, the examining physicians . . . the application, hearing, the physical and mental condition of the patient when admitted and the placement by the hospital, . . . to the State Department of Health and Welfare and one copy to the County Clerk of the county of the admitted person's residence. The superintendent shall certify in like manner the fact of a patient's release on convalescent status, his escape for more than thirty days, or his discharge from the hospital."

Also recommended by medical men are the temporary non judicial commitment procedures.

In 1930 the Committee on Legal Measures and Laws to the First International Congress on Mental Hygiene stated: "Laws also should be adopted as speedily as possible for the temporary care and study without formal commitment of patients upon the recommendation of a physician, as well as for provision for the commitment of patients for a period of observation."

Dr. Kempf recommended adoption of temporary commitment laws with the following characteristics:

(a) "It should allow" the emergency admission of a patient to the hospital for observation and treatment on the written recommendation of a health officer or a reputable, licensed practicing physician who is registered as a qualified examiner. A definite reason for the emergency should be stated.

(b) The law should specifically state that any person who, in the opinion of two qualified physicians not related by blood or marriage to the person, is mentally ill and is in need of treatment . . . shall be admitted to the hospital upon presentation of the patient to the hospital with a verified petition from a responsible relative or friend of the patient and a certificate signed by two qualified physicians. The patient should have been examined within 7 days of the signing of the certificate and presented at the hospital within 2 weeks of the signing of the certificate. The superintendent of the hospital to which the patient is to be taken should be asked beforehand whether or not there is a vacancy for the patient. The requirements for a qualified examiner should be that he is a graduate of an incorporated medical college, has been in active practice at least 2 years and is registered to practice medicine in the State and also registered with the court of the county in which he resides.

(c) A copy of the emergency admission order should be delivered to the judge of the county court for his information but not approval.

(d) Emergency admission should be for 30 days with unlimited extension of treatment when there is no written request by the patient or anyone in his behalf for a discharge. The superintendent should be authorized to retain the patient for an indefinite period unless he or someone in his behalf signs a request for his release. When this request is signed and the superintendent is of the opinion that the patient is in need of further hospital treatment he should be required to request court commitment of the patient within 7 days after the written request for release is made. The superintendent should be authorized to discharge or release such a patient at any time he deems it to be advisable.

5. Basis of Opposition to Simplified Admission Laws

The chief obstacle (assuming that legal "due process" requirements can be satisfied) barring nation wide adoption of simplified commitment procedures, similar to those existing in Delaware, Louisiana, Maryland, New Hampshire, Pennsylvania, and Rhode Island is the common fear that normal people may be "railroaded" into mental hospitals.

Although there have been actual cases of "railroading" and attempted "railroading",[60] the opportunity for successful collusion has been exaggerated by the frequent use of "railroading" as a plot device in fictional writing, and by patients whose very illness causes them to blame others for their commitments.[61] Frederick W. Parsons, Commissioner of the New York Department of Mental Hygiene 1926 to 1937, has said, "As a matter of fact, after a long experience involving thousands of cases the writer is convinced that patients practically never are sent to mental hospitals as a result of conspiracy."[62]

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60. See note, 145 A.C.R. 711 (1943)
61. Deutsch, op. cit. Supra note 2 at 417-8
62. See Parsons, supra note 16, at 312

Similar statements have been expressed by other psychiatrists and hospital officials.[63]

It is significant that the supreme courts of the states which have simplified commitment procedures do not receive any more cases in which "railroading" is alleged than do the courts of other states.[64]

6. Recommendations for Minnesota

Providing care and treatment in the most efficacious manner is the ultimate object of any commitment procedure; and therefore the procedure should be designed to provide legal protection for the community, the patient, and his property without compromising the patient's medical welfare. In keeping with that principal, the following recommendations are submitted.

It seems to be unquestioned that medical commitment procedures used in such states as Maryland, New Hampshire, and Pennsylvania are most humane to the mentally ill and their families. Therefore, Minnesota should add to its present commitment procedure an alternative procedure which would allow the superintendents of the state mental hospitals to admit, (or refuse to admit if they so desire), mentally ill, mentally deficient, or senile patients upon the presentation of a verified petition accompanied by the certification of two qualified physicians.

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63. "I have been in psychiatry for over thirty years . . . In all this time I have seen only two attempts at railroading, and neither of them was successful." Bowman, Presidential Address, 103 Am. J. Psychiatry 1,11 (1946).

