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"Arbeit Macht Frei:" Vocational Rehabilitation and the Release of Virginia's Criminally Insane

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"ARBEIT MACHT FREI:" VOCATIONAL REHABILITATION AND THE RELEASE OF VIRGINIA'S CRIMINALLY INSANE

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I. INTRODUCTION

The release from confinement of persons acquitted by reason of insanity is one of the most perplexing problems of the criminal law. The insanity acquittee's release confronts our deepest fears, and the procedures which society employes in this process force us to face the difficult and often intractable issue of the responsibility of the criminally insane.

Virginia courts have required vocational training of an insanity acquittee prior to the release of the not guilty by reason of insanity (NGRI) patient from hospitalization.[1] While the Code of Virginia provides procedures for the committing court to retain its common law power to conditionally release the NGRI patient, in our experience, this procedure has rarely been employed as a vehicle to mandate vocational training. Typically, vocational training is required by the court while the patient retains criminal commitment status. As the patient is not being conditionally released under the current Virginia practice, the requirement of vocational training can be viewed only as a precondition of release.

As a precondition of release, vocational training can be justified only if it bears a sufficient relation to the statutory standards for release of a criminal committee. If the need for vocational training can be shown to bear a relation to either the patient's insanity or dangerousness, vocational training may legitimately be imposed as a precondition of release. A number of factors support our view that in the typical case vocational training will not be related to either of these criteria for release. Accepting, however, the proposition that if such proof is adduced vocational training may legitimately be imposed as a precondition of release, our research and experience have unveiled no instance in which such proof was undertaken. We believe that current Virginia practice of preconditioning the NGRI's release on the patient's participation in vocational training is therefore invalid under the statutory scheme. In our view, vocational training of a NGRI patient may be imposed as

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1. In several of the cases which we have reviewed the court has ordered the patient to attend a vocational training program prior to release despite clinical opinion that the patient is no longer mentally ill, no longer dangerous, and ready for release subject to appropriate *medical* conditions.

a precondition of release only if the lack of vocational training is proved to be related to the patient's present dangerousness or insanity.

The question remains whether vocational training may legitimately be imposed under the conditional release procedure of the Virginia statute. An examination of the statutory scheme reveals that in terms of both procedural and substantive due process the Virginia procedure is constitutionally valid. While the statutory scheme reveals no due process defect, we believe that as applied the procedure denies the NGRI equal protection of the law. Vocational training should be imposed upon NGRI patients only on the same terms as imposed upon civilly committed patients. Since vocational training can be mandated as a condition for the release of civilly committed patients only upon a showing that the lack of vocational training is reasonably related to the patient's insanity or dangerousness, it can be mandated for the NGRI only upon the same terms.

Specifically, this article addresses the Virginia courts' practice of requiring insanity acquittees to receive vocational training[2] as a prerequisite to their release. First, this requirement will be explained and analyzed in light of the provisions of the Virginia Code.[3] Second, its constitutional validity will be examined. Third, the thesis will be developed that a defendant found not guilty by reason of insanity may properly be required to participate in a court ordered vocational training program pursuant to conditional release procedures, but only in accordance with the constitutional mandates of due process and equal protection of the law, that is, only after a full release hearing and only if vocational training bears a relationship to the acquittee's mental illness or dangerousness. The conclusion will be developed that the current manner in which Virginia courts have mandated vocational training for insanity acquittees is constitutionally infirm.

2. Vocational training, for purposes of this article, is defined as attendance at or participation in a structured program geared toward teaching the participant job skills. The programs typically offered by such centers include carpentry, food service, light metal working, mechanical service and repair, and similar occupational programs.

3. The commitment and release procedures for NGRI acquittees are embodied in VA. CODE ANN. § 19.2-181 (Cum. Supp. 1981). *See* text accompanying notes 5 to 20 *infra*.

II. RELEASE OF PERSONS ACQUITTED BY REASON OF INSANITY: VIRGINIA PROCEDURE

For centuries society has employed the state's power to protect both itself and the individual from mentally ill persons who are dangerous to themselves or others. Individuals acquitted by reason of insanity are nearly always committed to a mental institution.[4] Section 19.2-181 of the Virginia Code embodies Virginia's procedure for the commitment and release of persons acquitted by reason of insanity.[5] Upon a verdict of not guilty by reason of insanity, the defendant is placed in the temporary custody of the Commissioner of Mental Health and Mental Retardation.[6]

Virginia procedure further provides for clinical evaluation and a judicial hearing after acquittal and prior to commitment of the defendant.[7] If "the defendant is insane or feeble minded or [if] his discharge would be dangerous to the public peace and safety or to himself, the court shall order him to be committed."[8] The subsequent release of the defendant may be secured, upon application to the committing court, by one of two avenues: (1) by application of the director of the state hospital in which the person is confined;[9] or (2) by application of the committed person.[10] In either event,

> [i]f the court is satisfied [on the basis of the evidence] that the committed person is *not insane or feebleminded and that his discharge or release will not be dangerous to the public peace and safety or to himself, the court shall order his discharge or release. If the court is not satisfied, it shall promptly order a hearing to determine whether the committed person is at that time insane or feebleminded and to determine whether his discharge would be dangerous to the public peace and safety to himself.*[11]

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4. Note, *The Virginia Procedure for Commitment and Release of Persons Acquitted by Reason of Insanity,* 11 WM. & MARY L. REV. 185 (1969).

5. For the full text of VA. CODE ANN. § 19.2-181 (Cum. Supp. 1981), see Appendix.

6. *Id.* at § 19.2-181 (1).

7. *Id.* The constitutionality of mandatory commitment statutes has been questioned on the grounds that the not guilty by reason of insanity (NGRI) verdict addresses mental state at the time of the offense whereas commitment addresses present insanity—the two should, therefore, be independent determinations.

8. *Id.* at § 19.2-181 (1).

9. *Id.* at § 19.2-181 (2).

10. *Id.* at § 19.2-181 (4).

11. *Id.* at § 19.2-181 (3). (emphasis added). Virginia procedure incorporates both sanity and non-dangerousness as conditions of release. Many courts have held that an insanity acquittee may be released upon a showing that the patient is no longer mentally ill. *See, e.g.,* United States v. Carter, 415 F. Supp. 15 (D.D.C. 1975); Warner v. States, 244 N.W.2d

Depending upon the court's determination in that hearing, one of the three possible dispositions of the defendant will be made: (1) discharge or unconditional release; (2) recommitment; or (3) upon recommendation of the Commissioner, civil commitment.[12] In a typical civil commitment the patient is treated at the hospital until the attending physician notes such progress that the patient is no longer deemed mentally ill or dangerous. The physician may then release the patient under an appropriate after-care program. The statute explicitly provides for conditional release of the NGRI under a modified civil commitment procedure:

> [I]n lieu of discharging or releasing, or recommitting the person, [the court may] permit such person to be treated as a patient committed pursuant to §§ 37.1-67.1 through 37.1-67.4, [the involuntary civil commitment provision] subject to such limitations and restrictions as the court may deem appropriate and *such individual shall remain under the jurisdiction of the committing court subject to such modification or additional order as the court may determine appropriate.*[13]

640 (Minn. 1976). There is authority, however, that considerations of due process and equal protection require consideration of both mental illness and dangerousness. It should also be noted that in Virginia both insanity and dangerousness are legal conclusions to be determined upon a hearing before the committing court.

As of 1976, twenty (20) states based the release determination on either one or both of these release criteria. German & Singer, *Punishing the Not Guilty: Hospitalization of Persons Acquitted by Reason of Insanity*, 29 RUTGERS L. REV. 1011 (1976). *See also* Application of Noel, 577 P. 2d 1096 (Kan. 1978) (holding that these are conclusions of law while noting that Kansas has vacillated over the years between holding release a legal or a medical conclusion).

12. VA. CODE ANN. § 19.2-181(3) (Cum. Supp. 1981). In practice this recommendation would be made by the hospital director, upon the advice of those clinicians caring for the patient.

13. *Id.* (emphasis added). It is the emphasized clause which preserves the common law conditional release power. VA. CODE ANN. §§ 37.1-67.1 to .4 (Cum. Supp. 1981) provide for the involuntary civil commitment of an individual. Under § 37.1-67.1 an individual may be detained and § 37.1-67.2 affords the detainee an opportunity for voluntary civil commitment. As the judge retains jurisdiction over the patient, even if the patient was allowed to be voluntarily admitted under the provision, the court retains final authority over the patient's release. VA. CODE ANN. § 19.2-181(3) (Cum. Supp. 1981). For all practical purposes therefore commitment under § 37.1-67.2 is the same as an involuntary commitment. Section 37.1-67.3 provides for the involuntary commitment upon judicial hearing. Under § 37.1-67.3 an individual who is not in need of involuntary hospitalization and treatment "shall be subject to court-ordered out-patient treatment, day treatment in a hospital, night treatment in a hospital, referral to a community mental health clinic, or other such appropriate treatment modalities as may be necessary to meet the needs of the individual." VA. CODE ANN. § 37.1-67.3 (Cum. Supp. 1981). Section 37.1-67.4 sets forth the place where hearings are to be held under §§ 37.1-67.2 and 37.1-67.3. It also addresses services to be provided the patient during detention as well as liability for costs.

A. *Vocational Training of the Insanity Acquittee: Current Practice*

While the statute provides for the conditional release of persons acquitted by reason of insanity, the practice of Virginia courts has not uniformly been to permit the treatment of the acquittee as a civil committee before imposing such conditions.[14] Instead, in cases which we have reviewed, courts have required the acquittee to receive vocational training as a precondition of release. The following illustration is typical of the cases we have encountered.

David B. is a twenty-five year old black male who is currently committed to one of Virginia's public mental hospitals, having been acquitted by reason of insanity of two counts of attempted rape and two counts of burglary. He has been hospitalized continuously since January, 1976, shortly following his arrest.

