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S.B. 297: Procedural Changes in Civil Commitment for Those Found to Be Not Guilty by Reason of Insanity in Ohio

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S.B. 297: PROCEDURAL CHANGES IN CIVIL COMMITMENT FOR THOSE FOUND TO BE NOT GUILTY BY REASON OF INSANITY IN OHIO

I. INTRODUCTION

In April 1980, the Ohio General Assembly enacted Senate Bill 297.[1] The bill was promulgated to provide specific changes in the procedures for the civil commitment and release hearings of persons found not guilty by reason of insanity (NGRI).[2] This legislation was enacted as an emergency measure[3] in response to increasing public unrest over the release of NGRI patients.[4] Much of the concern was seemingly precipitated by recent, well publicized trials in which the defendants pled not guilty by reason of insanity following charges of murder.[5] The

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1. Am. Sub. S.B. 297, 113th General Assembly (1980) (codified in scattered sections of titles 29 and 50 OHIO REV. CODE ANN. (Page Supp. 1980 & Page 1981) (effective April 30, 1981)). *See* note 28 *infra*.

2. *See* Press Release from the Office of State Senator M. Morris Jackson, (21st District, President Pro Tempore, Ohio Senate) (March 12, 1980) [hereinafter cited as Jackson Press Release] (copy on file with the University of Dayton Law Review office).

3. Section 7 of S.B. 297 reads:

> This act is hereby declared to be an emergency measure necessary for the immediate preservation of the public peace, health, and safety. The reason for such necessity lies in the fact that the act's safeguards are necessary to assure that potentially dangerous persons who were found not guilty by reason of insanity or incompetent to stand trial and committed to mental health facilities are not released without judicial scrutiny. Additionally, the reason for such necessity is that certain persons committed as mentally ill or mentally retarded under the former Ascherman Act were, at the time of their commitment, entitled to a probation hearing upon recovery, and Am. Sub. H.B. 565 of the 112th General Assembly repealed this right to a hearing, thereby removing from persons presently committed a substantial right to which they were entitled at the time of their commitment. Therefore, this act shall go into immediate effect.

4. "The legislative intent of this law . . . was to protect the public from a sense of vulnerability due to increasing public unrest about insane persons in the street." Letter from Dr. Phillip Resnick to Ned J. Nakles, Jr. [hereinafter cited as Resnick Letter] (on file with the University of Dayton Law Review office). Dr. Resnick is Director of the Psychiatric Clinic in Cleveland, Ohio, and is an Assistant Professor of Psychiatry at Case Western Reserve School of Medicine. Dr. Resnick was frequently consulted during the drafting of S.B. 297.

5. "The recent Levine and Geiger cases have focused attention on our controversial and complex criminal insanity law. These cases have outraged and frightened the citizens of our community, yet they have served a purpose by pointing out the deficiencies in our law." Address by Senator M. Morris Jackson, Jewish Community Center's Public Affairs Committee Program on "Insanity and the Law." (May 7, 1980)

new bill was designed to correct procedural flaws in the present insanity law and insure public safety by holding the court in which the defendant was found NGRI responsible for commitment and release hearings.[6] This procedure attempts to insure greater public safety by giving the court which is most familiar with the case and is most accountable to the people of the county where the criminal act was committed, the authority to make the decision regarding the NGRI patient's release.[7]

Among the most important changes the bill makes are: 1) the change of jurisdiction of commitment and release hearings for persons found NGRI from the probate court to the trial court in which the person was found NGRI;[8] 2) allowing the original prosecutor, at any commitment or release hearing, the opportunity to argue that the person is still mentally ill or mentally retarded and in need of hospitalization or institutionalization;[9] 3) prohibiting a person found NGRI from being able to voluntarily admit, and subsequently discharge, himself from hospitalization;[10] and 4) giving the trial court the power to monitor the progress of the NGRI patient and retain control over him by allowing conditional release programs.[11]

The Ohio legislature has responded to the deficiencies in prior law by enacting S.B. 297. In the words of Senator M. Morris Jackson, prime sponsor of the legislation, "[i]t will close glaring loopholes in the present insanity law. It will insure public safety and guarantee an NGRI patient due process and appropriate aftercare treatment. It is a legislative step long overdue."[12]

The following discussion will examine in detail the procedural model which the law establishes for the civil commitment process, the aforementioned changes which S.B. 297 effectuates, and the possible constitutional questions arising from this legislation. The analysis will begin with a brief look at the insanity defense.

[hereinafter cited as Address by Senator Jackson] (copy on file with the University of Dayton Law Review office).

6. *Id.*

7. *Id.*

8. OHIO REV. CODE ANN. § 2945.40 (Page Supp. 1980). Under prior Ohio law, the probate court was responsible for commitment and release hearings. These hearings were usually held in the Probate Court of Allen County, where the Lima State Hospital for the criminally insane is located. Jackson Press Release, *supra* note 2.

9. OHIO REV. CODE ANN. § 2945.40 (Page Supp. 1980). The prior law made no provisions for the original prosecutor or the trial judge who heard the case to make any presentation at the NGRI patient's commitment or release hearings.

10. *Id.* Former §§ 5122.15(G) and 1523.76(G) of the Ohio Revised Code allowed any person involuntarily committed, to change his status and voluntarily admit, and then discharge, himself during the initial 90 days of commitment.

11. OHIO REV. CODE ANN. § 2945.40 (Page Supp. 1980). The prior law made no provisions for conditional release.

12. Address by Senator Jackson, *supra* note 5.

II. THE INSANITY DEFENSE

A successful defense of a criminal charge results in acquittal and release of the accused.[13] The successful defense of not guilty by reason of insanity, however, will probably result in commitment of the defendant to a mental institution until his sanity has been regained.[14] The effect of the NGRI defense is to relieve the defendant of responsibility for committing the alleged criminal acts, thereby negating the state's power to punish the individual.[15] Because of his lack of blameworthiness the accused who is found NGRI is better suited to medical-custodial treatment than to punitive-correctional measures.[16]

Under the Ohio statutory scheme, when a defendant enters a plea of not guilty by reason of insanity, he and the court become subject to the provisions of section 2945.39 of the Ohio Revised Code. This section provides for an evaluation of the defendant's mental condition at the time the alleged criminal offense was committed. The judge may order up to three evaluations conducted either by a forensic center, or by another facility designated by the Department of Mental Health and Mental Retardation to conduct such evaluations, or by examiners designated by the court.[17] If the defendant has not been released on bail or recognizance, he must be examined at his place of detention or an another facility within thirty days.[18] The examiner is to be informed of the offense charged and at trial may be called as a witness by the court and examined and cross-examined by counsel.[19] A written report concerning the mental condition of the defendant must be prepared by the examiner and provided to the court, prosecutor, and defense counsel.[20]

In Ohio, for the jury to return a verdict of not guilty by reason of insanity:

> [t]he accused must establish by a preponderance of the evidence that disease or other defect of his mind had so impaired his reason that, at the

13. *See* W. LAFAVE, MODERN CRIMINAL LAW at 324 (1978).
14. *Id.*
15. *See* State v. Summons, 1 Ohio Dec. Reprint 416, 422 (1852), *aff'd*, 5 Ohio St. 325 (1856).

> [I]n order to [commit] a crime, a man must have intelligence and capacity enough to have a criminal intent and purpose; and if his reason and mental powers are so deficient that he has no will, no conscience or controlling mental power, or if, through the overwhelming violence of mental disease, his intellectual power is for the time obliterated, he is not a responsible moral agent, and will not be punished for criminal acts.

16. *See* W. LAFAVE, MODERN CRIMINAL LAW at 324 (1978).
17. OHIO REV. CODE ANN. § 2945.39(A) (Page Supp. 1980).
18. *Id.* § 2945.39(C).
19. *Id.*
20. *Id.*

> time of the criminal act with which he is charged, either he did not know that such act was wrong or he did not have the ability to refrain from doing that act.[21]

This rule, adopted by the Supreme Court of Ohio in *State v. Staten*,[22] is based upon the M'Naghten test for determining whether a defendant is NGRI.[23]

III. SENATE BILL 297—THE PROCEDURAL MODEL

Civil commitment of mentally ill persons is of course not restricted to persons found NGRI. In general, civil committees are those persons who are determined to be mentally ill subject to hospitalization by court order and who, because of their illness, represent a substantial risk of physical harm either to themselves or to others.[24] Chapter 5122 of the Ohio Revised Code establishes the procedures by which all classes of mentally ill persons are committed to appropriate institutions.[25]

One particular class of civil committees affected by chapter 5122 provisions is comprised of persons found NGRI. These people form a group unique from other mentally ill committees in that a determination of their mental illness is made in a criminal proceeding.[26] This process, through which a defendant is determined to be not guilty of commiting a criminal act because of his mental illness at the time of its

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21. State v. Staten, 18 Ohio St. 2d 13, 21, 247 N.E.2d 293, 299 (1969), *modified*, 408 U.S. 938 (1972).

22. *Id.*

23. The M'Naghten test requires that:

> [at] the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong.

M'Naghten's Case, 8 Eng. Rep. 718, 722 (1843).