"In my ten years in mental hospitals I can only think of two patients who were improperly committed and even in them that mistake was readily excusable. . ." Communication to the National Mental Health Foundation from Dr. Robert A. Clark, Clinical Director of the Western State Psychiatric Institute and Clinic in Penna. April 23, 1947, cited in Comment, 56 Yale L. J. 1178, 1182 No. 16 (1947).

64. This information is derived from examination of the malicious prosecution and false imprisonment sections of West's Digest, "a digest of all . . . decisions of the American courts as reported in the National Reporter System and State Reports."

Unwarranted detention could be prevented by the following provisions: (a) the physicians would be required to certify the patient's condition on certificates prescribed by the chief of the State Mental Health Unit; (b) a reputable resident of the county would file an application requesting commitment; (c) mentally ill patients would have to be brought to the hospital and admitted within seven days of the first examination and certification (because of the lack of bed space, a longer waiting period would have to be allowed for the mentally deficient or the senile) (d) the superintendent of the hospital would transmit copies of the certificates and application to the probate court of the county of the patient's residence, within three days after the patient's entrance; (e) the superintendent of the hospital, upon the request of the patient or anyone in his behalf, must immediately discharge the patient or institute proceeding for a judicial commitment (in the probate court of the county of the hospital's location.) It should also be remembered that fear of common law liability will deter anyone from falsely certifying the condition of any person. Statutory penalties could also be provided for willfully false or grossly negligent certification. Such penalties would make doctors reluctant to certify; but by the same token doubtful cases would be left for judicial commitment.

In lieu of the above proposal, temporary commitment upon medical certification, with provision for a judicial hearing if further compulsory detention is required, warrants consideration. Here too, the probate court of the hospitals location should conduct the hearing.

An alternative commitment procedure would not only allow avoidance of the inconveniences of judicial commitment, but would also afford prompt care and treatment in those counties which do not have adequate hospital space or psychiatric facilities.

Minnesota's existing commitment statute should be amended to expressly allow the court to dispense with service of notice upon the allegedly mentally ill person whenever doctors certify that such notice would be injurious or detrimental. Notice should then be served on someone other than the petitioner and an attorney and guardian ad litem should be appointed.

Whether or not the above procedures would satisfy the Minnesota supreme court's conception of "due process" is a matter for speculation. Existing pertinent decisions indicate that commitment without prior notice and hearing would be held unconstitutional in all but emergency cases.[65] On the other hand, courts of other jurisdictions have approved the "medical commitment" procedures. Those courts hold that the right to demand and obtain a judicial hearing is sufficient to satisfy "due process" requirements. Of course the "medical commitment" procedures must insure careful examination of the allegedly mentally ill person by competent disinterested doctors a short time before he is admitted to a hospital. The certification should be based on the doctor's own findings and not on information which he might obtain from other people.

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65. "Notice in commitment proceedings is not always practicable where the person sought to be committed is violently and dangerously insane. But those types of insanity or feeble-mind-ness which manifest themselves in harmless symptoms lend themselves to the orderly processes of a formal hearing and adjudication . . ." In re Wretlind, 32 N.W. 2d 161, 166, (Minn. 1948) quoting in re Restoration to Capacity of Masters, 216 Minn. 553, 556, 13 N.W. 2d 487 (1944). Compare State ex rel. v. Billings, 55 Minn. 473,57 N. W. 794 (1894); State ex rel. v. Kilbourne, 68 Minn. 320, 71, N.W. 396 (1897); Leavitt v. City of Morris, 105 Minn. 170, 117 N.W. 393 (1908); State ex rel. Fechner v. Carlgren, 209 Minn. 362, 296 N.W. 573 (1941).

III. EFFECT OF COMMITMENT UPON THE LEGAL CAPACITY OF THE MENTALLY ILL AND THE MENTALLY DEFICIENT

Mental abnormalities may affect an individual's legal status in such fields of law as partnership, domestic relations, contracts, wills, torts, and criminal law. For example: In Minnesota, by statute, a partnership may be dissolved whenever "a partner has been declared a lunatic in any judicial proceeding or is shown to be of unsound mind;"[67] no marriage may be contracted ". . . between persons either one of whom is epileptic, imbecile, feebleminded, or insane;"[68] and no person ". . . who may be non compos mentis or insane, shall be permitted to vote at any election in this state."[69]

It is therefore necessary to determine the effect of commitment upon an individual's legal status. In other words, is commitment tantamount to a decree of legal incompetence. If not, is commitment evidence of the patient's insanity (legal incompetence)[70] within the meaning of the common law and the above statutes? The importance of that question is re-emphasized by the fact that many committed patients who are released from custody either never petition for restoration to capacity or are not restored until twelve months after discharge.