Mr. B. reports that he had been a heavy drug user since the age of thirteen, preferring cocaine and heroin but using other drugs when these were not available. He dropped out of school after completing the tenth grade and remained unemployed until his arrest. The charges against Mr. B. grew out of two incidents which occured ten days apart in the latter part of 1975. On each occasion, Mr. B. broke into a basement window of the victim's home, disrobed, placed a stocking over his head and, wielding a kitchen knife, located and removed money from the victim's purse. On both occasions, the victim discovered Mr. B. who then attempted rape. In each case, Mr. B. reports that he became frightened and left the house, unclothed, without physically injuring his victim.

His initial hospitalization following his arrest was for evaluation of his competency to stand trial. At that time he admitted to experiencing auditory hallucinations and told his various examiners that he was being harrassed by two acquaintances who had forced him to commit the offenses described above. His speech was often incoherent, he was subject to unpredictable outbursts of violent behavior, and he was often found laughing to himself without any discernable provocation. Both the state's psychiatrists and those retained by the defense felt that Mr. B. was suffering from schizophrenia and that he was incompetent to stand trial.

Mr. B. was treated with medications appropriately used in cases of schizophrenia and, gradually, he recovered to the point of com-

14. VA. CODE ANN. § 19.2-181(3) (Cum. Supp. 1981).

petency. At his trial in early 1979, the prosecution did not dispute his defense of insanity. Following a verdict of not guilty by reason of insanity on all four of the criminal counts against him, Mr. B. was committed to one of Virginia's state hospitals. By early 1980, Mr. B. had recovered to the point where he had no longer experienced hallucinations or entertained delusional beliefs, was no longer subject to fits of violent behavior, was able to converse coherently at all times, and maintained an emotional state appropriate to his circumstances. At this time, the psychiatrist treating him described him as being in a state of "fairly good remission."

One year later, in early 1981, Mr. B. petitioned the committing court for his release pursuant to section 19.2-181 of the Virginia Code. At this time, he had been free from any signs of major mental illness for over a year, according to hospital records. Shortly thereafter, the court issued an order denying the request and finding Mr. B. to be insane and dangerous to the public peace and safety. The court further found from the evidence that the defendant's mental disease was in remission and that it appeared that he would be amenable to a treatment plan incorporating gradual re-entry into the community. The court stated in its order recommitting him that it would entertain recommendations for a release program for Mr. B. The court did not, however, structure any form of conditional release program for Mr. B., and no subsequent court order for vocational training appears in his record. Mr. B. says he was told by the judge that he would have to "prove himself to the court." He was instructed to pursue vocational training under the direction of the hospital staff, but without a conditional release. According to Mr. B., the judge commented that he believed Mr. B. to be safe and sane, but that he just needed to be sure.

Mr. B. feels that he is safe and sane, yet that he is being punished. Hospital records confirm that his mental illness has been in remission for the last two years. He feels that his confinement despite the absence of any illness or need for additional treatment generates a great deal of stress in his life, and he fears that this will eventually worsen his psychiatric condition.

Mr. B. has been successfully participating in a vocational rehabilitation program for the past year, but remains pessimistic that he will be released following his next hearing.

Mr. B.'s situation is similar to others we have reviewed. Clinical evaluation has found many of these insanity acquittees to be no longer mentally ill and not dangerous. These individuals are considered to be dangerous due to the fact that they have no job skills and little prospect for meaningful stable employment upon release. Despite restoration to sanity, it is sometimes considered unwise to release such persons, even conditionally. The judge is often reluctant to return to society an individual whom he considers to lack the tools to support himself. Accordingly, conditions have been imposed on such persons before they are released from confinement. In these situations, despite the facts presented at the hearing, the judge sometimes issues an order finding the individual insane and dangerous. The acquittee is recommitted and the court directs that he receive vocational training without a formalized conditional release.[15] The effect of this procedure is to precondition the defendant's release from the hospital upon receipt of vocational training. The patient's NGRI status is maintained and the statutory scheme for conditional release bypassed.

B. *Statutory Compatibility of the Vocational Training Requirement*

If the vocational training requirement is to be compatible with the Virginia statutory scheme, the lack of vocational training must relate to the standard for release set forth in section 19.2-181. Assuming that the court has determined not to release the patient until the patient has received vocational training, that decision must be made in light of one of two dispositions of the NGRI as discussed above: (1) criminal recommitment[16] or (2) involuntary civil commitment.[17] To require vocational training of an NGRI patient pursuant to a criminal recommitment is to effectively make that training a precondition of release. Pursuant to the involuntary civil commitment procedure, the requirement falls within the

15. In one particularly onerous application of this technique, the NGRI was directed to enroll in a specific rehabilitation program. The rehabilitation center, however, refused the patient's application for admission on grounds of dangerousness, although the only evidence of dangerousness was the act for which he had been originally committed two years earlier. This lack of adequate statement of the release conditions placed the training center in a position to make the ultimate legal determination of dangerousness.

16. VA. CODE ANN. § 19.2-181(3) (Cum. Supp. 1981). *See* text accompanying notes 1-9 *supra*.

17. VA. CODE ANN. § 19.2-181(2) (Cum. Supp. 1981). *See* text accompanying notes 1-9 *supra*.

court's power to conditionally release the NGRI patient.[18]

1. Vocational Training As a Precondition of Release

Under the criminal recommitment procedure, if the committed person is no longer insane or feebleminded and if that person's discharge would not be dangerous to the public peace and safety or to himself that person must be released.[19] When an insanity acquittee has satisfied the statutory criteria of sanity and nondangerousness, further confinement is illegal and habeas corpus will lie to obtain the pateint's release.[20] As the purpose of the detention of the NGRI is to achieve the treatment goal of making that person sane and not dangerous, it would appear proper for the court to impose such treatment which would help achieve that goal. The lack of vocational skills, if related to either the NGRI patient's insanity or dangerousness, could legitimately be identified as a proper target for preconditional release requirements. If the individual's vocational skill level is not related to either of the statutory criteria, the imposition of vocational training participation as a prerequisite for release is wholly unjustified. While the social engineering goals of such an effort may be lauded, if not justified by its relationship to either insanity or dangerousness, mandatory vocational training is proper only as a condition of release and should be imposed only through the procedure set forth in section 19.2-18(3) of the statute.

a. Insanity

The question of whether the vocational training requirement bears on the issue of continuing insanity hinges on two more limited questions: (1) whether vocational training[21] constitutes treatment for mental illness, and if so (2) whether the absence of such skills as might be developed by a program of vocational training continues to render an individual mentally ill.

18. VA. CODE ANN. §§ 19.2-181(3), 37.1-67.3 (Cum. Supp. 1981).

19. VA. CODE ANN. § 19.2-181(2) (Cum. Supp. 1981).

20. Annot., 95 A.L.R.2d 54, 58-59 (1964).

21. Because of the lack of a standardized terminology in the rehabilitative disciplines we have used the terms "vocational training" and "vocational rehabilitation" synonymously. In some authors' usage, "vocational rehabilitation" includes more than teaching job skills and involves attempts to improve the client's "self-determination, self-care . . . and employability" among other goals. G. WRIGHT, TOTAL REHABILITATION 17 (1980). In practice, the range of services offered by Virginia's agencies of this type seems to vary.

(1) Vocational Training As Treatment for Mental Illness

Although vocational training is commonly offered to individuals hospitalized due to a severe mental disorder, there is little agreement within the rehabilitation disciplines whether such services might reasonably be viewed as treatment. The terms "vocational training," "vocational rehabilitation," "work adjustment," and "vocational counseling" are ambiguous and at times are used interchangeably. One authority has noted that "the rehabilitation nonmenclature is unstandardized because many of its words are derived from other disciplines and are contaminated by varied uses . . . a universal, scientific vocabulary designating explicit names for rehabilitation concepts has not yet been authoritatively expounded."[22] One writer has gone so far as to describe the field's terminology as "a babel of tongues."[23]

As an illustration of the jungle of terminology one encounters in these fields, consider the following definition of "work adjustment," appearing in a United States Government publication:

> Work adjustment is a treatment/training process utilizing individual and group work, or work related activities, to assist individuals in understanding the meaning, value and demands of work; to modify or develop attitudes, personal characteristics, and work behavior; and to develop functional capacities, as required, in order to assist individuals toward their optimum level of vocational development.[24]

In defining this term in an introductory text, however, one author, who appears to eschew a medical model of rehabilitation services, cites the above source and yet modifies it in a manner crucial to our concerns:

> *Work adjustment. A training process* which involves individuals and groups in work related activities to help them understand the meaning, value, and demands of work in general and to modify or develop their attitudes, personal characteristics, work behaviors, and functional capacities as required for achieving their optimal level of

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22. *Id.* at 8.

23. S. FEINGOLD, THE VOCATIONAL EXPERT IN THE SOCIAL SECURITY DISABILITY PROGRAM: A GUIDE FOR THE PRACTITIONER 39 (1969).

24. U.S. DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, REHABILITATION SERVICES ADMIN., TENTH INSTITUTE ON REHABILITATION SERVICES, VOCATIONAL EVALUATION AND WORK ADJUSTMENT SERVICES IN VOCATIONAL REHABILITATION 3-4 (1972) (emphasis added).

vocational adjustment.[25]

While the medical matters of illness and its treatment are of concern to rehabilitation professionals, the theoretical underpinnings of the field of rehabilitation derive rather from a wide range of purely interpersonal and sociological theories.[26] Thus, turning to the rehabilitation literature itself will not yield an adequate answer to the question we have posed.

A more useful approach to this question may be drawn from a conceptual framework derived from the field of public health and most carefully linked to mental health problems by Gerald Caplan.[27] In Caplan's conceptualization, mental health services are viewed as directed toward three goals: primary, secondary and tertiary prevention. According to Caplan, services may be aimed at reducing "(1) the incidence of mental disorders of all types in a community ('primary prevention'), (2) the duration of a significant number of those disorders which do occur ('secondary prevention'), and (3) the impairment which may result from these disorders ('tertiary prevention')."[28] For our purposes, the distinction between secondary and tertiary prevention is pertinent.