24. *See* text accompanying note 61 *supra*. The primary focus of this note is upon persons found not guilty by reason of insanity. For an exhaustive examination of the overall scope of civil commitment, *see* Comment, *Developments in the Law—Civil Commitment of the Mentally Ill*, 87 HARV. L. REV. 1190 (1974). For treatment of this subject in Ohio, *see* Blackley, *Judicial Intervention as a Psychiatric Therapy Tool*, 15 CLEV.-MAR. L. REV. 506 (1966); Dewey, *Civil Incompetency in Ohio: Determination and Effect*, 34 CIN. L. REV. 419 (1965); Gui, Lavin, & Bradin, *The New Ohio Mental Health Act*, 11 AKRON L. REV. 104 (1977). For additional reference, *see generally* Saphire, *The Civilly-Committed Public Mental Patient and the Right to Aftercare*, 4 FLA. ST. U. L. REV. 232 (1976); Comment, *Involuntary Commitment of the Mentally Ill*, 38 MONTANA L. REV. 308 (1977); Comment, *Commitment and Release Standards and Procedures: Uniform Treatment for the Mentally Ill*, 41 U. CHI. L. REV. 825 (1974).

25. Chapter 5122 of the Revised Code is entitled "Hospitalization of Mentally Ill."

26. *See* note 136 *infra*.

commission, is governed by the provisions of section 2945.39 of the Revised Code and by state common law.[27] After this determination has been made, the person found NGRI is subject to procedures ensuring appropriate disposition of the party. These procedures are contained in section 2945.40 and chapter 5122 of the Revised Code.

Senate Bill 297 amends sections of titles 29 and 51 of the Ohio Revised Code.[28] The key section of the bill is section 2945.40,[29] which outlines the procedural effects of a verdict of not guilty by reason of insanity as they relate to civil commitment and conditional release, the latter provision being a totally new addition to the existing law. Significant amendments are also made in section 5122.02[30] and 5122.15.[31] Section 5122.02 now prohibits a person found not guilty by reason of insanity from voluntarily admitting himself to a state hospital, while section 5122.15 extends the amount of time between full hearings for outright or conditional release of persons involuntarily committed.[32] The complexity of the bill, resulting from the interrelation of the amended provisions within the two titles, creates the necessity to formulate a working model of the procedures encompassed within the law itself.

A. Jurisdictional Changes in the Commitment Procedure

Formerly under Ohio law, upon a finding of not guilty by reason of insanity, the trial court which rendered the verdict was required to file an affidavit with the probate division of the court of common pleas of either the county where the respondent lived, was institutionalized, or where he had been found NGRI.[33] The affidavit had to state the person to be "a mentally ill person subject to hospitalization by court order. . . ."[34] A probable cause hearing was then conducted by the probate court within three days in order to determine whether the person was mentally ill, or retarded, subject either to hospitalization or institutionalization.[35] Upon such a finding, civil commitment in

27. *See* notes 17-23 and accompanying text *supra*.

28. Amended sections of Title 29 include: 2945.37, .371, .38, .39, .40. Amended sections of Title 51 include: 5119.74, 5120.11, .16, 5122.01, .02, .05, .06, .10, .11, .12, .141, .15, .20, .21, .22, 5123.68, .69, .71, .72, .73, .76, .78, .79, .80, 5125.05, .11. Section 5125.03 is repealed by this legislation.

29. OHIO REV. CODE ANN. (Page Supp. 1980). Section 2945.40 is entitled: "Procedure upon acquittal by reason of insanity."

30. *Id.* (Page 1981). Section 5122.02 is entitled: "Admission of voluntary patients."

31. *Id.* Section 5122.15 is entitled: "Full hearing; disposition; mandatory hearing on continued commitment."

32. *Id.* §§ 5122.02(D), .15(H).

33. *Id.* § 2945.40 (Page Supp. 1979).

34. *Id.*

35. *Id.*

one of six types of facilities could have been ordered for an initial ninety day period.[36] This hearing was to be conducted in a physical setting not likely to have a harmful effect on the respondent . . . ."[37] The provision included the possibility of holding the hearing in a hospital outside the county where the person had been found not guilty by reason of insanity.[38]

Senate Bill 297 changes the procedures within section 2945.40 by relieving the probate court of jurisdiction over all full civil commitment hearings of persons found NGRI. Jurisdiction over the commitment decision now remains within the authority of the trial court which originally finds the person not guilty by reason of insanity.[39] Prior to the full hearing, "if the trial court judge believes that there is probable cause that the person found not guilty by reason of insanity is a mentally ill or retarded person, he may issue a temporary order of detention. . . ."[40] The standard for determining the respondent to be a mentally ill person remains that which is provided within section 5122.01(A).[41]

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36. Section 5122.15(C)(1)-(6) formerly read:

If, upon completion of the hearing, the court finds clear and convincing evidence that the respondent is a mentally ill person subject to hospitalization by court order, the court may order the respondent's discharge or may order the respondent, for a period not to exceed ninety days to:

(1) A hospital operated by the department of mental health and mental retardation;
(2) A nonpublic hospital;
(3) The veterans' administration or other agency of the United States government;
(4) A community mental health clinical facility;
(5) Receive private psychiatric or psychological care and treatment. [sic]
(6) Any other suitable facility or person consistent with the diagnosis, prognosis, and treatment needs of the respondent.

37. *Id.* § 5122.141.

38. *Id.* For a summary of the former statutory provisions in this area, *see* Sen. Jud. Report of Sen. Bill 297 1-6 (1980) [hereinafter cited as Report of S.B. 297] (copy on file with the Ohio Legislative Service Commission Library, Columbus, Ohio).

39. OHIO REV. CODE ANN. § 2945.40(A) (Page Supp. 1980). Section 2945.40(A) only names the court involved as the "trial court." Sections 5122.01(Q), and 5123.68(V), however, have been amended to read: " 'Court' means the probate division of the court of common pleas except when the respondent is a person found not guilty by reason of insanity, in which case 'court' means the court that found the respondent not guilty by reason of insanity."

40. § 2945.40(A) (Page Supp. 1980). This section allows the trial court judge to evaluate each situation before him when determining what type of facility the NGRI patient should be detained in prior to, and during, the commitment hearing. It is suggested, therefore, that the person could possibly be held in a jail during this period. *See* Report of S.B. 297 *supra* note 38.

41. Section 5122.01 defines mental illness to mean "a substantial disorder or thought, mood, perception, orientation, or memory that grossly impairs judgment,

Upon a trial court determination of probable cause, a full hearing must be held within seven court days[42] after the initial verdict of not guilty by reason of insanity.[43] Failure to conduct the hearing within the allotted time will result in immediate discharge of the respondent unless, upon a showing of good cause, the trial judge grants a continuance.[44]

The jurisdictional change in the law only applies to persons found not guilty by reason of insanity. In all other cases, jurisdiction for the full civil commitment hearing is vested in the probate court of the county where the respondent is held, or in a probate court "out of the county in which the respondent is held."[45] Such hearings shall be presided over by the probate court judge or by a referee assigned by the judge.[46]

B. The Full Hearing

All full hearings determining both initial and continued commitment decisions are held pursuant to section 5122.15 of the Ohio Revised Code.[47] The Ohio Rules of Civil Procedure are controlling insofar as they are not inconsistent with that section.[48] Senate Bill 297 provides that all full hearings involving a respondent found not guilty by reason of insanity are now to be open to the public.[49]

1. Parties to the Full Hearing; the Addition of the Prosecutor

Senate Bill 297 changes the procedure for full hearings by providing that the prosecutor who represented the state during the original

behavior, capacity to recognize reality, or ability to meet the demands of life." In making the probable cause determination, the trial court judge need not find a showing of dangerousness. OHIO REV. CODE ANN. §§ 2945.40(A) (Page Supp. 1980), 5122.01(A) (Page 1981).

Findings of mental illness, being made for the purpose of civil commitment, involve a completely different standard for determination than do the original finding of not guilty by reason of insanity. The former finding depends upon the present mental state of the person involved, while the latter is a determination of mental state at the time the criminal act took place. *See* State v. Staten, 18 Ohio St. 2d 13, 21, 247 N.E.2d 293, 299 (1969). *See generally* notes 13-23 and accompanying text *supra*.

42. Amended § 2945.40(A) changed the time span for possible temporary detention from three to seven days. OHIO REV. CODE ANN. § 2945.40(A) (Page Supp. 1980).

43. *Id.*

44. *Id.*

45. *Id.* § 5122.15(A) (Page 1981).

46. *Id.* Section 5122.15(A) requires that any designated referee must be an attorney.

47. *Id.* § 5122.15.

48. *Id.* § 5122.15(A)(15).

49. *Id.* § 5122.15(A)(5). Civil committment hearings in cases not involving persons found not guilty by reason of insanity are still closed to the public. *Id.*

criminal trial, continue to do so in the commitment proceedings.[50] Prior to passage of S.B. 297 prosecutors could not take part in either commitment or release hearings involving persons found not guilty by reason of insanity.[51] The new law creates an adversary posture between the state and the respondent, yet the proceedings remain within a civil context. The prosecutor as the representative of the state, "shall present the case demonstrating that the respondent is a mentally ill person subject to hospitalization by court order. . . ."[52] This must be done in all hearings where determinations as to commitment, release, discharge, trial visits, and transfers are at issue.[53] In hearings to determine violation of conditional release, the prosecutor must present the case showing such release to have been violated.[54]

In all full hearings under this law, the respondent is entitled to be present and to be represented by the counsel of his choice.[55] If the respondent does not have counsel, and if this right has not been waived, the court must appoint an attorney for him.[56] In doing so, the court retains the right to have the respondent pay the counsel fee so long as he is not shown to be an indigent.[57]

The third party to all full hearings is the hospital or facility under whose care and supervision the respondent has been placed. Senate Bill 297 provides for the Attorney General's office to designate an attorney to represent the interests of such parties.[58] In order to best represent these interests, the assigned attorney "shall offer evidence of the

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50. Senate Bill 297 now includes the prosecutor within the civil commitment process through the addition, in § 5122.01, of a completely new definition for that position. OHIO REV. CODE ANN. § 5122.01(U) (Page 1981). The amended section now reads:

> 'Prosecutor' means the prosecuting attorney, village solicitor, city director of law, or similar chief legal officer who prosecuted a criminal case in which a person was found not guilty by reason of insanity, who would have had the authority to prosecute a criminal case against a person, if the person had not been found incompetent to stand trial, or who prosecuted a case in which a person was found guilty.