THE MENTALLY ILL

In most jurisdictions commitment is generally not equivalent to a decree of legal incompetence, but it is admissible as evidence of the patient's mental status in subsequent judicial proceedings. In Minnesota, however, commitment

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67. 2 Minn. Stat., sec. 323.31 (1) (1945).

68. 2 Minn. Stat., sec. 517.03 (1945). The effect of this provision is qualified by 2 Minn. Stat., Sec. 514.05-.05 (1945)

69. Minn. Const. Art. VII, sec. 2.

70. That is, ability to contract, make a will, etc.

appears to be inadmissible as such evidence.[71] The Minnesota supreme court in the frequently cited case of Knox v. Haug (1892)[72] stated that in the commitment proceedings under 1878 G.S. ch. 35 sec. 21, "the only matter to be investigated is the alleged insanity and need of care and treatment. The degree of the insanity, except so far as necessary to ascertain if care and treatment be needed, and its effect on the capacity of the person to do business or manage his property need not be investigated. A person may be insane on some one subject and still be able as the sanest to manage his own property and affairs."[73] Several Minnesota cases, citing Knox v. Haug, have stated that commitment is not in itself evidence of legal incompetency.[74] Somewhat consistent with that view is a Minnesota statute which permits the county commissioner of registration to destroy, if he wishes, the voting registration card of committed persons.[75]

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71. See Weihofen and Overholsen, supra note 1, at 323; Smoot, supra note 19, at 492.

72. 48 Minn. 58, 50 N.W. 934.

73. Knox v. Haug, 48 Minn. 58, 61, 50 N.W. 934 (1892)

74. See Schaps v. Lehner, 54 Minn. 208, 211, 55 N.W. 911 (1893); McAllister v. Rowlan 124 Minn. 27, 32, 144 N.W. 412, (1913); Schultz v. Oldenbur, 202 Minn. 237, 243, 277 N.W. 918 (1938). To the same effect is Rep. Att'y. Gen. (1944) 337; but compare Rep. Att'y. Gen. (1942) 275. See Pearson, Guardianship and Commitment Under the Probate Code, 20 Minn. L. Rev. 333, 344 (1936). Although the rule may be implicit in the court's reasoning, Knox v. Haug does not hold that commitment is inadmissible as evidence of mental condition. Although the commitment proceedings were apparently admitted as evidence by the trial court and were the only evidence on the question of mental capacity, the trial court "found" the plaintiff to be legally competent. The plaintiff appealed on the ground that the trial court's finding of legal competency was not warranted by the evidence. The supreme court affirmed the trial court's finding. Although the supreme court apparently discounted the relevancy of the commitment proceedings, it is significant that it also stated, "The question in the case is as to the effect of these proceedings, as evidence of McLennan's incompetence to execute the deed to defendant."

75. Minn. Stat. sec. 201.16 (1945). Thus if he wishes, the commissioner may permit the committed person to vote even though he has not been "restored to capacity" by an order of the probate court. See Op. Atty. Gen., 183-R, Jan. 22, 1945.

However, in the case of Woodville v. Morrill, (1915) 130 Minn. 92, 96, 153 N.W. 131, the supreme court said: "The adjudication of insanity and the commitment of testator to the asylum raised a presumption of mental incapacity to make the will, and the presumption continued notwithstanding testator had been released on parole, there being no normal discharge from the asylum." The Woodville case is distinguishable from Knox v. Haug, in that a guradian[76] was appointed shortly after the patient had been committed and before the instant proceedings were commenced; and the two cases relied upon by the court, Rice v. Rice (1883) 50 Mich. 448, 15 N. W. 545, and Estate of Johnson (1881) 57 Cal. 529, also involved situations in which guardians had been appointed pursuant to an adjudication of incompetence. Knox v. Haug was not cited in the opinion. Also inconsistent with Knox v. Haug and the dicta of subsequent cases are the terminology and provisions of 2 Minn. Stat. 525.61 (1945). That section, providing for the restoration to capacity of the insane and inebriate, and undoubtedly intended to apply to patients committed to state institutions,[77] uses the phrase "adjudicated insane or inebriate;" and as a prerequisite to restoration it requires proof that the person is of "sound mind and capable of managing his person and estate." thus implying that a committed person is incapable of managing his estate.