In Caplan's analysis, which has gained broad acceptance in contemporary psychiatry,[29] effective treatment is seen as an aspect of prevention since it contributes, along with early diagnosis, to an overall reduction in the prevalence of the disorders in question.[30] Since one manner of reducing the overall prevalence of a disorder is to reduce the duration of individual patients' episodes of the disorder,[31] psychiatric treatment falls within the rubric of secondary prevention.[32]

Tertiary prevention, on the other hand, is not seen as directed at reducing the prevalence of illness. Instead, Caplan restricts the term to "reducing the rate of residual defect, the lowered capacity to contribute to the occupational and social life of the community

25. J. BITTER, INTRODUCTION TO REHABILITATION II ___ (1979) (emphasis added).

26. *See* J. Dunham & C. Dunham, *Psychosocial Aspects of Disability*, in DISABILITY AND REHABILITATION HANDBOOK (R. Goldenson ed. 1978).

27. *See* G. CAPLAN, PRINCIPLES OF PREVENTIVE PSYCHIATRY (1964).

28. *Id.* at 16-17.

29. *See, e.g.,* H. Spiro's discussion in A. FREEDMAN *et al.*, COMPREHENSIVE TEXTBOOK OF PSYCHIATRY 2859-62 (3d ed. 1980).

30. G. CAPLAN, *supra* note 27, at 105.

31. MAXEY-ROSENAU, PREVENTIVE MEDICINE AND PUBLIC HEALTH 6 (P. Sartwell ed.) (1973).

32. G. CAPLAN, *supra* note 27, at 105-08.

which continues after the mental disorder has ended.[33] It is under the rubric of tertiary prevention that vocational training falls, in Caplan's analysis.[34] Indeed, efforts that are directed to individuals whose disorders have ended are not generally seen in medicine as constituting treatment, but rather prophylaxis.[35] In this light, vocational services, however effective they may be in promoting the social readjustment of psychiatric patients, do not constitute treatment. Further, individuals such as Mr. B., during the time they are experiencing the range of serious symptoms described earlier, profit poorly from vocational services.[36] In fact, in Mr. B.'s case, these services were not offered to him until the symptoms of his disorder had disappeared and he was viewed as no longer mentally ill by those clinicians responsible for his care.

(2) The Absence of Vocational Skills and Mental Illness

While vocational training may or may not be viewed as constituting treatment, the mandatory provision of such services to insanity acquittees should hinge on whether such services are required to render the individual no longer mentally ill. This, in turn, derives from the question of whether, in the absence of other symptoms of mental disorder, an individual who lacks occupational training remains mentally ill. The meaning and utility of the concepts of mental health and mental illness have been subject to considerable debate both within the psychiatric community and in the legal literature.[37] However, since the publication in 1980 of the third edition of the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders*,[38] practitioners in both psychiatry and law have had at their disposal a series of criterion-based definitions for mental disorders which have been shown to yield acceptable levels of reliability in their application.[39] In-

33. *Id.* at 113 (emphasis added).

34. *Id.* at 118-20.

35. This would be true even when the same chemical agents are involved in treating a disorder and preventing its recurrence. For example, see the discussion of prophylaxis of depression in C. Bowden & M. Giffen, Psychopharmacology for Primary Care Physicians 33 (1978).

36. Fish's Schizophrenia 136 (2d ed. M. Hamilton 1976).

37. *See, e.g.*, T. Szasz, The Myth of Mental Illness (rev. ed. 1974); Ennis & Litwack, *Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom*, 62 Calif. L. Rev. 693 (1974).

38. American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders (3d ed. 1980) (hereinafter cited as DSM-III).

39. *Id.* at 467-72.

deed this manual (commonly referred to as the DSM-III) has provided American psychiatry with the first criterion-based guide to deciding whether an individual is suffering from a particular mental disorder.[40] It is thus feasible to examine the DSM-III to determine whether the vocationally unrehabilitated individual continues to suffer from a particular disorder.

As an illustration, let us consider the example of schizophrenia, the disorder from which Mr. B. suffered. The only criterion for the "active phase" of the disorder which involves occupational functioning is as follows: "Deterioration from a previous level of functioning in such areas as work, social relations, and self-care."[41] In order for such a condition to be diagnosed as schizophrenia, however, other signs and symptoms all must be present as well.[42] These additional signs and symptoms all relate to severe abnormalities of mental functioning, such as delusions, hallucinations, and incoherence of speech.[43] Deterioration of vocational functioning alone would not permit the diagnosis of schizophrenia in its active phase. Further, if no vocational skills have ever been developed by an individual, no deterioration in them could be adduced and this particular criterion could not be used in diagnosing that individual as schizophrenic.

A "residual phase" of schizophrenia is also described which may persist after the active phase has terminated. One of the criteria for this residual phase (in an individual with a history of having experienced the active phase) is a "marked impairment in role functioning as wage-earner, student or homemaker."[44] Again, however, in order for such an impairment to be indicative of schizophrenia in its residual phase, at least one other symptom must be present as well, including, among others, "markedly peculiar behavior (*e.g.*, collecting garbage, talking to self in public, hording food) . . . blunted, flat, or inappropriate affect . . . unusual perceptual experiences, *e.g.*, recurrent illusions, sensing the presence of a force or person not actually present."[45] Even in an individual with a history of active schizophrenia, vocational impair-

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40. *Compare* American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders (2d ed. 1968) (hereinafter cited as DSM-II) *with* DSM-III, *supra* note 38. In DSM-II no criteria, only brief descriptions of disorders, are provided.

41. DSM-III, *supra* note 38, at 189.

42. *Id.*

43. *Id.* at 188.

44. *Id.* at 189.

45. *Id.*

ment alone does not allow one to be categorized as experiencing the residual phase, even if it were to represent a deterioration, as it must to qualify as a symptom in the first instance.

An individual is "in remission" when he or she "now is free of all signs of the illness."[46] This places in an ambiguous status the individual with a single symptom remaining who, for that reason, could not be classified as experiencing either the active or residual phases (which each require more than one symptom) and yet who could not be characterized as "in remission." For those individuals like Mr. B. who never had attained any vocational skills in advance of becomming ill, however, continued vocational incapacity could not be viewed as a "sign of the illness" since, as we have seen, any vocational impairment must represent a *deterioration* in functioning before it would constitute a criterion of the illness. Thus, the individual who had never attained adequate vocational adjustment and was free of other signs of schizophrenia must be seen as "in remission" and perhaps as experiencing no mental illness, a condition for which no criteria are provided in DSM-III.

A similar analysis carried out with other DSM-III diagnoses leads to the same result: lifelong vocational incapacity alone, even in an individual who formerly satisfied other diagnostic criteria for the disorder in question, is insufficient to continue to render that individual mentally ill. Indeed, for every disorder other than schizophrenia, even the aftermath of a deterioration in vocational functioning cannot by itself be construed as evidence of continuing mental disorder. For the great majority of insanity acquittees then, if vocational training is to be justified as a precondition of release, it must be justified under the statutory criterion of dangerousness.[47]

b. Dangerousness

In the general case, we cannot assume, without adequate proof, that vocational training bears a sufficient relationship to insanity to justify its imposition as a precondition of release. Therefore, if

46. *Id.* at 193.

47. American psychiatry is far more likely than is British or European psychiatry to see deterioration of social functioning as evidence of illness. *See, e.g.*, Lewis, *Health as a Social Concept*, 4 Brit. J. Soc. 109-24 (1953) (use of poor vocational functioning as a sign of illness called into further question). *See also* Fish's Schizophrenia, *supra* note 36, at 26-69 for a discussion by British psychiatrist Max Hamilton of the symptoms of schizophrenia. No mention by Hamilton is made of deterioration in vocational functioning.

vocational training is to be justified as such, it must be under the concept of dangerousness. Does a lack of vocational skills render an individual more dangerous than he would be if vocationally trained? If so, how much more dangerous? In order to understand the relationship of vocational training to dangerousness, we must first examine the process by which we access dangerousness.

The clinical prediction of dangerousness is one of the most perplexing and controversial issues in mental health law. What is dangerousness? How dangerous does a patient have to be in order to justify continued confinement? The concept of dangerousness is heavily relied on in almost every state's mental health laws, yet the concept remains ill defined and greatly misunderstood.

Although Virginia Code section 19.2-181 vaguely identifies certain factors in relation to which dangerousness is to be measured,[48] section 19.2-181 offers no clear definition of the standards by which dangerousness is assessed. It is with a heavy burden of definitional uncertainty and imprecision that the mental health professional undertakes to ascertain the dangerousness of a patient. This burden of uncertainty cannot but impair the accuracy of clinical prediction of dangerousness.

The clinical prediction of violent behavior is inherently inaccurate.[49] While authorities differ on the precise level of the defects in predictive reliability, it is clear that the mental health professionals are highly inaccurate at predicting violent behavior.[50] Estimates of the predictive accuracy of clinical evaluation hover around forty to fifty percent.[51]

Cocozza and Steadman, addressing this issue, have concluded:

> In sum, we would hesitate to conclude that the evidence proves beyond a reasonable doubt the inability of psychiatrists or anyone else to predict accurately. We nevertheless feel strongly that on the basis of the series of direct and indirect studies reviewed, there is certainly a preponderance of evidence which, when coupled with [our findings], would probably constitute clear and convincing proof.

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48. VA. CODE ANN. § 19.2-181 (Cum. Supp. 1981).
49. *See* J. MONAHAN, PREDICTING VIOLENT BEHAVIOR (1981) (previously published as U.S. Department of Health and Human Services, *The Clinical Prediction of Violent Behavior* (1981)); Cocozza & Steadman, *The Failure of Psychiatric Predictions of Dangerousness: Clear and Convincing Proof*, 29 RUTGERS L. REV. 1085 (1976).
50. *Compare* Cocozza & Steadman, *supra* note 49 *with* MONAHAN, *supra* note 49.
51. MONAHAN, *supra* note 49, at 28.

> . . . With few exceptions . . . there is *no* empirical evidence to support the position that psychiatrists have any special expertise in accurately predicting dangerousness.[52]

Despite the inherent unreliability of psychiatric techniques, the use of the concept of dangerousness remains pervasive in the involuntary commitment and differential treatment of mental patients.[53] If we must embrace a concept so inaccurate as dangerousness, how might we improve its accuracy?