51. Prior to S.B. 297, prosecutors had lacked standing to take part in the civil commitment and release hearings in any manner. Interview with John E. Murphy, Executive Director, Ohio Prosecuting Attorney's Association (Sept. 1980) [hereinafter cited as Murphy Interview] (on file with the University of Dayton Law Review office).

52. OHIO REV. CODE ANN. § 5122.15(A)(10) (Page 1981).

53. *Id.* § 2945.40(G)(Page Supp. 1980).

54. *Id.* § 2945.40(D)(3). *See* notes 89-94 and accompanying text *infra.*

55. OHIO REV. CODE ANN. § 5122.15(A)(2) (Page 1981). Sections 5122.15(A)(3), (4) provide for appointment of counsel for the respondent. The procedural right to be represented by a counsel of the respondent's choice, however, is an amended addition which S.B. 297 adds to § 5122.15(A)(2). Previously that section only secured the respondent's right to attend the hearing. *Id.* § 5122.15(A)(2) (Page Supp. 1979).

56. *Id.* §§ 5122.15(A)(3), (4) (Page 1981).

57. *Id.*

58. *Id.* § 5122.15(A)(10)

diagnosis, prognosis, record of treatment, and less restrictive plans, if any."[59]

2. Necessary Showing for Commitment at Full Hearings

To order an initial commitment, or to have a commitment continued, the trial court must find by clear and convincing evidence that the respondent is a "mentally ill or mentally retarded person subject to hospitalization or institutionalization by court order. . . ."[60] In order for either of these judgments to be rendered, there must be a showing of at least one of the four requirements set forth in the definition of "mentally ill person subject to hospitalization by court order" as stated in Revised Code section 5122.01(B)(1)-(4), or a showing of both requirements set forth in the definition of a "mentally retarded person subject to institutionalization by court order" as is stated in Revised Code section 5123.68(N)(1)-(2). The former is defined in section 5122.01(B) as:

> [A] mentally ill person who, because of his illness: (1) [r]epresents a substantial risk of physical harm to himself as manifested by evidence of threats of, or attempts at, suicide or serious self-inflicted bodily harm; (2) [r]epresents a substantial risk of physical harm to others as manifested by evidence of recent homicidal or other violent behavior, evidence of recent threats that place another in reasonable fear of violent behavior and serious physical harm, or other evidence of present dangerousness; (3) [r]epresents a substantial and immediate risk of serious physical impairment or injury to himself as manifested by evidence that he is unable to provide for and is not providing for his basic physical needs because of his mental illness and that appropriate provision for such needs cannot be made immediately available in the community; or (4) [w]ould benefit from treatment in a hospital for his mental illness and is in need of such treatment as manifested by evidence of behavior that creates a grave and imminent risk to substantial rights of others or himself.[61]

A mentally retarded person subject to institutionalization by court order is defined in section 5123.68(N) as:

> (1) [a] person who is at least moderately mentally retarded and, because of his retardation, represents a very substantial risk of physical impair-

59. *Id.*

60. *Id.* § 2945.40(C) (Page Supp. 1980).

61. "Mental Illness" as used in this subsection is defined in section 5122.01(A) of the Revised Code as "a substantial disorder of thought, mood, perception, orientation, or memory that grossly impairs judgment, behavior, capacity to recognize reality, or ability to meet the ordinary demands of life."

ment or injury to himself as manifested by evidence that he is unable to provide for and is not providing for his most basic physical needs and that provision for such needs is not available in the community; (2) [a] person who is at least moderately mentally retarded and, because of his retardation, needs and is susceptible to significant habilitation in an institution.[62]

When the hearing has been completed, if none of these standards have been met through clear and convincing evidence, the respondent will be immediately discharged, unless the Department of Rehabilitation and Correction seeks to detain him, in which case he will be "returned to that department."[63]

C. *Commitment*

If at the conclusion of the full hearing the court finds by clear and convincing evidence that the respondent is mentally ill or retarded subject to hospitalization or institutionalization by court order, it shall then order a commitment and send all relevant reports of the respondent's condition to the place of commitment.[64] Senate Bill 297 provides new criteria by which the nature of this commitment is to be determined. Ohio Revised Code section 2945.40(D)(1) now sets forth two factors which will be dispositive. First, the court must implement the "least restrictive commitment alternative" available.[65] The least restrictive commitment alternative is limited, however, by the second factor which the trial court must analyze; that is, that such a commitment "must be consistent with the public safety."[66]

Commitment of a person mentally ill subject to hospitalization is done in accordance with divisions (C) through (E) of section 5122.15

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62. A person who is "at least moderately mentally retarded" as used in subsection (N) of this section is defined in § 5123.68(O) of the Revised Code as:

> [A] person who is found, following a comprehensive evaluation, to be impaired in adaptive behavior to a moderate degree and to be functioning at the moderate level of intellectual functioning in accordance with standard measurements as recorded in the manual of terminology and classification in mental retardation, 1973 revision, American association on mental deficiency publication.

For further treatment on the subject of the mentally retarded and the law *see generally Mental Retardation and the Law*, 13 CONT. L. REV. 588 (1978) (symposium); *Mentally Retarded People and the Law*, 31 STAN. L. REV. 541 (1979) (symposium).

63. OHIO REV. CODE ANN. § 2945.40(B) (Page Supp. 1980).

64. *Id.* § 2945.40(C).

65. *Id.* § 2945.40(D)(1).

66. *Id. See* Bontempo, Memorandum to Senator M. Morris Jackson at 3 (April 29, 1980) [hereinafter cited as Memorandum to Senator Jackson] (copy on file with the University of Dayton Law Review office). The author of the report notes that this is the first time the court has been able to consider the public safety factor when making the commitment determination.

of the Revised Code.[67] Senate Bill 297 now makes mandatory[68] an initial ninety day commitment in one of seven[69] possible facilities.[70] If the court should choose to commit the person to a community health center or an inpatient unit in such a center, commitment will be conditioned upon whether or not the facility has available space.[71]

Commitment of a mentally retarded person subject to institutionalization will be carried out according to divisions (C) through (E) of section 5123.76.[72] Upon such a finding, the court may order one of five possible commitment alternatives[73] for an initial ninety day detention period.[74] If the alternative chosen is either commitment to the care of a private institution or individual, then such a commitment is conditioned upon the consent of that party.[75] In the case of a mentally retarded person subject to institutionalization, as opposed to a mentally ill person, the court does have the option to discharge that person, if it so chooses, at the completion of the full hearing.[76]

D. Conditional Release

1. Provisions for Determination of Conditional Release

Senate Bill 297 adds to section 2945.40 of the Revised Code a new provision for conditional release of a person found not guilty by reason of insanity.[77] Under the new law, a conditional release is con-

67. OHIO REV. CODE ANN. § 2945.40(C) (Page Supp. 1980).

68. Prior to the passage of S.B. 297, even after a requisite showing of mental illness subject to hospitalization, the court still had the prerogative to discharge the person rather than commit him for the initial ninety day period. The new amendment eliminates this possibility, requiring all people found mentally ill subject to hospitalization to be committed for an initial ninety day period. *Id.* § 5122.15(C) (Page 1981).

69. *See* note 36 *supra*. Senate Bill 297 adds a seventh possible facility to the original six provided under this section. The section now includes: "[a]n inpatient unit administered by a community mental health center licensed by the division of mental health of the Department of Mental Health and Mental Retardation under section 5123.16 of the Revised Code." OHIO REV. CODE ANN. § 5122.15(C)(7) (Page 1981).

70. *Id.* § 5122.15(C).

71. *Id.* § 5122.15(D).

72. *Id.* § 2945.40(C) (Page Supp. 1980).

73. The five commitment alternatives provided in § 5123.76(C)(1) are:

(a) [A] public institution;
(b) [A] private institution;
(c) [A] county mental retardation program;
(d) To receive private habilitation and care;
(e) [A]ny other suitable facility, program, or to the care of any person consistent with the comprehensive evaluation, diagnosis, prognosis, and habilitation needs of the respondent.

74. *Id. See* notes 116-120 and accompanying text *infra*.

75. OHIO REV CODE ANN. § 5123.76(D) (Page 1981).

76. *Id.* § 5123.76(C)(2).

77. *Id.* § 2945.40(D)(1)-(6) (Page Supp. 1980).

sidered a continuing commitment.[78] A conditional release may be ordered at the conclusion of the initial commitment hearing, or any time during the commitment of a person found not guilty by reason of insanity.[79] In the latter instance, the conditional release must first be recommended by the director of the hospital, institution, or program under which the respondent was initially committed.[80]

In any conditional release hearing, the trial court must balance the well being of the respondent against any risk to the public safety which the respondent's release may create.[81] Whether or not a conditional release will be granted, and the conditions which will be placed upon that release, will be determined by the court's evaluation of each case through this balancing process.