Presumably in Minnesota a committed person is not precluded from marriage until an adjudication of incompetency based on other proof has been entered. By the same token, a "paroled" patient, who allegedly entered into a contract while "paroled," could not introduce his commitment as evidence in a contract action.

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76. In Minnesota, guardianship proceedings are generally admissible as evidence of mental incompetence. That point will be discussed more fully later in this report.

77. See Pearson, supra note 74, at 333, 344. The author, Judge Albin S. Pearson, was a member of the Probate Code Revision Committee which drafted the Minn. Probate Code (1935)

Whether or not there is any logical basis for distinguishing between commitment and an adjudication of insanity so as to exclude commitment as evidence of legal incompetency is open to question; and the practice has been criticised by Professor Wigmore.[78] Therefore, it might be questioned whether the Supreme Court of Minnesota will, when the issue is presented to it, follow the rational of Knox v. Haug.

THE MENTALLY DEFICIENT

Effect of Guardianship Proceedings on Ward's Legal Capacity

Section 525.54 of the Minnesota statutes provides for the appointment of a guardian over the ". . . person or estate or of both of any person . . . who because of . . . deterioration of mentality is incompetent to manage his person or estate . . ."[79] It is well settled that the appointment of a guardian under that provision is admissable in subsequent judicial proceedings as evidence of the ward's mental condition;[80] and there is dictum to the effect that a person under guardianship is "conclusively presumed incompetent to make a valid contract concerning his property though in fact he is sane at

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78. See 5 Wigmore, Evidence sec. 1671 (5) (b) (3 ed. 1940). See McAllister v. Rowland, 124 Minn. 27, 32, 144 N. W. 412 (1913); where the Supreme Court of Minnesota appears to approve of Professor Wigmore's criticism, but see the more recent case of Schultz v. Oldenburg 202 Minn. 237, 243, 277 N. W. 918 (1938)

79. 2 Minn. Stat. sec. 525.54 (1945).

80. McAllister v. Rowland, 124 Minn. 127, 144 N.W. 412, (1913), See Rebne v. Rebne, 216 Minn. 379, 382, 12 N.W. 2d 18, (1944); Johnson v. Johnson, 214 Minn. 462, 466, 8 N.W. 2d 620, (1943); Schultz v. Oldenburg, 202 Minn. 237, 244, 277 N.W. 918, (1938); Champ v. Brown 197 Minn. 49, 60, 266 N.W. 94, (1936); Dahlsie V. Hallenberg, 143 Minn. 234, 173 N.W. 433, (1919); compare Woodville v. Morrill, 130 Minn. 92, 96, 153 N.W. 131, (1915).

the time of making the same.[81] However that dictum has been highly qualified by subsequent cases.[82]

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81. "This rule is based upon convenience and necessity, for the protection of the guardian, and to enable him properly to discharge his duties as such. Without this rule it would be difficult, if not impossible, for the guardian to execute his trust, for in every action concerning the property of the ward he might be obliged to go before the jury upon the question of the ward's sanity, and one jury might find one way and another the other way. Now, when the reason for the rule does not exist, the rule does not apply. Hence, if there is in fact no actual and subsisting guardianship, but the same had been practically abandoned, and the person who had been under guardianship after such abandonment makes a deed at a time when he is in fact of sound mind, and the contract is fair, the deed will be enforced, though the guardian has not been discharged by any judicial action." Thorpe v. Hanscom, 64 Minn. 201, 205, 66 N.W. 1, (1896).