Monahan has developed the thesis that the clinical prediction of dangerousness can be greatly enhanced by the infusion of statistical and environmental factors.[54] Statistical factors are used to identify a class of individuals of which the patient is a member. Using the data available on the class of persons, an actuarial prediction of the patient's dangerousness is undertaken. Monahan identifies several principal statistical correlates of future violent behavior:

> (1) Past crime particularly violent crime—The probability of future crime increases with each criminal act.[55]
> (2) Age—"As violence feeds on the energy of youth, so age mellows even the most habitual offender." Not only present age, but age at first police contact is important as well.
> (3) Sex—Males commit the vast majority of violent crimes.
> (4) Race—Blacks have a disproportionately high rate of arrests for violent crimes and non-whites generally have a disproportionately high rate over whites.
> (5) Socioeconomic status and employment stability—pre-prison income levels and the stability of pre-prison employment appear to be significant in predicting successful release.
> (6) Opiate or alcohol abuse—The use of narcotics and alcohol in combination significantly increases the risk of violence, although alcohol alone has tended to have no effect.[56]

Monahan also employs environmental factors as situational predictors of dangerous behavior.[57] Acccording to this model, the

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52. Cocozza & Steadman, *supra* note 49, at 1099.
53. *Id.* at 1100.
54. MONAHAN, *supra* note 49.
55. *See also* S. PFOHL, PREDICTING DANGEROUSNESS (1978); Kirshner, *Constitutional Standards for Release of The Civilly Committed and not Guilty By Reason of Insanity: A Strict Scrutiny Analysis,* 20 ARIZ. L. REV. 233 (1978).
56. MONAHAN, *supra* note 49, at 104-13.
57. *Id.* at 129-41.

clinical prediction of dangerousness should further be guided by a comparison of the characteristics of the environment in which the person has been violent in the past with the characteristics of the environments in which the person will live in the future. The similarities between the two environments should serve as an indicator of the risk of violence.[58]

The Supreme Court of Kansas, in *Application of Noel,*[59] picturesquely phrased the issue by analogy:

> Let us suppose a court is called upon to determine whether a shipment of nitroglycerin can be stored in the center of a large city. The experts testify that nitroglycerin is not dangerous as long as it is stored at temperatures below 180 degrees Fahrenheit and is not jiggled. No evidence is admitted as to the conditions under which the nitroglycerin is proposed to be kept, or supervision thereof. It would obviously be error for the court to conclude the explosive presented no risk as long as it [*sic*] needs were met, and to delegate determination of proper conditions to others.[60]

Monahan reports six major situational correlates of violent behavior.

> (1) Family Environment—The family environment may be critical in supporting or discouraging violent behavior.
> (2) Peer Environment—Association with the same peers who in the past encouraged violence may indicate future violence to the extent violent behavior has occurred in a specific social context.
> (3) Job Environment—Once again pre-prison income levels and employment stability are important.
> (4) Availability of Victims—Victim-specific violence may reduce the likelihood of future violence.
> (5) Availability of Weapons—Weapons may influence the severity and lethality of violent behavior.
> (6) Availability of Alcohol—To the extent that violence has been correlated with alcohol in the past, excessive use of alcohol by a peer group may encourage future violence.[61]

It is essential to note that the same variable, *i.e.,* pre-arrest income level and stability of pre-arrest employment, is identified by

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58. *Id.*
59. 226 Kan. 536, 601 P.2d 1152 (1979).
60. Id. at ___, 601 P.2d at 1167.
61. MONAHAN, *supra* note 49, at 132-37.

Monahan in each set of variables. This is the only correlate Monahan identifies which is relevant to vocational training. Indeed, this single correlate is not identified as one of the most critical. By far, the most important correlate of violent behavior identified by Monahan and others is a past history of violent behavior.[62]

It is also essential to keep the relevant inquiry in proper focus. What is at issue is not the ability to successfully complete a vocational training program but the need for vocational training in order to secure stable and satisfying employment. Addressing aspects of the parole system, one commentator has noted:

> The principal underlying assumption behind vocational rehabilitation has been that the reason that many persons have turned to crime is that they lacked the job skills necessary to compete in the labor market . . . . It is not noticed that there are many in the same circumstances who never turn to crime and who often work menial jobs all their lives. It is not asked whether the difference between those who commit crimes and those who do not is more often one of attitude rather than training . . . .
>
> A favorable attitude toward work itself is probably even more important than the acquisition of job skills. . . . Problems [are] not always related to insufficient training. Rather typical problems [involve] frequent job changes, lengthy periods of unemployment, and interpersonal problems with bosses and peers.[63]

Clearly then, emphasis on vocational training instead of the stability and personal satisfaction of employment misleads the inquiry into dangerousness. Further, it must be recalled that, while stability of employment is statistically associated with violent behavior, authorities disagree as to the utility of actuarial data when applied to the individual case. Another author has stated:

> Where this [acturarial] reasoning seriously trips is in prediction applied to the single case instead of to a population of cases. A factual nonsequitur occurs in the reasoning that if 80 percent of delinquents who come from broken homes are recidivists, then this delinquent from a broken home has an 80 percent change of becoming a recidivist. The truth of the matter is that this delinquent has either 100 percent certainty of becoming a repeater or 100 percent certainty of going straight. . . . Indeed, psychological causation is always per-

62. *Id.*

63. Lopez, *The Crime of Sentencing Based on Rehabilitation*, 11 GOLDEN GATE U. L. REV. 533 (1981).

sonal and never actuarial. . . .[64]

Given these concerns, it would appear that the clinical assertion that the "individual remains dangerous because he has poor vocational skills" is an enormously tenuous one. Just how close is the relationship between vocational training and dangerousness? Vocational training is merely one aspect of a wide range of environmental factors which comprise the criteria of dangerousness.[65] There is a great deal of controversy surrounding the closeness of the relationship between vocational training and dangerousness.[66] It is clear that "[t]he acquisition of new vocational skills will not solve personal problems related to employment that are of a psychological nature."[67] While it would appear that holding a steady job is both satisfying and supportive, the available "data [do] not prove a causal relationship between employment and crime."[68] While the relationship between vocational training and dangerousness appears to be closer than the relationship between vocational training and insanity, it is nevertheless attenuated at best. Such a relationship cannot justify the use of vocational training as the sole criterion of dangerousness in assessing the suitability of a defendant for release.

It is possible that in some instances an individual's insanity or dangerousness may be directly related to a lack of vocational skills. Based on the foregoing analysis, we believe that the relationship is weak, at least in the vast majority of cases. If the state could show that the individual's lack of vocational training was related to either of the two criteria, vocational training could constitute a valid precondition of release. This relationship should be determined by the state at the patient's release hearing by a sufficient quantum of evidence. In the typical case, this relationship will not exist. If it cannot be shown to exist, vocational training is not a valid precondition of release and may not be required of the NGRI patient in the absence of statutory conditional release procedures.

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64. MONAHAN, *supra* note 49, at 98-99 (quoting P. MEEHL, CLINICAL VERSUS STATISTICAL PREDICTION: A THEORETICAL ANALYSIS AND A REVIEW OF THE EVIDENCE 20 (1954)).

65. MONAHAN, *supra* note 49. Vocational training is often given relatively little importance in this hierarchy of criteria.

66. *Compare* MONAHAN, *supra* note 49 *with* Lopez, *supra* note 63.

67. Lopez, *supra* note 63, at 569.

68. MONAHAN, *supra* note 49, at 135.

2. Vocational Training as a Condition of Release

While vocational training may not constitute a legitimate criterion of dangerousness or insanity, it may very well be legitimate as a condition of release. Virginia statutes preserve the court's common law power to grant conditional release.[69] There is substantial authority for the proposition that vocational training may properly be imposed as a condition of release.[70] In general, any temporary release should be treated as a conditional release, and an appropriate court order must issue.[71]

In Virginia, in order to exercise its conditional release authority, the court must first transfer the NGRI to civil commitment. The failure of Virginia practice to comply with the statutory scheme supports the invalidity of the preconditional vocational training release criteria.

Under current Virginia practice, the vocational training requirement is employed as a precondition of release and not as a condition of release. The authorities discussed in the preceding section indicate that vocational training may be imposed only as a condition of release. The importance of this distinction involves the inherent due process and equal protection safeguards which flow from a full hearing. Of key importance in this regard is the requirement of adequate findings of fact to support the imposition of conditional release requirements.[72] Let us now examine the constitutionality of Virginia Code section 19.2-181 and the vocational training requirement pursuant to a conditional release.[73]

III. Constitutionality of the Release Provision of the Virginia Statute: Procedural Due Process

At stake in the confinement of the NGRI is the fundamental

69. Va. Code Ann. §§ 19.2-181(3), 37.1-67.3 (Cum. Supp. 1981). Nineteen (19) states have statutory provisions for conditional release. Cocozza & Steadman, *supra* note 49, at 1076-79.

70. United States v. Ecker, 479 F.2d 1206 (D.C. Cir. 1973); Zion v. Xanthopoulos, 585 P.2d 1084 (Mont. 1978). *Contra*, Scheidt v. Meredith, 307 F. Supp. 63 (D. Colo. 1970) (holding that educational conditions are inappropriate and may not be imposed).

71. *See generally* Annot., 95 A.L.R.2d 97 (1964).

72. United States v. Ecker, 479 F.2d 1206 (D.C. Cir. 1973); United States v. McNeil, 434 F.2d 502 (D.C. Cir. 1970); Miller v. Blalock, 411 F.2d 548 (4th Cir. 1969); Hough v. United States, 271 F.2d 458 (D.C. Cir. 1959); Application of Noel, 226 Kan. 536, 601 P.2d 1152 (1979).