In addition to the respondent's personal welfare, S.B. 297 also specifies a number of factors which must be taken into account in relation to the public safety consideration. Under the new law, the court shall, in evaluating the potential risks to public safety, "consider the current quantity of psychotropic drugs and other treatment the person is receiving and the likelihood the person will continue to take the drugs and continue the other treatment while on conditional release."[82] When conditional release is ordered, the court "may set any conditions on the release with respect to the treatment, evaluation, counseling, or control of the respondent that insure the protection of the public safety and welfare of the person."[83]

2. Recommendation for Conditional Release by Supervising Agency

Upon a proposal by a hospital director or other supervising agency[84] for conditional release of a person committed by court order, written notice must be sent to the trial court in which the person was found not guilty by reason of insanity, the Attorney General's office, and the prosecutor.[85] The trial court and/or the prosecutor then have fifteen days in which to request a full hearing upon the proposal.[86] When a hearing is requested, it must be held within thirty days of such a re-

78. *Id.* § 2945.40(D)(1).
79. *Id.* § 2945.40(D)(4).
80. *Id.*
81. *Id.* § 2945.40(D)(1).
82. *Id.*
83. *Id.*
84. For the purposes of this note, the term supervising agency shall mean any type of out-patient care of a person found not guilty by reason of insanity, including the situation where a private individual has been charged with supervision of a person conditionally released.
85. *Id.* § 2945.40(D)(4).
86. *Id.*

quest by the same trial judge who originally committed the person, or by "another judge of the court with jurisdiction over the trial."[87] If no request for a hearing is set forth, the director or supervising agency proposing the conditional release may authorize it according the provisions set out under division (D)(1) of Revised Code section 2945.40.[88]

3. Provisions for Violation and Modification of Conditional Release

Upon violation of conditional release, the hospital or supervising agency assigned to monitor the person must make an immediate report to the trial court.[89] A temporary seven day detention order may then be issued by the court which may, either on its own initiative or by request of the prosecutor, hold a full hearing to determine whether a violation actually took place, and if so, whether conditional release should either be modified or terminated.[90] Any hearing held on these matters will be conducted in accordance with the provisions set out for full hearings as codified in sections 2945.40 and 5122.15 of the Revised Code.[91]

Before a violation hearing, the trial court must give reasonable notice to the prosecutor.[92] The prosecutor will then represent the state in attempting to show that the terms of the conditional release were violated.[93] If a supervising agency seeks to have the conditions of the release modified, such a modification must be made pursuant to section 5122.15(L) and 5122.20 of the Revised Code.[94]

Section 5122.15(L) provides for transfer to a more restrictive setting during conditional release.[95] In order to effect such a transfer, the supervising agency must file a motion with the trial court requesting the court to amend its original placement order.[96] In emergency cases, immediate transfer to a more restrictive setting may be made, immediately after which, the supervising agency must notify the court of this transfer.[97] In either instance, a full hearing will be held at the pa-

87. *Id.* The provisions allowing for another judge of the trial court to decide upon conditional release were incorporated to deal with the possibility that the original judge may not still be on the bench at the time of this hearing. It is not a proposal that a different trier of fact preside at the different hearings. Murphy Interview, *supra* note 51.

88. OHIO REV CODE ANN. § 2945.40(D)(4) (Page Supp. 1980).

89. *Id.* § 2945.40(D)(3).

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.* §§ 5122.15(L), .20 (Page 1981).

95. *Id.* § 5122.15(L).

96. *Id.* § 5122.20.

97. *Id.* § 5122.15(L).

tient's request.[98] For the purposes of this hearing, the patient retains the same rights accorded him in any full hearing held pursuant to sections 2945.40(A) and 5122.15 of the Revised Code.[99]

Modifications to a less restrictive setting are made through section 2945.40(F) of the Revised Code.[100] To effect such a change, the supervising agency to which the person has been committed[101] must send written notice by certified mail of the proposed transfer to the trial court in which the person was found not guilty by reason of insanity, the Attorney General, and to the prosecutor.[102] Such notice "shall include the hospital's or facility's report on the current status of the person and its recommendations concerning the pending action."[103]

The trial court and/or the prosecutor may request a full hearing on the transfer within fifteen days[104] after notice has been received, with notice of this request to be given to the head of the supervising agency to which the person has been committed.[105] If a hearing is not requested within fifteen days, the supervising agent may authorize the less restrictive transfer.[106]

If a hearing is requested, it shall be held in the court in which the person was committed.[107] The prosecutor and Attorney General must be given notice, within fifteen days, of the time and place of the hearing.[108] The hearing will be presided over by the committing trial judge or any other judge in the trial court having jurisdiction over the case.[109]

At the hearing, the prosecutor will represent the position the state assumes with regard to the transfer, while the Attorney General's office will represent the position of the hospital or facility involved if the respondent has been so committed.[110] All hearings conducted under

98. *Id.* § 5122.20.

99. *Id. See* notes 47-59 and accompanying text *supra*.

100. The procedures outlined in § 2945.40(F) also apply to discharges, releases and authorization of trial visits.

101. Such supervising agencies may include "the head of the hospital or facility, managing officer of the institution, director of the program, chief of the division of mental retardation and developmental disabilities or his designees, chief of the division of mental health or his designee, or person to which the person is committed." OHIO REV. CODE ANN. § 2945.40(F) (Page Supp. 1980).

102. *Id.*

103. *Id.*

104. Senate Bill 297 changed the time period in which a hearing had to be requested from five to 15 days. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. Senate Bill 297 also changed the notice requirement from five to 15 days. *Id.*

109. *Id.*

110. *Id.* § 2945.40(G).

this section will be done in accordance with the provisions set forth under division (C) of Revised Code section 2945.40.[111] At the conclusion of the hearing, the court may authorize the transfer, or continue the commitment.[112]

4. Termination of Conditional Release

Under S.B. 297, termination of conditional release occurs at what would have been "the expiration of the maximum sentence the person could have served in a penal institution had he been convicted of the most serious offense for which he was found not guilty by reason of insanity."[113] At least ten days prior to the termination of a conditional release, the trial court judge must notify the prosecutor who may then file an affidavit for continued hospitalization or institutionalization of the person whose conditional release is terminating.[114] All hearings deciding continued commitment must be conducted in accordance with division (F) of section 2945.40 of the Revised Code.[115]

E. Ninety Day Order; Limitations on Voluntary Commitment

1. Ninety Day Order

Any initial civil commitment will be ordered for a ninety day period.[116] If no disposition of the case has taken place by the end of the first ninety day period, the supervising agency must discharge the person immediately, unless the prosecutor or the Attorney General's office files an application for continued commitment at least ten days before the end of this period.[117] Hearings resulting from such applications must take place at the end of the initial ninety day period, and continued commitment hearings must be held at least every two years

111. *Id.* *See* notes 47-59 and accompanying text *supra*.

112. OHIO REV. CODE ANN. § 2945.40(F) (Page Supp. 1980).

113. *Id.* § 2945.40(D)(6).

114. *Id.*

115. *Id.* Section 2945.40(E) refers to §§ 5122.15(H) and 5123.76(H) in determining procedures for the full hearing at this point in the proceeding. Both of these sections, in turn, refer back to § 2945.40(F) and require a completion of the procedures found in that section. All division (F) hearings in § 2945.40 are, of course, conducted according to division (C) of that section. *See generally* notes 47-59 and accompanying text *supra*.

116. OHIO REV. CODE ANN. § 5122.15(C) (Page 1981).

117. *Id.* § 5122.15(H). Both offices must include in such an application:

> [A] written report containing the diagnosis, prognosis, past treatment, a list of alternative treatment settings and plans, and identification of the treatment setting that is the least restrictive consistent with treatment needs. The prosecutor shall file such written report at least three days prior to the full hearing. A copy of the application and written report shall be provided to the respondent's counsel immediately.

Id.

after the expiration date of this period.[118] Hearings at the request of the person committed will be held so long as the request has been made more than one hundred and eighty[119] days after the applicant's last full hearing.[120]

2. Limitation on Voluntary Commitment

Under prior law, any person eighteen years of age or older, who was, appeared to be, or believed himself to be mentally ill, was permitted to make a written application for voluntary admission to a mental hospital or institution.[121] The law also allowed the NGRI patient who had been involuntarily committed to a facility to change his status by applying for voluntary admission to the hospital, after which, he was then free to voluntarily sign himself out.[122]

Under the provisions of S.B. 297, the NGRI patient is specifically prohibited from voluntarily committing himself to a hospital or institution.[123] Two exceptions to this rule are provided. The first exception occurs when the trial court has failed to find clear and convincing evidence that the person is mentally ill or retarded subject to hospitalization or institutionalization and the second occurs when an involuntarily committed patient has received a discharge from his place of commitment.[124] In both instances the person involved is, by law, no longer a NGRI patient, and thus voluntary commitment and discharge may be effected.[125]

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118. *Id.*

119. Senate Bill 297 increases the time, between the completion of the last full hearing and the time the patient can request a new hearing, from 90 to 180 days. *Id.*

120. *Id.* "Last full hearing" as stated in the Revised Code refers to mandatory as well as requested hearings. *Id.*

121. *Id.* § 5122.02(A)-(B) (Page Supp. 1979).

122. *Id.* § 5122.15(G).