82. Thorpe v. Hanscom 64, Minn. 201, 66 N. W. 1, (1896) the first Minnesota case stating that insane wards are conclusively presumed incompetent, actually held that a ward's mortgage was valid because the guardianship had been in effect abandoned. In Dahlsie v. Hallenberg 143 Minn. 234, 173 N.W. 433, (1919) the court held that a ward was capable of committing a willful and malicious assault. More recently in the case of Champ v. Brown, 197 Minn. 49, 266 N.W. 94 (1936), the court held that a ward, who was actually mentally competent and had consented to certain investments made by the guardian, could not hold the guardian liable for losses caused by those investments. The court after quoting the dictum of Thorpe v. Hanscom made the following significant statement: "In at least two subsequent cases decided by this court it has been held that an adjudication of incompetency in guardianship proceedings is only prima facie evidence thereof and is not conclusive." Finally in Johnson v. Johnson 214 Minn. 462, 8 N.W. 2d 620, (1943), the Supreme Court refused to annul a marriage entered into by a ward. The court citing Thorpe v. Hanscom, stated: "This rule /the dictum of Thorpe v. Hanscom/ is based upon convenience and the necessity, for the protection of the guardian and to enable him properly to discharge his duties as such . . . When the reason for the rule ceased the rule does not apply. Convenience and necessity of the guardian extend only to those acts which he is authorized to do on behalf of the ward, such as managing and controlling his property and his estate . . . The appointment of a guardian disabled the alleged incompetent only from making contracts, which relate to his estate, but not all kinds of contracts. One who has been adjudged an incompetent may contract a valid marriage if he has in fact sufficient mental capacity for that purpose."

Also, since section 525.543 provides a statutory method of depriving the ward of capacity to contract,[83] it might be questioned whether the court will hold void contracts of a ward if the requirements of section 525.543 are not complied with.[84]

Effect of Appointment of Director of Public Institutions As Guardian of the Person of the Mentally Deficient

The director of public institutions is by statute constituted the guardian of the person of patients committed as mentally deficient.[85] Nevertheless, the rules applicable to the wards of guardians appointed pursuant to section 525.543 are not necessarily applicable to guardianships established under section 525.753; for those cases which hold that guardianship proceedings are evidence of the ward's mental condition are presumably based on the fact that section 525.54 requires as a prerequisite to the appointment of a guardian, a finding that the prospective ward is ". . . incompetent to manage his person or estate . . ."[86] Those findings are not prerequisite to the commitment of the mentally deficient to the guardianship of the director of public institutions.

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83. 2 Minn. Stat. sec. 525.543 (1945) provides: "after the filing of the petition, the certified copy thereof may be filed for record in the office of the register of deeds of any county in which any real estate owned by the ward is situated and if a resident of this state, in the county of his residence. If a guardian be appointed on such petition, all contracts excepting for necessaries, and all transfers of real or personal property made by the ward after such filing and before the termination of the guardian shall be void."

84. Thorpe v. Hanscom 64 Minn. 201, 204, 66 N. W. (1896), "expressly left that question open."

85. 2 Minn. Stat. sec. 525.753 (1945) as amended Lws of Minn., 1947, c. 622, sec. 5.

86. 2 Minn. Stat. sec. 525.54 (1945).

That guardianship is established pursuant to sections 525.749 and 525.753 (the same sections which provide for the commitment of the mentally ill) and not pursuant to section 525.54.[87] And those cases which have said that a person under guardianship is conclusively presumed incompetent to make a valid contract have based the rule on the necessity of protecting the guardian. In Thorpe v. Hanscom (1896) the court said, "Without this rule it would be difficult, if not impossible, for the guardian to execute his trust, for in every action concerning the property of the ward he might be obliged to go before the jury upon the question of the ward's sanity, and one jury might find one way and another the other way. Now, when the reason for the rule does not exist, the rule does not apply."[88] Since the director of public institutions is guardian of the person only and is not guardian of the patient's estate there isn't any reason to apply the "rule" to the mentally deficient.

Neither is there any reason to believe that the rules governing the admissability (as evidence) of the commitment proceedings of the mentally ill are applicable to the mentally deficient. Those rules are based on the fact that mental illness does not necessarily affect a person's business judgment. A mentally ill individual may be very astute and capable of managing his own affairs. Mental deficiency, on the other hand, necessarily implies a deficiency of mental capacity.

RECOMMENDATIONS

The legal effect of commitment is of course a question of public policy, but that policy should be defined by statute.

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87. 2 Minn. Stat. sec. 525.749 (1945) as amended Laws of Minn. 1947, c 622, sec. 1 defines "mentally ill" and "mentally deficient" as follows:

Subd. 3 "Mentally ill person" means any person of unsound mind and in need of treatment, control or care.