73. For an interesting and comprehensive discussion of these issues, see Kirschner, *supra* note 55, at 235 n.20 (suggesting the applicability of strict scrutiny analysis). *See also* Annot., 2 A.L.R.4th 934 (1981).

right of liberty. The state's interest in the deprivation of this fundamental interest can be justified only if both the interest furthered by confinement is substantial and the procedure by which the individual is deprived of liberty accords the NGRI due process of law.[74] Before we examine the constitutionality of the conditional release procedure, it is necessary to first establish that the statutory scheme embodying that procedure is constitutionally valid. Once the constitutionality of the statutory scheme is established, the constitutionality of the vocational training requirement can then be examined. At this point, it is appropriate to analyze the procedures employed in Virginia that implicate the deprivation of the NGRI's fundamental interest in liberty.[75]

The Virginia procedure has withstood constitutional attack upon its procedural adequacy.[76] In fact, section 19.2-181 of the Virginia Code affords significantly broader procedural protection to the NGRI than do other statutory schemes which have been held constitutionally valid in other jurisdictions.[77]

Section 19.2-181 provides the NGRI a broad variety of procedural safeguards at the release phase.[78] Release proceedings are initiated either by application of the director of the state hospital in which the patient is confined or annually by petition of the committee.[79] The committee is guaranteed under section 19.2-181(3) a full hearing on the issues of sanity and dangerousness. In that proceeding, the burden of proof is on the committee to prove that the NGRI is not insane, feebleminded or dangerous to himself.[80] Additionally, the Virginia procedure preserves the right of the commit-

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74. *See* text accompanying notes 92-157 *infra.*

75. The discussion will address the adequacy of due process protection afforded the NGRI at the release stage. No attempt is made to grapple with the panoply of due process concerns which arise in respect to such related issues as commitment and confinement.

76. *See* Harris v. Ballone, No. 80-686-N, slip op. at ___ (E.D. Va. Sept. 8, 1981).

77. *See generally* Annot., 95 A.L.R.2d 54 (1964).

78. *See* text accompanying notes 1-9 *supra.*

79. *See* text accompanying notes 6 & 7 *supra.*

80. In most states, the applicant for release bears the burden of proof. 21 AM. JUR. 2d *Criminal Law* § 93 (1981). Whether that burden is based on a preponderance of the evidence or clear and convincing proof, or beyond a reasonable doubt standard is an issue which remains to be determined. Many states have settled on proof by a preponderance of the evidence. United States v. Brown, 478 F.2d 606, (D.C. Cir. 1973) (burden of proof held to be by preponderance of the evidence and *not* beyond a reasonable doubt.) While the burden is clearly on the petitioner in Virginia, it is impossible to tell from a reading of the cases just what the level of that burden is. *See also* Blalock v. Markley, 207 Va. 1003, 154 S.E.2d 158 (1967), where the burden was placed on plaintiff but was not articulated. *See generally* 10A MICHIE'S JUR. *Insane and Other Incompetent Persons* § 5 (1978).

tee to petition for a writ of habeas corpus.[81]

The Virginia statute, by preserving three avenues for the committee to challenge continued confinement,[82] is significantly broader than the NGRI statutes in force in many states.[83] Where it is provided by statute that the committee may either apply for a certification of the physician in charge for an examination or petition the court directly, exclusive of the remedy of habeas corpus, and the NGRI is guaranteed a jury trial on the issue of sanity, that statute has been held valid.[84] While Virginia does not provide for jury trial, the committee is guaranteed a judicial hearing on the sanity issue.[85] Even in situations where the committee is not guaranteed a judicial hearing regarding the petition, the statute preserves the remedy of habeas corpus and has withstood due process challenge.[86] The flexibility of approach to the court coupled with the guarantee of a judicial hearing insulate the Virginia statute from constitutional attack on its face.[87]

The statute survived direct challenge in *Harris v. Ballone*,[88] where the plaintiff sought a declaratory judgment that section 19.2-181 of the Virginia Code was unconstitutional and an injunction restraining its enforcement. Relying on the due process and equal protection clauses of the fourteenth amendment, the plaintiff in *Harris* alleged denial of procedural due process and substantive due process and denial of equal protection.[89] The court held that section 19.2-181 was valid and dismissed plaintiff's complaint.[90]

While other Virginia cases have discussed the infirmity of the procedures as applied to a particular case and have awarded relief,[91] it appears that the procedures set forth in section 19.2-181

81. VA. CODE ANN. § 19.2-181(5) (Cum. Supp. 1981).

82. The three avenues for the committee to challenge continued confinement are application of the director of the state hospital in which the person is confined, annual petition of the committee, and habeas corpus. VA. CODE ANN. § 19.2-181(2), (4), (5).

83. Annot., 95 A.L.R.2d 54, 73-85 (1964).

84. *Id.* at 73.

85. It has been held that the right to trial by jury is distinguished from judicial hearing's material in terms of due process protection in the setting of release of NGRI committee. *Id.*

86. *Id.* at 81-84. (See particularly the District of Columbia cases cited therein).

87. This is not to say that a procedural due process attack would not be successful against the Virginia statute as applied in a particular case. Rather, the procedure set forth by the statute, if followed, is adequate to assure due process of law.

88. No. 80-686-N (E.D. Va. Sept. 8, 1981).

89. *Id.* slip op. at 5.

90. *Id.* slip op. at 15.

91. Challenges to the constitutionality of the Virginia procedure have been raised in a

clearly satisfy constitutional requirements. This does not answer the question, however, of application of the statute to facts in a given case. Given the amount of discretion vested in the committing court to formulate conditions of release, the handling of an individual case under the statute may implicate due process or equal protection interests as applied.

IV. Constitutionality of the Mandatory Vocational Training of Insanity Acquittees Pursuant to a Conditional Release Statute

Two fundamental constitutional challenges may be brought against Virginia's statutory conditional release procedure, as applied: (1) due process;[92] and (2) equal protection of the law.[93]

A. *Due Process*

Every justification for involuntary confinement invokes due process considerations.[94] Critical in due process analysis is the determination of whether a particular right, which might be infringed upon by the state, requires strict judicial scrutiny or a less rigorous rational basis scrutiny.[95] Strict judicial scrutiny requires that state intrusion into the protected liberty be justified by a *compelling* state interest and that the intrusion be the least restrictive alternative means of accomplishing the compelling interest. Rational basis scrutiny requires only that it is rational to believe that the in-

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number of cases. These cases have involved instances in which the appropriate procedure set forth in the statute was not followed, allegedly denying the NGRI patient his constitutional rights. *See, e.g.*, Miller v. Blalock, 411 F.2d 548 (4th Cir. 1969) (conclusory finding of insanity and subsequent confinement to a mental hospital with no facts to show accused could assist in his own defense was a denial of due process); Williams v. Blalock, 280 F. Supp. 298 (W.D. Va. 1968) (denial to defendant of benefit of counsel and expert testimony to challenge superintendent's testimony was denial of constitutional rights to notice and hearing).

92. *See* U.S. Const. amends. V, XIV.

93. *See id.* amend. XIV.

94. Kirschner, *supra* note 55, at 243.

95. San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 98 (1973). Often critical in the resolution of a due process challenge is whether the rational basis or strict scrutiny analysis applies. In this article our conclusion that vocational training may be required only if it bears some relationship to the patient's mental condition or dangerousness is supported under either analysis. The selection of one over the other is largely irrelevant to our conclusion. However, strict scrutiny analysis, while not adopted by the courts in this context, appears the more cogent selection and we therefore present the argument in support of its adoption.

fringement promotes a legitimate government interest.[96] To arrive at the proper due process standard for release from confinement, the threshold determinations should be whether the right to be free from confinement is deserving of strict judicial scrutiny.[97] The Supreme Court, in *Matthews v. Eldridge*,[98] announced a framework of analysis for determining what procedural protections a particular situation demands. The court set forth a three part analysis requiring the consideration of three factors: (1) the private interest that will be affected by the official action; (2) the risk of erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional procedural safeguards; and (3) the government's interest, including the fiscal and administrative burdens that the additional substitute procedures would entail.[99]

This procedure has been widely followed particularly in the parole context.[100] While the private interest in *Matthews* was substantial the risk of deprivation was not and the costs of additional procedures were high. In the context of mandatory vocational training of insanity acquittees pursuant to a conditional release statute, both the patient's interest and the risk of deprivation are quite compelling, despite the added costs to the state. The analysis utilized in *Matthews* therefore weighs heavily in favor of affording strong protections to patients like Mr. B.

San Antonio Independent School District v. Rodriguez[101] confirms the concept that the importance of the right at stake does not, by itself, require strict scrutiny in the constitutional scheme. Rather, a right is fundamental if it receives explicit or implicit recognition in the text of the Constitution.[102] Because the right to be free from confinement is central to liberty, liberty is a fundamental right given specific protection in the Constitution.[103]

On what grounds must confinement be justified? A person may be a member of an unusually dangerous class of people, but this

96. Kirschner, *supra* note 55, at 251.
97. *Id.*
98. 424 U.S. 319 (1976) (no deprivation of due process to terminate disability benefits under Social Security Act without judicial hearing).
99. *Id.* at 335.
100. *See, e.g.*, Greenholtz v. Inmates of Nebraska Penal & Correction Complex, 442 U.S. 1 (1979).
101. 411 U.S. 1 (1973).
102. *Id.* at 33.
103. *See* U.S. CONST. amends. V, XIV.

alone will not justify confinement.[104] The state may not involuntarily confine an individual to improve his living standard or to protect its citizens from exposure to people with harmless but peculiar habits.[105] Vocational training, therefore, cannot be imposed merely to upgrade the acquittee's life style. An examination of civil commitment due process considerations will be valuable in determining on what basis confinement is legitimized.

Unfortunately, the United States Supreme Court has not explicitly stated what level of judicial protection is mandated by the massive deprivation of rights which civil commitment entails.[106] Courts have generally held that, as a matter of substantive due process, the state cannot "confine individuals in furtherance of interests that are concededly rational but nothing more."[107] The continuing liberty interest of individuals properly civilly committed has resulted in strict scrutiny protection. Criminals detained longer than their maximum sentence likewise have received significant judicial protection.[108] The law has long proceeded on the premise that the insanity acquittee stands between the convicted and the civilly committed individual.[109] If dangerousness to self or others is sufficient justification for initial commitment, and if the nature and duration of confinement must bear a reasonable relation to these justifications, then the continuing validity of confinement must be judged by the existence *vel non* of the original justifications for commitment.[110]

Even if the infringement is justified, the concept of fundamental rights requires that necessary infringements take place only in the least restrictive way consistent with the state's compelling interest.[111] When a state's compelling interest in confinement no longer exists, those persons should be released. The state must prove insanity and dangerousness in order to have a compelling interest. When those acts are no longer recent, the confinement is no longer

104. Kirschner, *supra* note 55, at 243. *But see,* MONAHAN, *supra* note 49, at 115 ("mental patients without an arrest record prior to going to the hospital have a lower than average arrest rate for violent crime once they get out of the hospital").