123. *Id.* § 5122.15(G)(2) (Page 1981). This section reads: "A person who is found not guilty by reason of insanity shall not voluntarily admit himself to a hospital, facility or person pursuant to division (G) (1) of this section. . . ." *Id.*

124. *Id.* § 5122.15(G)(2)(a)-(b).

125. *Id.* § 5122.15(G)(1)-(2). In addition to procedural changes for voluntary commitment of NGRI patients, S.B. 297 revises the procedure for defendants found incompetent to stand trial. The bill establishes procedures for two potential situations. The first involves, in addition to a finding of incompetence to stand trial, a determination by the court that, even provided with a course of treatment, there is not a substantial probability that the defendant will become competent within one year. *Id.* § 2945.38(C) (Page 1981). Pursuant to such a finding, the court must file an affidavit with the probate division alleging the person to be subject to hospitalization or institutionalization by court order. If involuntarily commited through the civil proceedings governed by Chapter 5122 or 5123 of the Revised Code, the person may change his status to voluntary commitment. When such a change in status is made, however, the head of the hopsital must send written notice to the prosecutor. The prosecutor is therefore afforded an opportunity to file an affidavit for commitment under either §

An overview of the changes made by S.B. 297 in the NGRI commitment procedures indicates that the more meaningful steps taken by the bill have been directed toward protecting the interests of the public. The following analysis will note ways in which the interests of the NGRI defendant may not have been given equal consideration and suggestions will be made concerning concurrent accomodation of these interests.

IV. STATUTORY ANALYSIS

The basic rationale supporting the enactment of S.B. 297 is founded upon three notions: (1) decisions affecting the people of a certain county should be made by a court which is accountable to those people;[126] (2) the judge with the most knowledge of the issues of a particular case will be best equipped to efficiently handle the commitment and release proceedings resulting from that case;[127] and (3) there is both a right and a need for public awareness in such commitment proceedings.[128] The motivation underlying each of these seems to be a

5122.11 or § 5123.71 should a patient, who is determined to represent a substantial danger if released, attempt voluntary release.

The second situation provided for by § 2945.38 is a finding by the trial court that the person is incompetent to stand trial but there is a substantial probability that the person will become competent within one year if provided a course of treatment. *Id.* § 2945.38(D). Upon such a finding the court shall order the person committed to a facility for treatment. Under this section, however, no person may change his status to that of a voluntary patient. Voluntary discharge is thus foreclosed. Upon expiration of 15 months or one-third of the minimum sentence which could be ordered for a conviction of the most serious crime charged, a hearing will be held to determine competency to stand trial. If the person is again determined to be incompetent disposition of his case will be made in accordance with § 2945.38 of the Revised Code.

126. This point was enunciated by the bill's sponsor, State Senator M. Morris Jackson: "This change [of jurisdiction from the probate court to the trial court] will insure that the court that is most familiar with the case and that will be most accountable to the people of the county where the crime was committed, will make all decisions concerning commitment and release of a person found NGRI." Address by Senator Jackson, *supra* note 5.

As stated by another senator: "[i]t was our intention to leave that final decision [regarding commitment or release] to a person who was politically responsible." Letter from State Senator Richard H. Finan to Ned J. Nakles, Jr., and Frank Nagatani (Sept. 30, 1980) [hereinafter cited as Finan Letter] (on file with the Unviersity of Dayton Law Review office).

127. *See* note 126 *supra*.

128. The legal right of the public to know what transpires at commitment proceedings of persons found not guilty by reason of insanity is secured in S.B. 297's provision for open public hearings. *See* OHIO REV. CODE ANN. § 2945.40(A) (Page Supp. 1981).

It has also been suggested that open hearings in NGRI civil commitment cases may allow for the public to obtain a better understanding of the procedures which are controlling in this area of the law. Interview with Marian Bontempo (Legislative Assistant to Senator M. Morris Jackson) (Sept. 1980) [hereinafter cited as Bontempo Interview] (on the file with the University of Dayton Law Review office).

conviction that the public's interests must be adequately protected through a more direct judicial process; one working both openly and efficiently.

The change in jurisdiction for full hearings, along with the retention of the original trial court judge to conduct such hearings, and the addition of the prosecutor to the proceedings, all seem to speak to the aforementioned public safety concerns, while the new conditional release provisions seem to indicate concern for the well being of the person found NGRI. While the actual effectiveness of each of these changes and additions may likely depend in large part upon their actual application, they do present some possible difficulties which will be evaluated more closely below. Of specific concern are the possible problems the trial judge may face in his new role in full commitment hearings as well as the statutory dilemmas posed by commitment standards of proof as they interrelate with the conditional release provisions incorporated into the law by S.B. 297.

A. Effects of the Jurisdictional Change Upon the Trial Judge

Prior to passage of S.B. 297, most continued commitment hearings were held in the Allen County Probate Court.[129] It was felt by the bill's sponsors that the court was not accountable to the people in the county where the crime actually took place. The end result of this concern was a jurisdictional change which now allows the same trial court in which the respondent is originally found NGRI to retain jurisdiction over all ensuing civil commitment hearings, with the same trial judge maintaining authority over these proceedings.[130] Thus it is quite logical to assume that through this change, the judge most acquainted with the case will be presiding over it. The more important inquiry, however, is whether or not it is truly more effective to have such a judge presiding over both the criminal trial as well as the full civil commitment hearings.

As a result of the addition of the prosecutor to the civil commitment proceedings, and coupled with provisions making such proceedings open to the public, S.B. 297 has effectively created what could be termed an "open adversarial arena" and it is within this arena that issues concerning the insanity plea must now be litigated. Because this plea often tends to create great community apprehension and general opposition,[131] and

129. Memorandum to Senator Jackson, *supra* note 66. *See generally* notes 33-38 and accompanying text *supra*.

130. OHIO REV. CODE ANN. §§ 2945.40(A) (Page Supp. 1981). *See generally* notes 39-41 and accompanying text *supra*.

131. Michael Perlin, Director of Mental Health Advocacy, Dept. of the Public Advocate in New Jersey, notes that "while the academically interesting but empirically fruitless debate rages on concerning the issue of abolition of the insanity defense, there

because many NGRI cases receive extensive media coverage,[132] it is quite possible that actions taken by the trial court judge during commitment hearings will come under much closer public scrutiny and quite possibly, public pressure.[133]

Additionally, the trial judge's responsibility may be heightened by the fact that criminal defendants often tend to waive a jury trial in the first instance when they intend to plead NGRI.[134] As a result, the trial court judge may become even more of a focal point in the proceedings because in such instances he will make both criminal and civil adjudications.[135] Thus, he now must assume the burden of separating the com-

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has been little analytical attention paid to the fate of those found not guilty by reason of insanity. . . ." The author posits the possibility that this lack of focus as to the paramount issues involved in the insanity defense is the main cause of misunderstandings in this area. He eloquently asserts that "the 'Son-of-Sam'—type of case stokes political ferment and inspires demagoguery on all sides. . . ." Perlin, *Apres the Acquittal, Le Deluge: Release Procedures and Allocation of the Burden of Proof in Subsequent Review Hearings Following a Finding of "Not Guilty by Reason of Insanity,"* 7 BULL. AM. ACAD. OF PSYCH. L. 29 (1979); *see generally* Steadman & Cocozza, *Psychiatry, Dangerousness and the Repetitively Violent Offender*, 69 J. CRIM L.C. 226 (1978) [hereinafter cited as Steadman & Cocozza].

132. Media coverage may occasionally encourage community apprehension and opposition by creating confusion in the public concerning this area of the law. The tragic shooting death of singer John Lennon, and its aftermath, serve as a case in point. The accused defendant, Mark David Chapman, eventually pleaded innocent by reason of insanity, but not until newspapers had printed front page headlines and lead stories such as the following:

> Accused Lennon killer possibly hid psychic 'demon'; Psychic 'demon' blamed: Mark David Chapman apparently tried to conceal the psychic demon gnawing at him, a 'demon' that may have deluded him into thinking he was John Lennon and eventually led him to kill the real Lennon, according to a leading psychiatrist here . . . . Behind the competent facade . . . . there was apparently a second Chapman doubting who he really was and perhaps regarding ex-Beatle Lennon as a threat to his mental well being.

Dayton Daily News, Dec. 11, 1980, at 1, col. 1 (evening ed.).

133. Virtually all proponents of S.B. 297 agree that there will be increasing public pressure on the trial judge making the civil commitment decision. Nevertheless, the rationale put forth in support of these changes seem to be premised upon an increased trust in the competence of the trial judge. Basic suppositions that trial judges are sworn to uphold the law despite public pressure, and that such judges make decisions in many other pressure situations, are put forth to buttress the argument that the jurisdictional changes will lead to fair and efficient litigation on these matters. *See* Bontempo Interview, *supra* note 128; Finan Letter, *supra* note 126; Murphy Interview, *supra* note 51.

134. Interview with Dr. Phillip Resnick (Sept. 20, 1980) [hereinafter cited as Resnick Interview] (on file with the University of Dayton Law Review office). *See* note 4 *supra*. Ohio keeps no statistics on the frequency of jury trial waiver. The validity for Dr. Resnick's statement, however, was confirmed by a telephone survey to the prosecutor's office in six of the largest counties in Ohio as well as the Ohio Attorney General's office. (Survey information on file with the University of Dayton Law Review Office).