Subd. 6 "Mentally deficient person" means any person other than a mentally ill person, so mentally defective as to require supervision, control, or care for his own or the public welfare.

88. 64 Minn. 201, 205, 66 N.W. 1; accord. Champ v. Brown, 197 Minn. 49, 266 N.W. 74, (1936), Dahlsie v. Hallenberg, 143 Minn. 234, 173 N.W. 433, (1919)

IV. DISCHARGE AND RESTORATION TO CAPACITY OF THE MENTALLY ILL

EXISTING MINNESOTA PROCEDURES

At the present time a mentally ill patient may be discharged and restored to capacity under either section 525.753[89] or sections 253.16 and 525.61[90]. The former provision allows the superintendent of the hospital to "provisionally discharge" a patient. Twelve months after the date of the provisional discharge the patient is automatically "restored to capacity." Sections 253.16 and 525.61 offer a more cumbersome method. Section 253.16 authorizes the superintendent to discharge any patient who has recovered, but that discharge does not "restore the patient to capacity." There must be further proceedings under section 525.61.[91] That section provides:

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89. 2 Minn. Stat. sec. 525.753 (4) (1945) as amended Laws of Minn., 1947, c. 622, sec. 5 stipulates: "The superintendent of any state hospital to which the patient who is mentally ill, senile, or inebriate is committed or transferred may provisionally discharge such patient; and unless such patient is re-admitted to a state hospital within 12 months after the date of such provisional discharge, or unless proceedings were commenced for the appointment of a guardian for such patient, or unless the period of the provisional discharge is extended by the superintendent, the provisional discharge becomes absolute and operates to restore such patient to capacity. Notice of the expiration of the 12 months' period or of the extended period shall be given by the superintendent to the committing court and to the director."

90. 1 Minn. Stat. sec. 253.16 (1945) provides: "The superintendent of any hospital or asylum for the insane may discharge any patient certified by him to be recovered unless charged with or convicted of some criminal offense. In all other cases, patients shall be discharged only by the director of public institutions. When the superintendent recommends the discharge of a patient, improved or unimproved, he shall state his reasons therefore."

91. See Op. Atty. Gen., 248-B-8, July 20, 1939.

> "Any person who has been adjudicated insane or inebriate,[92] or any person who is under guardianship (except as a minor, or as a feeble-minded or epileptic person, or a person under guardianship in the juvenile court) or his guardian or any other person interested in him or his estate may petition the court in which he was so adjudicated to be restored to capacity."

Although 2 Minn. Stat. sec. 525.78 (1945) as amended, Laws of Minn., 1947, c. 622, sec. 12 is entitled "Restoration of feeble-minded and epileptics," it is literally applicable to the mentally ill, senile, and inebriate as well as the mentally deficient and epileptics.

> Sec. 525.78. (1) "Any reputable person or the director may petition the court of commitment, or the court to which the venue has been transferred, for the restoration to capacity of a patient. Upon the filing of such petition, if the petition is made by the director, the court shall fix the time and place for the hearing thereof, notice of which shall be given as the court directs. Upon proof of the petition, the court shall restore the patient to capacity."

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92. Although the statutes do not authorize an alleged senile patient to petition for restoration to capacity, he could nevertheless do so; for in the case of State Ex Rel. Preis v. District Court, 186 Minn. 432, 434, 243 N.W. 434, (1932) the Supreme Court said, "We are of the opinion that the jurisdiction over persons under guardianship conferred on the probate court by the Constitution by necessary implication carries with it the right upon proper application to pass upon the mental capacity of persons confined by its commitments in hospitals for the insane and to terminate the control of the public official or officials acting as the common guardian of the committed person."

(2) "Upon the filing of a petition by any person other than the director the court shall fix the time and place for the hearing thereof, 10 days' notice of which shall be given to the director and to the county attorney and to such other persons and in such manner as the court directs. Any person may oppose such restoration. Upon proof that the patient is not mentally ill, senile, inebriate, mentally deficient, or epileptic the court shall order him restored to capacity at the expiration of 30 days from the date of such order. The copy of said order shall be mailed to the superintendent of the state hospital or institution where said patient was last confined."