105. O'Conner v. Donaldson, 422 U.S. 563, 575 (1975).

106. Kirschner, *supra* note 55, at 253. *See* 422 U.S. 563 (1975).

107. Kirschner, *supra* note 55, at 256.

108. *Id.* at 257.

109. *See* Addington v. Texas, 435 U.S. 967 (1978).

110. Kirschner, *supra* note 55, at 257.

111. *Id.* at 258.

justified.[112] It follows that least restrictive means analysis prevents the continued confinement of the patient who needs only vocational training before being allowed to return to society. The state simply has no compelling interest in confinement of an individual who is that close to release as the liberty interest of the NGRI is identical to that of the committed or convicted.[113]

Two schools of thought have emerged in the case law regarding the type of conditions that may be imposed on the release of an insanity acquittee's consonant with due process. Some cases advocate the principle that the state's power over the NGRI will not support the imposition of *any* conditions of release. Other decisions advocate that only those conditions which are therapeutic, as distinguished from penal, may be imposed.

1. The Constitution Prohibits the Imposition of Any Conditions on the Release of Insanity Acquittees

There is authority for the proposition that it is a violation of due process to place any conditions on the release of an individual who has been acquitted of a crime by reason of insanity where the person has since been determined to be sane.[114] By virtue of the not guilty by reason of insanity verdict, the individual is not a criminal and cannot, therefore, be treated as one because of due process requirements.

In *Holderbaum v. Watkins*,[115] the Court of Appeals of Allen County, Ohio, held that the imposition of any conditions or qualifications upon the release of a man who has been found not guilty by reason of insanity would unconstitutionally deny him equal protection, deprive him of his liberty without due process of law, and deprive him of the right to enjoy liberty.[116] The court found that a petitioner, who has not been convicted of any crime and is not suffering under any disability under law, is entitled to his unconditional release. The court felt that any conditions or qualifications upon the release of a NGRI who was found to be sane pursuant to a writ of habeas corpus is unconstitutional as contrary to the fifth

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112. *Id.*

113. *Id.* at 262.

114. Annot., 2 A.L.R. 4th 933 (1980); 21 AM. JUR. 2d *Criminal Law* § 90 (1981).

115. 44 Ohio App. 2d 253, 73 Ohio Ops. 2d 256, 337 N.E.2d 800, *aff'd in part, vacated in part*, 42 Ohio St. 2d 372, 71 Ohio Ops. 2d 333, 328 N.E.2d 814 (1974).

116. 44 Ohio App. 2d at ___, 73 Ohio Ops. 2d at ___, 337 N.E.2d at 802.

and fourteenth amendments to the United States Constitution.[117]

It is interesting to note, however, that the principle articulated in *Holderbaum* has not been widely embraced. In fact, while affirming the trial court's decision on appeal, the Supreme Court of Ohio vacated that portion of the trial court's holding which found the Ohio statute permitting conditional release to be unconstitutional.[118]

The trial court in *Powell v. Genung*[119] also held that it was without authority to impose conditions on the release of an insanity acquittee. On appeal, the Florida Supreme Court supported this holding: "the trial court had no continuing jurisdiction over petitioner subsequent to his commitment . . . and those portions of [the trial court orders] making petitioner's release conditioned upon further court order . . . were made without authority of law."[120] This holding was based on the statute and, unfortunately, failed to address the trial court's disavowal of authority on constitutional grounds.[121]

While a number of courts have recognized the issue whether the unconditional release of the insanity acquittee is constitutionally compelled, they have declined to rule on the question.[122] A number of courts have held that the power to conditionally release eligible insanity acquittees while reserving jurisdiction to release them absolutely or to recommit them, is inherent in the court's continuing jurisdiction over insanity acquittees.[123]

2. The Release of an Insanity Acquittee May Be Conditioned on Therapeutic Grounds

Other courts have recognized that it is proper to place conditions of a therapeutic nature on the release from confinement of a per-

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117. 44 Ohio App. 2d at ___, 73 Ohio Ops. 2d at ___, 337 N.E.2d at 802. *Holderbaum* is particularly relevant because of one of the conditions of release was that the patient seek employment. The remaining conditions were all of a therapeutic or reporting nature.

118. 42 Ohio St. 2d 372, ___, 71 Ohio Op. 2d 333, ___, 328 N.E.2d 814, 815.

119. 306 So. 2d 113 (Fla. 1975).

120. 306 So. 2d at 120.

121. *Id.*

122. *See, e.g.*, Zion v. Xanthopoulos, 178 Mont. 468, 585 P.2d 1084 (1978); Warner v. State, 244 N.W.2d 640 (Minn. 1976); Powell v. Genung, 306 So. 2d 113 (Fla. 1975).

123. United States v. McNeil, 434 F.2d 502 (D.C. Cir. 1970); Hill v. State, 358 So. 2d 190 (Dist. Ct. App. Fla. 1978); Rawland v. Sheppard, 304 Minn. 496, 232 N.W.2d 8 (1975); State v. Carter, 64 N.J. 382, 316 A.2d 449 (1974).

son who has been found not guilty by reason of insanity.[124] There is substantial support for the theory that it is improper to condition the release of a NGRI inmate by imposing restrictions which are similar to those which are imposed on convicted criminals who are released on probation or parole.[125] This result is based on the premise that a NGRI acquittee is not a convicted criminal and is not properly subject to restrictions that are appropriately placed on convicts.[126]

These principles were articulated in *Scheidt v. Meredith.*[127] *Scheidt* involved a habeas corpus petition of an inmate of a state hospital who had been found not guilty by reason of insanity. The court held that "the imposition of [conditions imposed upon a convicted criminal who had been placed on probation] on one who has not been convicted of a crime is unconstitutional and that petitioner could not be denied his release based on the refusal to accept these conditions."[128] Petitioner "was not legally responsible for the acts committed. He was not therefore a convicted criminal."[129]

The court began from the following premise:

> The state may not constitutionally impose criminal sanctions against persons who have committed no crime. The purpose of modern criminal probation is said to be *rehabilitative and educational,* yet such a program is designed for the guilty and not for those who are not guilty. An essential requirement [for the imposition of rehabilitative conditions on release] is an adjudication of guilt. . . . Although probation may not be *primarily* punitive in nature, punitive aspects are clearly involved. Since a person may not, consistent with the Constitution, be punished when he has committed no crime, it would be unconstitutional to impose criminal probation conditions on someone in petitioner's circumstances. Just as *release on probation may not be weighted with terms and conditions which have nothing to do with the purpose or policy of probation, conditional release of a man who has been restored to sanity may not be conditioned on terms having no relation to his status.*
>
> The interests of the community and the individual are relevant to

124. 21 AM. JUR. 2d *Criminal Law* § 90 (1981). *Contra,* Holderbaum v. Watkins, 44 Ohio App. 2d 253, 73 Ohio Ops. 2d 256, 337 N.E.2d 800 (1974).

125. *See* Annot., 2 A.L.R. 4th 933 (1980).

126. *Id.*

127. 307 F. Supp. 63 (D. Colo. 1970).

128. *Id.* at 66.

129. *Id.*

the granting of a conditional release. Thus, it would be clearly proper to require that petitioner accept psychiatric out-patient care or supervision. However, terms which were designed to regulate the activities of convicted criminals, and which are punitive in nature, cannot be imposed in a case such as this.[130]

Following the principles articulated in *Scheidt* and *Holderbaum,* the Supreme Court of Montana, in *Zion v. Xanthopoulos,*[131] determined that conditioning the release of a NGRI patient upon compliance with parole rules and regulations was a constitutionally impermissible infringement on the liberty of a patient who had not been convicted of a crime and who was not now a danger to herself or others.[132] The trial court in *Zion* had conditioned the patient's release on a willingness to accept supervision by the Parole Division of the Montana Department of Institutions.[133] The Montana Supreme Court first noted that petitioner was not legally responsible for the act committed and that she was not regarded as a convicted criminal.[134] The court reasoned that "imposition of a condition designed for punishment or retribution is inapposite in dealing with an individual who has been acquitted of the crime charged."[135] Noting that petitioner "who has not been convicted of a crime and who was not sentenced to the state prison does not fall within either class of person to whom the criminal probation or parole provisions apply," the court found it clear that "such a person may not be constitutionally subject to such conditions. . . ."[136] The Supreme Court of Montana noted, however, that it was "reluctant to declare flatly for all purposes that some form of overseeing by the Parole Division would be unacceptable as a condition of release of an insanity acquittee."[137]

In accordance with the basic principles articulated in these cases, a number of courts have determined that conditions which

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130. *Id.* (citations omitted) (emphasis added). It is interesting to note that in the course of this discussion the court specifically identified rehabilitative and educational conditions as punitive.

131. 178 Mont. 468, 585 P.2d 1084 (1978).

132. *Id.*

133. *Id.* at __, 585 P.2d at 1086.

134. *Id.* at __, 585 P.2d at 1087.

135. *Id.* (citation omitted).

136. *Id. See* Scheidt v. Meredith, 307 F. Supp. 63 (D. Colo. 1970); Holderbaum v. Watkins, 44 Ohio App. 2d 253, 73 Ohio Ops. 2d 256, 337 N.E.2d 800 (1974). The *Zion* court specifically declined to discuss the constitutionality of the statute which had allowed such conditions to be imposed.