135. Under amended § 2945.40 of the Revised Code the trial court judge who found the respondent NGRI will have to make a probable cause determination and all

plex issues which must be determined at each stage of the process,[136] while at the same time not allowing outside public pressure to force a possible compromise of one decision in order to lay the groundwork for another later in the proceedings.[137]

Other potential difficulties a trial judge may face in his new dual role are noted by June German and Ann Singer in their article[138] on the subject of NGRI commitment, in which they note:

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commitment and continued commitment decisions. OHIO REV. CODE ANN. § 2945.40(A) (Page 1981).

136. The standard of proof in the initial decision as to criminal responsibility differs from that controlling in the civil commitment decision. *Compare* the standard of proof in State v. Staten, 18 Ohio St. 2d 13, 21, 247 N.E.2d 293, 299 (1969) (*see* note 21 and accompanying text *supra*.) *with* OHIO REV. CODE ANN. §§ 5122.01(B)(1)-(4), 5123.68(N)(1)-(2) (Page 1981) (*see* notes 60-63 and accompanying text *supra*). *See generally* note 41 *supra*. A finding of NGRI is necessarily a determination of a lack of criminal responsibility at the time of the allegedly criminal act. This determination must be distinguished from the civil commitment determination. The latter adjudication seeks to decide whether or not the dangerousness standards of sections 5122.01(B)(1)-(4) and 5123.68(N)(1)-(2) are affirmatively shown through clear and convincing evidence. This is a determination of the respondent's present mental state. *See* Caulfield, *Ohio Commitments of the Mentally Ill Offender,* 4 CAP. U. L. REV. 1, 20-21 (1974) [hereinafter cited as Caulfield]. The author suggests elements which should be controlling in an evaluation of the present mental state of a person once they have been found NGRI:

> A test of sanity must, of necessity, deal with a present evaluation of the individual's present mental condition, and its effect, if any, on the individual's ability to know or refrain from an undetermined number and variety of criminally wrongful actions, actions which might face the individual in the form of crucial decisions, should he be returned to society.

Id.

137. With the addition of the prosecutor to the commitment hearings, the situation is created wherein all parties to the criminal as well as civil decisions will remain the same. This creates an interesting, if not potentially troubling, situation much the same as that noted in a commentary to New York's civil commitment procedures:

> The whole scheme is premised on the prosecutor's burden, presumably civil in nature . . . to satisfy the court as to each level of commitment or change in status. The practical consequence here is that prosecutors will remain principle actors in civil, dare we call them quasi-civil, proceedings far beyond any former role; really they are in it from the cradle to grave *even though the whole thrust of the 'reform' is to terminate the criminal phase entirely and substitute a civil proceeding.* Moreover, the prosecutor's role is ambivalent at best and potentially conflicting, intellectually and practically. Whereas, either at plea or trial, the prosecutor was protagonist for the criminal responsibility, he must now, having lost on the responsibility issue, turn 180 degrees or so into the wind and become protagonist for the converse view, i.e., the dangerous mental disorder or mental illness that will keep the former defendant confined as an involuntary committed person.

N.Y. CRIM. PRO. LAW § 330.20 app., at 16 (McKinney 1973) (emphasis added).

138. German & Singer, *Punishing the Not Guilty: Hospitalization of Persons Acquitted by Reason of Insanity,* 29 RUTGERS L. REV. 1011 (1976) [hereinafter cited as German & Singer]. At the time the article was written Ms. German was the Supervising Attorney, Mental Health Information Service, First Judicial Department, New York and Ms. Singer was the Assistant Deputy Public Advocate, New Jersey Department of the Public Advocate, Division of Mental Health Advocacy.

> [T]here are . . . good reasons for having a different trier of fact decide the issue of present insanity. A defendant will almost inevitably find himself prejudiced in an attempt to demonstrate present sanity when he has just vociferously argued that he was mentally irresponsible at the time of the crime. The trier of fact is likely to have this argument, as well as the details of the crime, uppermost in his mind when deciding the issue of present sanity. On the other hand, a defendant who knows that the same fact finder will be deciding whether to commit him may be deterred from arguing an insanity defense at all.[139]

This view as to the inability of a trial court judge to be able to be an effective fact finder in both the criminal trial and the civil commitment determinations is refuted by Professor Raymond Spring, writing on the question of the continuing effectiveness of the insanity defense.[140] Professor Spring notes that evidence adduced regarding the determination of a respondent's mental state, for the purposes of the criminal trial, is often the same evidence brought forth during the civil commitment proceedings which follow. He asserts that this evidence is often quite clear, and thus, in order to avoid a simple replay of it during the civil proceeding, the determination of present mental state for commitment purposes can be made by the same trier of fact during the regular criminal proceeding. In order to allow the defendant to bring forth evidence of present sanity, the trial court judge can, if he chooses, bifurcate the trial and have this separate evidence presented after the initial verdict on the insanity plea.[141]

The two jurisdictions in which this issue has been examined have tended to ally, in theory if not form, more closely to the German-Singer line of reasoning.[142] In *In re Franklin*,[143] the California Supreme

139. *Id.* at 1034. The basic position taken by the authors is that a person acquitted by reason of insanity should not undergo a different or more stringent process than would any other person who is being civilly committed. They assert that a person, who has been adjudged not to have had the criminal capacity to have committed an act, must not therefore, be held responsible for the commission of that act. The authors contend that the fact that the respondent has pleaded guilty in the criminal trial does not guarantee that by the time the commitment decision is to be made he may not be restored to the degree of sanity which would allow for some type of release, either outright or conditional. Thus they perceive a "catch-22" type situation for the respondent, who as a matter of procedural wisdom, may be constrained from asserting the insanity defense at the criminal trial when the possibility exists that a harsh civil commitment may be ordered as a result of the court's efforts to, in a sense, modify an initial NGRI verdict. *Id.*

140. Spring, *The End of Insanity,* 19 WASHBURN L.J. 23 (1979). Prof. Spring was Professor of Law at Washburn Unviersity School of Law at the time the article was written.

141. *Id.* at 35.

142. The cases chosen as representative of these jurisdictions have involved juries as fact finders in both the criminal proceedings and the civil commitment proceedings. Since, under the provisions of S.B. 297, a trial court judge will make the civil commit-

Court, addressed the issue from the standpoint of having the same jury decide on both criminal and civil issues and held:

> [I]t would be unfair to the defendant himself, for he would be in the position of attempting to convince the same persons who believed him once insane that he has recovered his sanity, a finding which runs counter to the 'almost . . . common knowledge that insanity is for most part a long lasting phenomenon.'[144]

Franklin did not, however, specify whether the same rationale would hold in the instance where a judge was the same trier of fact. Also, while it can be argued that the situations are much alike, seemingly there is a great degree of difference between the judicial competence of a trial court judge and that of a jury member insofar as understanding the insanity issues involved.

The New Jersey Supreme Court, in deciding *State v. Krol*,[145] employed a rationale similar to that found in *Franklin*. That case involved a situation where a jury was being called upon to make a simultaneous decision on both the criminal responsibility and the civil commitment questions.[146] The court held that due to the inherent difficulty of this procedure, the decision regarding commitment was to be placed wholly in the hands of the trial judge for separate determination after the trial.[147]

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ment decision, the possibility of the same jury making these decisions is not present. The cases examined are to some extent, however, analogous to the procedures as set forth in OHIO REV. CODE ANN. § 2945.40(A) (Page 1980) in that, under this section, there is a very real possibility that the same trier of fact will be making all relevant determinations. Further, even when the original case is decided by a jury, the trial court judge will still be placed in a position where, by hearing the testimony in that instance, he may have difficulty separating the issues which should be determinative in the civil commitment proceedings from those which were dispositive in the criminal trial. *See* text accompanying note 139 *supra*.

143. 7 Cal. 3d 126, 496 P.2d 465, 101 Cal. Rptr. 553 (1972).

144. *Id.* at 144, 496 P.2d at 476, 101 Cal. Rptr. at 564. Many insanity statutes were developed in line with the notion that insanity is a continuing condition until legally proven otherwise. For further discussion on the presumption of continuing insanity and its effects on civil statutes in this area, *see* Comment, *Commitment Following Acquittal by Reason of Insanity and the Equal Protection of the Laws*, 116 U. PA. L. REV. 924 (1968); Note, *Release From Confinement of Persons Acquitted by Reason of Insanity in New Jersey*, 27 RUTGERS L. REV. 160 (1973).

145. 68 N.J. 236, 344 A.2d 289 (1975).

146. *Id.*

147. *Id.* at 264, 344 A.2d at 304 (footnotes omitted), The court enumerated the possible problems arising from such a procedure by stating:

> [R]equiring [the] defendant to simultaneously argue to the jury both that he was insane at the time of the crime and that he is no longer mentally ill or dangerous places him in a difficult and unfair tactical position. He may reasonably fear that the jury will be very loath to reach a verdict of not guilty by reason of insanity if

Obviously the facts in *Krol* make that holding distinguishable to some extent from the provisions of Revised Code section 2945.40(A) in that *Krol* dealt with a simultaneous decision on both civil and criminal issues. While at cursory glance it may seem that the procedure called for under section 2945.40(A) is in line with the holding of *Krol*, the question is still left open as to whether *Krol* is calling for a trial judge determination in all civil commitment hearings, or whether it was speaking mainly to the need of having a different trier of fact preside over such hearings.[148]

A possible alternative to the procedure which Revised Code section 2945.40(A) establishes is to conduct commitment hearings in the probate court of the county in which the original criminal trial took place.[149] Because the trial court judge would no longer have to conduct civil hearings, much of the potential public pressure he may experience with regard to the NGRI decision should be eliminated since his role will end after the trial. Yet at the same time, by keeping the situs of the commitment hearing in the same county where the criminal trial was held, the public safety and accountability factors which S.B. 297 seeks to incorporate would not be sacrificed, and a better balance with the respondent's rights may be maintained.