Since commitment has apparently little effect upon the patient's legal status, it seems unnecessary to require a judicial order as a prerequisite to restoration to capacity in uncontested cases.[93]

Section 525.753 (4) and the applicable provisions of section 525.61 should be consolidated and amended to allow the superintendent to discharge and restore to capacity a mentally ill, senile, or inebriate patient (who has not been charged with or convicted of some criminal offense) either provisionally or finally, at his option. The probate court, of course, should be notified of his action. The proposed amendment should also allow the patient or any other person to petition the probate court for his discharge and restoration to capacity.

Section 525.78 should be amended so as to clearly indicate its scope.

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93. The final disposition of recommendation IV will, of course, affect this recommendation.

V. CODIFICATION OF STATUTES

The Minnesota statutes governing the commitment and discharge of the mentally sick should be codified. Those statutes are dispersed over several chapters of the Minnesota Statute books and, enacted over a period of many years, they now contain superfluous, inconsistent and obsolete provisions.

DISCHARGE OF GUARDIANSHIP OVER MENTALLY DEFICIENT AND EPILEPTIC PATIENTS

2 Minn. Stat. sec. 525.611 (1945),[94] authorizing the director of social welfare to petition the probate court for termination of his guardianship over the persons of patients committed as feebleminded or epileptic, appears somewhat superfluous and should be repealed. Under our existing laws, the director of public institutions and not the director of social welfare is the guardian of patients committed as feebleminded or epileptic; and in 1947 the legislature enacted a statute [525.78 (5)][95] which authorized the director of public institutions to petition for termination of his guardianship over the mentally deficient and epileptics.

Laws of Minn., 1935, 72, sec. 176 provided that the state board of control should be appointed guardian of the person of patients committed as feebleminded or epileptic. The act also authorized the state board of control to petition for the restoration to capacity of the feebleminded and epileptic,[96] but did not contain any provision authorizing the board to petition for termination of the guardianship. Then in 1937 the legislature passed an act[97] which

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94. "When it appears to the director of social welfare that a person committed to his guardianship as a feebleminded or epileptic person is no longer in need of guardianship or supervision for his own or the public welfare, the director may petition the court of commitment, or the court to which the venue has been transferred, for his discharge as such guardian, stating facts in support of his petition."

95. 2 Minn. Stat. sec. 525.78 (1945) as amended Laws of Minn., 1947, c. 622, sec. 12.

96. Laws of Minn., 1935, c. 72, sec. 183.

97. Laws of Minn. 1937, c. 255.

now, basically, constitutes section 525.611.[98] That act authorized the state board of control to petition for termination of its guardianship over the person of patients committed to it as feebleminded or epileptic.

In 1939, pursuant to the Reorganization Act,[99] the director of social welfare was "constituted as guardian of both the estate and the person of all the wards of the state of Minnesota and other persons the guardianship of whom has been heretofore vested in the state board of control, whether by operation of law or by an order of court, without any further act or proceeding whatever."

The effect of the Reorganization Act was reflected in sections 525.611 (termination of guardianship), 525.753 (commitment), and 525.78 (restoration to capacity) of the Minnesota Statutes of 1941; for in each of those sections the phrase "director of social welfare" was substituted for "state board of control."

Finally, in 1943 the legislature passed an act making the director of public institutions "guardian of both the estate and person of all feebleminded and epileptic persons, the guardianship of whom has heretofore been vested in the state board of control or in the director of social welfare whether by operation of law or by an order of court without any further act or proceeding whatever . . ."[100] The Act of 1943 also expressly amended sections 525.753[101] (commitment of feebleminded and epileptics) and 525.78[102] (restoration to capacity) so as to substitute the phrase "director of public institutions" for "director of social welfare."[103] Apparently section 525.611[104] (termination of guardianship) was overlooked.

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98. 2 Minn. Stat. sec. 525.611 (1945)

99. Laws of Minn., 1949, c. 431, sec. 2 /2(10)/1 Minn. Stat. sec. 256.01, subd. 2(10) (1941)

100. Laws of Minn., 1943, c. 612, sec. 3; Minn. Stat. sec. 246.01 (1945). The act of 1943 also amended 1 Minn. Stat. sec. 256.01, subd. 2(10) (1941) (see note 99 and text, supra) so as to exempt from its operation persons committed as feebleminded or epileptic.