137. 178 Mont. at __, 585 P.2d at 1089.

relate solely to the therapeutic monitoring and control of insanity acquittees are appropriate conditions of release.[138] Not all penal release conditions, however, have been stricken down by the courts. In *Campbell v. District Court of Eighteenth Judicial District for County of Arapahoe*,[139] the Supreme Court of Colorado found a patient to be in violation of a release condition which required that he not possess firearms. The court noted that the proscription against penal conditions articulated in *Scheidt* was directed not to all punitive conditions, but only to "[t]he imposition of criminal probationary conditions which were not related to the individual seeking release."[140] The court found that "[t]he only condition imposed upon the petitioner's release which is commonly imposed upon criminal probations is the prohibition relating to the possession of firearms, a condition directly related to the abnormal and highly dangerous behavior which resulted in the petitioner's initial commitment."[141] The court then concluded that "[a] release condition of [a penal] nature is not unconstitutional if it bears a relationship to the particular individual seeking release and is in the best interests of the defendant and the community."[142]

The holding which emerges from this line of cases is that only those non-therapeutic conditions which bear a relationship to the particular individual seeking release may be imposed upon the release of a defendant found not guilty by reason of insanity.[143] Thus, to be valid, conditions must be individualized rather than boiler plate.

This principle gives rise to an interesting problem, however. The court in *Scheidt* determined that rehabilitative and educational conditions were constitutionally inappropriate as conditions of release.[144] In contrast, the court in *Zion* specifically held that voca-

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138. *See* People v. Blumenshine, 72 Ill. App. 3d 949, 29 Ill. Dec. 73, 391 N.E.2d 232 (1979) (outpatient care, reside with mother, participate in alcohol counseling program); Hill v. State, 358 So. 2d 190 (Dist. Ct. App. Fla. 1978) (continue medication and periodic psychiatric review); Warner v. State, 309 Minn. 333, 244 N.W.2d 640 (1976) (structured living conditions, outpatient psychiatric care, supervision by social worker); Rawland v. Sheppard, 304 Minn. 496, 232 N.W.2d 8 (1975) (continue medication, periodic examination and psychiatric review, periodic report by county welfare department).

139. 195 Colo. 304, 577 P.2d 1096 (1978).

140. *Id.* at ___, 577 P.2d at 1098.

141. *Id.* at ___, 577 P.2d at 1098.

142. *Id.* at ___, 577 P.2d at 1099.

143. *Id.* at ___, 577 P.2d at 1099. *See* Zion v. Xanthopoulos, 178 Mont. 468, 585 P.2d 1084 (1978).

144. 307 F. Supp. at 66.

tional training conditions were constitutionally permissible.[145] This conflict leaves undetermined the basic nature of vocational training requirements. Are such requirements punitive in nature and therefore constitutionally infirm in the absence of some relation to the patient or, rather, are they therapeutic in nature and constitutionally permissible?

A number of factors support the argument that vocational training requirements are punitive. Vocational training is inherently rehabilitative in nature—rehabilitation being one of the four classical justifications of punishment.[146] Vocational training is typically mandated for prisoners.[147] There is also strong support for the proposition that vocational rehabilitation techniques are wholly ineffective.[148] If true, this substantially detracts from their therapeutic value.

It seems more plausible to argue, however, that vocational training, while not a "treatment" for mental illness, is nonetheless therapeutic as opposed to punitive in nature.[149] While rehabilitation is often employed in punitive contexts, it is also offered to many nonprison populations without punitive intent. This form of therapy is not strictly treatment for an illness, but it has as its goal the allied therapeutic purposes of restoring lost functioning, maintaining a stable condition, or imparting new skills in the wake of the illness after the illness has responded to treatment.[150]

In this context, vocational training is more akin to such prophylactic measures as drug maintenance therapy to prevent relapse than to treatment for the primary condition for which the patient was hospitalized initially. Alternatively, it may be viewed as analogous to the use of speech therapy in restoring communicative skills to laryngectomy patients. While no one would question the importance of teaching esophageal speech to such individuals, neither

145. 178 Mont. at ___, 585 P.2d at 1090.

146. Selva, *Treatment as Punishment*, 6 NEW ENG. J. PRISON L. 265 (1980).

147. Lopez, *supra* note 63, at 566. *See* Gorham v. United States, 339 A.2d 401 (D.C. Cir. 1975).

148. *See* Fishman, *An Evaluation of Criminal Recidivism in Projects Providing Rehabilitation and Diversion Services in New York City*, 68 J. CRIM. L. & CRIMINOLOGY 283 (1977). Personal communications with a number of patients at Western State Hospital, Staunton, Virginia also support the ineffectiveness of vocational training programs. These programs are viewed as just one more hoop to jump through before the patient can get "back on the street."

149. *See* text accompanying notes 21-36 *supra*.

150. *See* text accompanying notes 33-36 *supra*.

would anyone regard speech therapy as treatment for laryngeal cancer.

The purpose of this form of therapy is restoration. The Virginia Code explicitly provides for this type of therapy under the conditional release procedure.[151] Presumably, if the patient is in need of vocational training, that individual has progressed to the point where he is not in need of continuous involuntary hospitalization.[152] Indeed if he had not progressed at least that far, it is doubtful if vocational training could be of any substantial benefit to the patient.[153]

Section 37.1-67.3 of the Virginia Code provides that a patient who still meets the criteria for involuntary commitment but who is not in need of involuntary hospitalization "shall be subject to court-ordered out-patient treatment, day treatment in a hospital, night treatment in a hospital, referral to a community mental health clinic, or other such appropriate treatment modalities as may be necessary to meet the needs of the individual."[154]

Thus, as a matter of substantive due process, vocational training may be imposed as a valid condition of release if certain facts are presented. First, vocational training generally is not considered treatment[155] and therefore may be imposed only if necessary to prevent relapse or to restore essential lost functioning. Once these purposes are no longer served, requiring vocational training or any other condition of release is unconstitutional.[156] Vocational training must therefore be tied to some valid therapeutic goal of the patient care program.

Second, vocational training may be imposed pursuant to a conditional release procedure. The factors discussed above require, however, that the lack of vocational training be related to the therapeutic needs of the patient. The same conclusion has also been reached with respect to vocational training as a pre-condition of release.[157] As will be developed below, no less is required by the equal protection clause of the fourteenth amendment.

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151. VA. CODE ANN. § 37.1-67.3 (Cum. Supp. 1981), VA. CODE ANN. § 19.2-181 (3) (Cum. Supp. 1981).

152. *See* text accompanying notes 33-36 *supra*.

153. *See* text accompanying note 36 *supra*.

154. VA. CODE ANN. § 37.1-67.3 (Cum. Supp. 1981).

155. *See* text accompanying notes 21-36 *supra*.

156. Annot., 2 A.L.R. 4th 933, 935 (1980).

157. *See* text accompanying notes 21-68 *supra*.

B. *Equal Protection*

The equal protection clause of the fourteenth amendment provides that "[n]o state shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the law."[158] Like substantive due process, equal protection analysis is divided into two levels of judicial scrutiny.[159] Where strict scrutiny due process analysis requires that state intrusions into protected liberty interests be justified by some compelling governmental interest, strict scrutiny equal protection analysis requires that the state establish a compelling interest in its distinction between classes which are similarly situated.[160] Further, the state must prove that those distinctions are the least restrictive available means necessary to fulfill its purpose.[161] Similarly, rational basis due process analysis requires a determination of whether it is rational to believe that the government policy involved promotes a legitimate government purpose; a rational basis exists for the differential treatment of similarly situated individuals if the purpose for the differential treatment is legitimate and articulated.[162]

The individual possesses a fundamental right to remain free from confinement. Acquittees by reason of insanity and civil committees are similarly situated in terms of this right. Distinctions in treatment between these two categories must, therefore, be based on a compelling state interest.[163]

Equal protection problems raised by distinctions drawn between NGRI defendants and civil committees are more serious at the release stage than at initial confinement. This discussion has focused solely on the legitimacy of differential treatment at the release stage. In practice, significant distinctions continue to be made both at the point of commitment and at the point of release.[164]

It is necessary to examine the rationales which have been offered in support of governmental distinctions between civil committees

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158. U.S. CONST. amend. XIV.

159. Kirschner, *supra* note 55, at 253. *But see* Michael M. v. Superior Court of Sonoma County, 450 U.S. 464 (1981), where the Court appears to depart from the two pronged, rational basis, strict scrutiny, analysis.

160. Boddie v. Connecticut, 401 U.S. 371, 383 (1971).

161. *Id.*

162. Maher v. Roe, 432 U.S. 464, 470 (1977).

163. Kirschner, *supra* note 55, at 266.

164. *Id.* Significant distinctions have always been made at the point of initial confinement. There are strong arguments that the NGRI verdict requires equal treatment of criminal and civil committees at all stages.

and insanity acquittees: (1) the state has an interest in deterring false insanity pleas; (2) those acquitted may have a degree of culpability for an offensive act which civil committees do not have; and (3) the acquitted patient may be more likely to injure others since his conduct has already manifested itself in an antisocial manner.[165]

While the first rational presents a legitimate state interest, it is questionable whether it should justify continued confinement of those already adjudicated as not guilty by reason of insanity. The NGRI verdict exonerates the defendant from liability. The defendant has committed a wrongful act yet the wrong is not attributable to him due to his insanity.[166] The purpose of the verdict is to excuse from punishment those individuals who are not culpable for their actions.[167]

In *United States v. Brown*,[168] the Court of Appeals for the District of Columbia held that, for purposes of initial commitment, the deterrence of false guilty pleas is a legitimate interest which can be protected by differential treatment of the NGRI defendant. At least three jurisdictions, however, disagree with the *Brown* holding.[169] Additionally, the *Brown* court conceded that any deterence value wanes after a lengthy confinement.[170]

The second rationale, that the NGRI acquittee may possess some meaningful degree of culpability, is misguided. This argument entirely overlooks the underlying purpose of the not guilty by reason of insanity verdict.[171] Since the individual is insane, in our jurispurdence that person while capable of acting cannot supply the second requisite of *mens rea* necessary to convict him—a culpable mind. The culpability rationale also fails to take into consideration the level of culpability of the civil committee, since the only valid distinction which can be drawn between the two is proof beyond a reasonable doubt of commission of a criminal act.[172] Culpability, however, comprises many factors which the NGRI verdict simply fails to consider.[173]