B. Conditional Release; Statutory Complications

1. Overview of Conditional Release: The Need for Alternatives in Treatment

Recent studies indicate that persons found not guilty by reason of insanity are not dangerous per se, and in fact are, in some instances,

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he successfully demonstrates that he is no longer dangerous and must be released upon such a verdict. This fear may well deter him from vigorously arguing present sanity and lack of dangerousness under such circumstances.

Id.

148. *See* German & Singer, *supra* note 138, at 1034 n.103. The authors suggest that the language in *Krol*, quoted in note 147 *supra*, would seem to indicate the need for a different judge to make the civil commitment determination. *Id.* For further treatment of the trier of fact issue, *see generally* Weihofen, *Institutional Treatment of Persons Acquitted by Reason of Insanity*, 38 TEX. L. REV. 849-50 (1960).

149. This suggestion was originally proposed by various groups having input into the drafting of S.B. 297. *See, e.g.*, Report, *The Cuyahoga County Bar Association Position Regarding the Insanity Defense* (April 1980) (copy on file with the University of Dayton Law Review office). "[T]he issue . . . should be determined in the probate court of the community where the crime took place." *Id.; see generally Ohio Department of Mental Health and Mental Retardation, Suggested Amendment to S.B. 297* (on file with the Ohio Legislative Service Commission Library, Columbus, Ohio). This amendment sought to keep the NGRI civil commitment proceedings in the probate court.

likely to be less dangerous than a member of the general population.[150] Hospitalization, once thought to be the only means of remedial care for the mentally ill, is now undergoing a much closer analysis so as to determine its true effectiveness. As a result, symptoms once thought to indicate mental illness are now being discovered to be the direct, or indirect results of hospitalization and institutionalization.[151]

The ineffectiveness of hospitalization or institutionalization in

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150. *See* Steadman & Cocozza, *supra* note 131, at 227-31. The authors set forth the results of a study they conducted upon a group of 967 mental patients who had been held in maximum security correctional hospitals and had, in 1966, been transferred out of these facilities against psychiatric advice in accordance with the Supreme Court's decision in *Baxstrom v. Herold*, 383 U.S. 107 (1966). The study indicated that only three percent of these patients exhibited violent behavior sufficient to warrant a return to the maximum security facilities. Although 20% were later arrested for some violation, only two percent were actually convicted of crimes in the nature of assault. Steadman & Cocozza, *supra* note 131, at 227. *See* Cocozza & Steadman, *The Failure of Psychiatric Predictions of Dangerousness: Clear and Convincing Evidence,* 29 RUTGERS L. REV. 1084, 1087-91 (1976) [hereinafter cited as Cocozza, Steadman]. The authors appraise a group of studies which sought to evaluate the dangerousness of mental patients solely through an examination of the percentages of those arrested after release, as compared to the arrest rates of the general public. They note a series of earlier studies which indicated that past mental patients had a lower arrest record than the general public. *Id.* at 1088 n.22. They also point to a study by Zitrin *et al* which indicated that out of a group of 1,000 patients, the arrest rates for crimes of murder and robbery were lower than those of the same number of the general public. *Id.* at 1089.

151. For a discussion of a series of case studies dealing with hospital treatment of the mentally ill, *see* DuBose, *Of the Parens Patriae Commitment Power and Drug Treatment: Do the Benefits to the Patient Justify Involuntary Treatment?*, 60 MINN. L. REV. 1149 (1976). These studies indicate that, in many cases, prolonged hospitalization will often compound the patient's difficulties or retard speedy improvement of their mental condition. *Id.* This view is aptly summarized in Chambers, *Alternatives to Civil Commitment of the Mentally Ill: Practical Guides and Constitutional Imperatives,* 70 MICH. L. REV. 1108 (1972) where the author states:

> Nearly all long term hospital patients exhibit flatness of response, withdrawal, muteness, and loss of motivation. Once believed to be part of the degenerative process of mental illness, these phenomena are now universally accepted—even by public hospital administrators—as responses to hospitalization itself superimposed on the difficulties of illness.

Id. at 1127.

A further problem regarding hospitalization and institutionalization is posited by David Wexler in his book, *Criminal Commitments and Dangerous Mental Patients: Legal Issues of Confinement, Treatment, and Release* (1977). The author notes that when the release decision is left solely to the hospital, in cases where a patient has been found NGRI, there may be a tendency for the facility to detain him longer than usual due to the fear that, should he commit a later crime, the hospital's error of judgment will receive the full attention of the public. Wexler asserts that, in order to avoid this problem, release decisions must be given the status of a recommendation which will later be acted upon by a trial judge. Such a measure would allow the hospital to function without the overriding fear of psychiatric error, and as a result, better treatment and possibly less restrictive commitment alternatives would be present for the NGRI patient.

many instances, was recognized by the Supreme Court of New Jersey in the landmark decision of *State v. Carter*.[152] The court discussed the possibility of alternative methods of treatment for NGRI committees and held that while "some patients will be faced with lifetime commitment . . . we can discern no . . . [purpose in] confin[ing] others for those periods during which they may be capable of functioning in society so long as reasonable assurances are provided that no harm will come to the public."[153] Acceptance of the *Carter* rationale has been instrumental in bringing forth, in all states, some sort of provision, either statutory or by judicial decision, regarding conditional release.[154]

The conditional release provisions added to Title 29 of the Ohio Revised Code by S.B. 297[155] are complete insofar as providing for a less restrictive alternative setting, termination, and a hearing to determine violations. In two areas, however, the conditional release rules mandated by this law may lead to potential problems in application. These two areas, the openendedness of provisions for setting conditions and the contradiction between commitment and release standards, are examined below.

2. Openendedness in Condition-setting Provisions

Division (D)(1) of Ohio Revised Code section 2945.40 allows the trial court judge to "set any conditions on the release with respect to treatment, evaluation, counseling or control of the respondent that insure the protection of the public safety and the welfare of the person."[156] The terms "protection of the public safety" and "welfare of the person" are very openended, and are not qualified by any other portion of the statute. Since S.B. 297 mandates that trial judges in every county will now be setting conditions for release, a possible problem of statewide consistency in those conditions may result.[157] When such consistency is not present, each judge becomes free to set conditions in accord with that degree of restrictiveness which he alone deems

152. 64 N.J. 382, 316 A.2d 449 (1974).

153. *Id.* at 389, 316 A.2d at 453.

154. For a fairly recent summary of conditional release provisions in each state, *see* German & Singer, *supra* note 138, at 1075-83.

155. *See* notes 77-112 and accompanying text *supra*.

156. OHIO REV. CODE ANN. § 2945.40(D)(1) (Page Supp. 1980).

157. Resnick Interview, *supra* note 134. Dr. Resnick points to the great diversity in the counties of Ohio, and asserts that because of such diversity and due to the fact that the statutory language of § 2945.40(D) provides no "measuring stick" which all judges can follow in setting conditions for release, the end product will become a highly subjective decision for judges in each county.

necessary.[158] This may result in a quandry on the part of both counsel for the respondent and the prosecutor for the state when seeking to present a conditional release case before a particular judge since they may be without the aid of suitable and consistent standards from which to work.[159]

3. Statutory Contradiction in the Commitment and Conditional Release Provisions

The addition of the conditional release provisions into the law creates a statutory inconsistency between the procedures set out by

158. This problem is well illustrated in a case where the patient is being restored to sanity through the use of psychotropic medicine. Judges statewide may be able to make an endless variety of decisions regarding the effectiveness of such medicine. Examples of the possible resulting disparity are: (1) United States v. Bennett, 460 F.2d 872, 875-76 (D.C. Cir. 1972), in which the court held that "[h]ostility and uncooperativeness are thought to be especially amenable to drug therapy. Within two weeks major tranquilizers may end hallucinations and delusional ideas, and under medication . . . ' [t]he sullen, sarcastic and antagonistic patient is less irritable and frequently becomes quiet, cooperative, and accessible' "; and (2) the "all or nothing" holding of Wolonsky v. Balson, 58 Ohio App. 2d 25, 387 N.E.2d 738 (1976), that a person who could conform his conduct to the law only through the use of medication could not be considered to have been restored to sanity.

159. *See* Resnick Interview, *supra* note 134. Dr. Resnick suggests that where no objective standards for conditional release exist, a judge, surrounded by so many conflicting factors found in NGRI hearings, may tend to simply make a "gut level judgment." Such a judgment would create a two-tiered level of subjectivity, with the first level being that of statewide inconsistencies, and the second being inconsistencies within each individual judge's decisions.

An examination of another jurisdiction's treatment of this problem may offer a useful solution. The conditional release provision in the Oregon Revised Statutes establishes a statewide board which is charged with supervision and direction of all persons civilly committed following a finding of "not responsible on grounds of disease or defect." OR. REV. STAT. § 161.325 (1977). A major responsibility of this statewide Psychiatric Security Review Board is the setting of conditional release provisions in each case. *Id.* at § 161.336. The Board is made up of five members, each representing a different group which is involved with, or potentially affected by, the commitment and release process. More specifically, the members include:

(1) a psychiatrist with experience in the criminal justice system;
(2) a licensed psychologist experienced in the criminal justice system;
(3) a person with substantial experience in the processes of parole and probation;
(4) a member of the general public; and
(5) a lawyer with substantial experience in criminal trial practice.