101. 2 Minn. Stat. sec. 525.753 (1941)

102. Id. sec. 525.78

103. Laws of Minn., 1943, c. 612, sec. 9, 13; 2 Minn. Stat. secs. 525.753, 525.78 (1945).

104. 2 Minn. Stat. sec. 525.611 (1941)

Evidently section 525.611[105] was enacted to empower the state board of control to petition for the termination of its guardianship over patients committed as feebleminded or epileptic. The director of social welfare was substituted for the state board of control pursuant to the Reorganization Act of 1939;[106] and the director of public institutions should have been substituted for the director of social welfare pursuant to the reorganization act of 1943.[107] Assuming that to be true, section 525.611 became a superfluous statute in 1947 when the legislature added to section 525.78 (dealing with restoration to capacity), the following provision:

> "Subd. 51. When it appears to the director [of public institutions] that a person committed to his guardianship is no longer in need of such guardianship, he may petition the court of commitment, or the court to which the venue has been transferred, for his discharge as such guardian.[108]

DISTINCT TREATMENT OF RESTORATION TO CAPACITY AND TERMINATION OF GUARDIANSHIP OVER MENTALLY DEFICIENT AND EPILEPTICS

Section 525.78[109] treats separately the restoration to capacity of the mentally deficient and epileptics, (subd. 2) and the discharge of the

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105. 2 Minn. Stat. sec. 525.611 (1945)
106. Laws of Minn., 1939, c 431. See note 97 supra, and text.
107. Laws of Minn., 1943, c. 612. See notes 98, 99, 100, and 101, supra, and text.
108. Laws of Minn., 1947, c. 622 sec. 12.
109. 2 Minn. Stat. sec. 525.78 (1945) as amended Laws of Minn. 1947, c. 622, sec. 12.

guardian of such patients (subd. 5). However, it might be questioned whether there is any basis for distinguishing between restoration to capacity and discharge of guardianship. Since 525.753[110] makes mandatory the appointment of the director of public institutions as guardian of committed mentally deficient and epileptic patients, it would seem that a discharge of guardianship would necessarily imply restoration to capacity. Furthermore, the statutory definitions of "mentally deficient" and "persons subject to guardianship" appear so similar that it is doubtful whether it can be said that a person is capable of being released from guardianship but incapable of being restored to capacity. A mentally deficient person is defined as "any person, other than a mentally ill person, so mentally defective as to require supervision, control, or care for his own or the public welfare."[111] An individual is subject to guardianship when ". . . because . . . of . . . imperfection or deterioration of mentality /he/ is incompetent to manage his person or estate . . ."[112] It might also be noted that the case of Vinstad v. State Board of Control,[113] holding that a mentally deficient patient may petition the probate court for restoration to capacity, treats "termination of guardianship" and "restoration to capacity" synonymously; and 2 Minn. Stat. sec. 525.60 (1945) states: "The guardianship of a ward other than a minor shall terminate upon his death or upon his restoration to capacity." Of course, it can be said that 525.60 is applicable only to guardianships established under 525.54[114] (the general provision for guardianship) and not to those established by commitment under 525.753.[115]

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110. 2 Minn. Stat. sec. 525.753 (1945) as amended Laws of Minn. 1947, c. 622, sec. 5.
111. 2 Minn. Stat. sec. 525.749, subd. 6 (1945) as amended Laws of Minn. 1947 c. 622, sec. 1.
112. 2 Minn. Stat. sec. 525.54 (1945)
113. 169 Minn. 264, 211 N.W. 12 (1926)
114. 2 Minn. Stat. sec. 525.54 (1945)
115. 2 Minn. Stat. sec. 525.753 (1945).

MEANING OF RESTORATION TO CAPACITY

Apparently commitment has little effect upon the patient's legal competency; therefore the term "restoration to capacity" is meaningless, and use of the courts to obtain "restoration" in uncontested cases seems unnecessary. The term "final discharge" which does not imply a lack of capacity, should be used in lieu of "restoration to capacity".

VI. RECORDS OF COMMITMENT PROCEEDINGS

In view of the fact that commitment has negligible effect on the legal status of the mentally ill, there is little reason for making judicial commitment proceedings a matter of public record. Those proceedings contain testimony and details which the mentally ill patient would undoubtedly prefer to have withheld from public knowledge. Therefore, the records of the proceedings should be made available only upon the order of the judge.