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165. Kirschner, *supra* note 55, at 270-77.
166. *See* G. Fletcher, Rethinking Criminal Law (1978).
167. Powell v. Texas, 392 U.S. 514, 529 (1968).
168. 478 F.2d 606 (D.C. Cir. 1973).
169. Kirschner, *supra* note 55, at 272 n.343.
170. 478 F.2d at 612.
171. Kirschner, *supra* note 55, at 272, *see* notes 108 & 109 *supra*.
172. Kirschner, *supra* note 55, at 272.
173. Many civil committees are NGRI simply because of the exercies of prosecutorial dis-

The third rationale of manifest dangerousness is similarly defective. Past dangerous acts by the NGRI are not more probative of future danger than the past dangerous acts of the civil committee. If the best evidence of a person's prospective dangerousness is his past dangerousness, how is the NGRI defendant ever to be released? Even the most sophisticated clinical predictors of dangerousness are subject to unacceptably high rates of error. We cannot ascribe greater accuracy or precision to the prosecution or acquittal of a NGRI.[174]

Regardless of distinctions which could be drawn at the commitment phase, there is substantial authority that no distinction between the NGRI and the civil committee should extend beyond the maximum sentence for the offense. Beginning with *Baxtrom v. Herold*,[175] a line of cases has found that NGRI-civil committee distinctions become so attenuated by the end of the penal term or maximum sentence as to be non-viable. *Baxtrom* held that the protection afforded a civil committee must be extended to a state prisoner at the end of his sentence in order for the state to retain custody of the prisoner.[176]

Based on this holding, in *United States v. Brown*,[177] the United States Court of Appeals for the District of Columbia stated that:

> [w]hen the [insanity acquittee] has been in detention for a considerable period of time, his continued detention *vel non* should be governed by the same standard of burden of proof as applies to civil commitments. The extent of that period calls for sound discretion, would take into account, *e.g.*, the nature of the crime (violent or not), nature of treatment given and response of the person, would generally not exceed five years, and should, of course, never exceed the maximum sentence for the offense, less mandatory release time.[178]

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cretion. The civil committee may be just as culpable as the NGRI but was never charged with a felony because of the response of his victim. Another distinction could be generated by the fact that the NGRI was competent to stand trial and the civil committee was not. Indeed, the civil committee may be a great deal more dangerous or culpable than the NGRI yet will enjoy a lower standard of proof for release. Kirschner, *supra* note 55, at 276-77.

174. *See* MONAHAN, *supra* note 49; Cocozza & Steadman, *supra* note 49. *See also* WEXLER, CRIMINAL COMMITMENTS AND DANGEROUS MENTAL PATIENTS (1976).

175. 383 U.S. 107 (1966).

176. *Id.*

177. 478 F.2d 606 (D.C. Cir. 1973).

178. *Id.* at 612.

Returning to the issue in *United States v. Ecker,*[179] the court held that "equal protection requires the standards governing the release of criminal acquittees who have been confined for a period equal to the maximum sentence authorized for their crimes to be substantially the same as the standards applicable to civil committees."[180] In *Jones v. United States,*[181] the D.C. Circuit reaffirmed the rule.[182]

To summarize, distinctions in release procedures between the NGRI defendant and civil committees raise questions of equal protection violations.[183] Given that the fundamental interest in liberty requires strict judicial scrutiny, these differences should be tested under the compelling interest standard. Under this standard, it is impossible to justify continuation of the assumption that the not guilty by reason of insanity defendant is distinguishable from the civil committee. Even if we are to assume that the state may legitimately distinguish between the NGRI defendant and the civil committee at the initial commitment stage,[184] at release this distinction is so attentuated as to be constitutionally defective. By the time these individuals are ready to leave the hospital and all that is justifying confinement is the patient's lack of vocational training, there is no viable distinction remaining between the two classes to justify differential treatment. In light of the constitutional dictates of equal protection, these classes of individuals must be afforded the same level of protection under the law. The Constitution mandates equal treatment by the least restrictive means.

The release of civil committees may be conditioned on the receipt of vocational training in some circumstances. Vocational training can be required only if the training bears some relationship to the individual's insanity or dangerousness. Equal protection requires that it be imposed on NGRI patients only upon a similar showing.

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179. 543 F.2d 178 (D.C. Cir. 1976), *cert. denied,* 429 U.S. 1063 (1977).

180. 543 F.2d at 188 n.34 (citations omitted).

181. 432 A.2d 364 (D.C. Cir. 1980).

182. In *Jones,* however, the court limited the application of the rule to the applicability of civil release procedures. The state is *not* required to release the individual if it does not choose to initiate civil commitment and procedures. Rather, the individual's release is governed by the standards of release for civil committees.

183. Kirschner, *supra* note 55, at 277.

184. An assumption which, arguably, is itself invalid under the strict scrutiny analysis. *See also* United States v. Brown, 478 F.2d 606 (D.C. Cir. 1973).

V. Conclusion

Involuntary confinement intrudes upon an individual's natural legal status of freedom. Infringement of this right to liberty can be justified only if the committing jurisdiction satisfied strict scrutiny standards of due process and equal protection.[185] In accordance with these constitutional mandates, vocational training can be imposed upon an insanity acquittee only through the procedure of conditional release. Due process requires that this determination be made at a full hearing with findings of fact supporting the conclusion that vocational training is necessary to ensure the NGRI's safety or sanity. Equal protection requires that no more stringent standards be imposed on the NGRI than are imposed on civil committees. Therefore, whether viewed either as a condition or precondition of release, vocational training may be imposed only when it can be shown to bear some relationship to the insanity or dangerousness of the patient being considered for release, regardless of status.

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185. Kirschner, *supra* note 55, at 277.

APPENDIX

VA. CODE ANN. § 19.2-181 (m. Supp. 1981)—

(1) When the defense is insanity or feeblemindedness of the defendant at the time the offense was committed, the jury shall be instructed, if they acquit him on that ground, to state the fact with their verdict, and the court shall place him in temporary custody of the Commissioner of Mental Health and Mental Retardation, hereinafter referred to as the Commissioner, and appoint three physicians or two physicians and one clinical psychologist, skilled in the diagnosis of insanity and feeblemindedness, to examine the defendant and make such investigation as they may deem necessary in order to determine whether, at the time of their examination, he is insane or feebleminded and to determine whether his discharge would be dangerous to the public peace and safety or to himself and to report their findings to the court. Upon receipt of such report, the court shall forthwith order a hearing. If the court is satisfied by the report, or such testimony of the examining physicians or clinical psychologist as it deems necessary, that the defendant is insane or feebleminded or that his discharge would be dangerous to public peace and safety or to himself, the court shall order him to be committed to the custody of the Commissioner. Otherwise, the defendant forthwith shall be discharged and released.

(2) If the director of the State hospital in which a person is confined under paragraph (1) of this section is of the opinion that a person committed to his custody, pursuant to paragraph (1) of this section, is not insane or feebleminded and may be discharged or released without danger to the public peace and safety or to himself, he shall make application for the discharge or release of such person in a report to the court by which such person was committed and shall transmit a copy of such application and report to the attorney for the Commonwealth for the city or county from which the defendant was committed. Upon receipt of such application for discharge or release, the court forthwith shall appoint at least two qualified psychiatrists, one of whom shall be an employee of a State mental institution other than the one in which the person is confined, to examine such person and to report within sixty days of their opinion as to his mental condition. To facilitate such examination and the proceedings thereon, the Commissioner shall transfer such person to the appropriate State mental institution located nearest the place where the court sits.

(3) If the court is satisfied by the application and report seeking the release or discharge of the committed person filed pursuant to paragraph (2) of this section and by the report or such testimony of the reporting psychiatrists, appointed pursuant to paragraph (2) of this section, as the court deems necessary, that the committed person is not insane or feebleminded and that his discharge or release will not be dangerous to the public peace and safety or to himself, the court shall order his discharge or release. If the court is not so satisfied, it shall promptly order a hearing to determine whether the committed person is at the time insane or feebleminded and to determine whether his discharge would be dangerous to the public peace and safety or to himself. Any such hearing shall be deemed a civil proceeding and the burden shall be on the committed person to prove that he is not insane or feebleminded and that his discharge would not be dangerous to the public peace and safety or to himself. According to the determination of the court upon such hearing, the committed person shall thereupon be discharged or released or shall be recommitted to the custody of the Commissioner. Upon recommendation of the Commissioner, the court may, in lieu of discharging or releasing, or recommitting the person to the custody of the Commissioner, permit such person to be treated as a patient committed purusant to §§ 37.1-67.1 through 37.1-67.4, subject to such limitations and restrictions as the court may deem appropraate and such individual shall remain under the jurisdiction of the committing court subject to such modification or additional order as the court may determine appropriate. It shall be the duty of the superintendent of the institution in which such person is confined, at yearly intervals commencing six months after the date of confinement, to make a report of such person's condition to the court from which he was committed.

(4) At yearly intervals commencing six months after the date of confinement, and not more frequently, a committed person may make application to the court by which he was committed for his discharge or release and shall transmit a copy of such application and report to the attorney for the Commonwealth for the city or county from which the defendant was committed and the procedure to be followed upon such application shall be the same as that prescribed above in the case of an application by the superintendent of the institution in which such person is confined. The attorney for the Commonwealth for the city or county from which the defendant was committed shall represent the interests of the Com-

monwealth in proceedings under subsections (3) and (4) of this section.

(5) No trial court in this Commonwealth, other than the court which ordered the comitment of a person committed purrsuant to paragraph (1) of this section, shall have jurisdiction to entertain any action seeking the release of such person committed pursuant to paragraph (1)), whether the release is sought through application for a writ of habeas corpus or otherwise. Errors committed or allowed by the court having jurisdiction over the release proceedings set forth in paragraphs (2), (3) and (4) of this section shall be appealable to the Supreme Court as in other civil cases except appeals of right.

(6) Costs of the service of physicians or clinical psychologists required by this section shall be paid by the State as provided in § 19.2-175.

(7) In applying this section the term "feebleminded" shall be construed to mean a person who is adjudicated legally incompetent because of mental deficiency by a circuit court in which he is charged with crime and who is also found to lack the mental condition to enable him to be discharged without danger to the public peace and safety or to himself.