Id. at § 161.385(2)(a)-(e). All members are appointed by the governor of the state, subject to approval by the state Senate, and all serve set terms. *Id.*

One statewide entity such as Oregon's Psychiatric Security Review Board may provide for a more thoughtful and consistent manner of review. By having all conditional release provisions set by one central board, the possibility of diverse or inconsistent results may be minimized. Additionally, the decisions of such a board would not be subject to the same degree of public pressure as those of a trial judge holding an elected office. The trade-off, however, is the concern for keeping the proceedings in the county where the criminal act was committed. *See* notes 33-46 and accompanying text *supra*.

S.B. 297's amendment to Revised Code section 2945.40 and those retained under section 5122.01(B)(1)-(4). The inconsistency arises since, in order to avoid an immediate discharge at any full hearing, the state must prove by clear and convincing evidence[160] that the respondent is "presently dangerous" under one of the provisions set forth in section 5122.01(B)(1)-(4).[161] Thus while it is entirely possible that the respondent may be fit for, and would benefit from conditional release at the time of the initial commitment hearing[162] or a later continued commitment hearing, his chances of securing it may be effectively lessened after a successful showing of present dangerousness on the part of the state.[163] Such a result is likely since the trial judge making the commitment and conditional release decisions will be placed in the awkward position of having to justify a conditional release, in many cases back to public life, promptly after a finding by clear and convincing evidence that the respondent released is "presently dangerous to himself and others."[164] In some instances the state may favor conditional release as a means of continued commitment, yet since it must assert that the respondent meets the present dangerous standards of section 5122.01(B)(1)-(4), it too places itself in the same position as that of the trial judge, seeming to favor release for a person considered presently dangerous.[165]

One possible solution to the conflict between the commitment stan-

160. Although it is technically impossible to fractionalize human judgment, various legal commentators seem to agree that a showing of clear and convincing evidence will be met when the fact finder can accord approximately 75% certainty to his decision. *See* Cocozza, Steadman, *supra* note 150, at 1101.

161. *See* text accompanying note 61 *supra* for the four tests in OHIO REV. CODE ANN. § 5122.01 (B) (Page 1981).

162. Conditional release may be in order even at the time of the initial full hearing on civil commitment. In many instances, the time span between the initial detention and the end of the criminal trial may afford the respondent adequate opportunity to recover his sanity to such a degree that, with adequate care, treatment, or monitoring he will be better able to recover than he would be under continued hospitalization or continued institutionalization. This possibility is furthered by the new developments in the area of psychotropic drugs. *See* note 158 *supra*; Bontempo Interview; *supra* note 128.

163. For further discussion of the assessment of dangerousness as well as the components of a workable civil commitment law, *see* Albers, Pasewark, Meyer, *Involuntary Hospitalization and Psychiatric Testimony: The Falibility of the Doctrine of Immaculate Perception,* 6 CAP. L. REV. 11 (1976); Arons, *Working In the "Cuckoo's Nest": An Essay on Recent Changes In Mental Health Law and the Changing Role of Psychiatrists In Relation to Patient and Society,* 9 U. TOL. L. REV. 73 (1977).

164. Resnick Letter, *supra* note 4.

165. It is suggested that to avoid statutory contradiction, a psychiatrist for the state, in seeking conditional release as a form of commitment, may testify that the respondent may qualify under the provisions of § 5122.01(1)-(4) "in their broadest sense," but that such a qualification should not preclude him from being granted conditional release. Resnick Interview, *supra* note 134.

dards and the provisional release provisions is the addition of a fifth dangerousness standard to section 5122.01(B) of the Ohio Revised Code; one which would recognize the fact that the respondent is presently dangerous, but may nonetheless be a suitable candidate for conditional release so long as proper care or treatment is provided. Section 161.336(1) of the Oregon Revised Statutes suggests such a standard:

> [Upon determination] that the person presents a substantial danger to himself or others but that he can be adequately controlled with supervision . . . and treatment is available, [he may be ordered] conditionally released subject to those supervisory orders . . . as are in the best interests of justice, the protection of society and the welfare of the person.[166]

A similar provision in the Ohio Revised Code would permit statutory recognition that the behavior of sometimes dangerous people can be modified and controlled through proper treatment and monitoring rather than hospitalization or institutionalization.[167]

C. *The Constitutional Issue*

1. Basic Freedom Involved

Upon a finding of not guilty by reason of insanity, the trial court is authorized to conduct a hearing to determine whether the person is a mentally ill person subject to hospitalization or a mentally retarded person subject to institutionalization. If the trial court finds by clear and convincing evidence that the person is mentally ill or mentally retarded, the person will be committed to a hospital or institution as deemed appropriate by the trial court.[168]

The civil commitment procedure for mentally ill or mentally retarded persons to appropriate institutions for confinement and care, when reasonably necessary for the protection of the public or for the safety of the person himself, is accomplished under the exercise of the police power of the state.[169] This use of police power, however, must be viewed in light of the fact that by involuntarily committing a per-

166. OR. REV. STAT. § 161.336(1) (1977).
167. *See* note 162 *supra*.
168. OHIO REV. CODE ANN. § 2945.40 (Page Supp. 1980).
169. The Supreme Court in O'Connor v. Donaldson, 422 U.S. 563 (1975), granted certiorari to determine if a Florida state hospital had intentionally and maliciously deprived a mental patient of his constitutional right to liberty. The Court held that Donaldson's right had been breached but in a concurring opinion, Chief Justice Burger stated: "There can be little doubt that in the exercise of its police power a State may confine individuals solely to protect society from the dangers of significant antisocial acts or communicable disease." *Id.* at 580 (Burger, C.J., concurring).

son, the state is denying him the basic right of liberty, guaranteed to all persons by the United States Constitution.[170] The fourteenth amendment provides in part that:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law nor deny to any person within its jurisdiction the equal protection of the laws.[171]

The Supreme Court in *Bolling v. Sharpe*,[172] although not defining "liberty" with any great precision, stated that liberty extends to the full range of conduct which the individual is free to pursue including freedom from bodily restraint. The court also made it clear that this basic right cannot be encroached upon except for a proper governmental objective.[173] The Supreme Court in *O'Connor v. Donaldson*[174] also confronted the question concerning every person's constitutional right to liberty. Donaldson was involuntarily civilly committed to a Florida state hospital for nearly 15 years after being found to be suffering from paranoid schizophrenia. A suit was brought against the hospital superintendent alleging he had denied Donaldson's subsequent release, even though he was found to be dangerous to no one and his release had been supported by responsible persons willing to provide him any care he might need on release. The Court held that absent a constitutionally adequate basis for further confinement, the hospital had no right to hold Donaldson against his wishes and that the jury's award for compensatory and punitive damages for deprivation of his liberty was justified.[175]

Bolling and *O'Connor* explicitly establish the principle that an individual's freedom is a basic right protected by the fourteenth amendment. Although the government may infringe upon this right, it must

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170 U.S. CONST. amend. XIV, § 1.

171. *Id.*

172. 347 U.S. 497 (1954). The issue addressed by the Court involved an individual's deprivation of liberty through segregation in public education.

173. *Id.*

174. 422 U.S. 563 (1975). In a concurring opinion Chief Justice Burger stated:

> There can be no doubt that involuntary commitment to a mental hospital, like involuntary confinement of an individual for any reason, is a deprivation of liberty which the state cannot accomplish without due process of law. . . . Commitment must be justified on the basis of a legitimate State interest, and the reasons for committing a particular individual must be established in an appropriate proceeding.

Id. at 580 (Burger, C.J., concurring).

175. *Id.*

do so in an even-handed manner. The fourteenth amendment[176] also guarantees that the government treat similar individuals in a similar manner.[177] The government may classify persons in the creation and application of laws but those classifications may not be used to arbitrarily burden a group of individuals. In general, the classification will be constitutionally valid if it relates to a proper governmental objective.[178] The following sections will analyze the classification involved in S.B. 297 and the validity of the underlying governmental objective.

2. Conflicting Commitment Procedures

Senate Bill 297 changes the procedure the NGRI patient must follow for involuntary commitment by court order which is necessary to gain conditional release or discharge after commitment.[179] This procedure differs from the procedure used for persons civilly committed. Under the new law the NGRI's hearings for commitment and for conditional release or discharge are held in the trial court which found the person not guilty by reason of insanity. Prior to S.B. 297, commitment and release hearings were held for both the NGRI's and civil committees in the probate court. Senate Bill 297 also provides that the trial judge preside over the hearing which shall be open to the public with the prosecutor taking an active role in the proceeding as a representative of the public's interest.[180] The bill now mandates that the trial court evaluate the potential risks to public safety and the welfare of the person in its determination to commit, release or discharge.[181]

For purposes of involuntary commitment after a finding of not guilty by reason of insanity, the defendant must now contend with the arguments of the prosecutor acting in an adversarial role representing the public's interest. For purposes of conditional release or discharge, the NGRI patient must first secure recommendation from the hospital that he has recovered his sanity to the point where release is warranted. He must also prove recovery to the trial court judge and possibly overcome the prosecutor's arguments against his release or discharge.[182]

Therefore, despite the acquittal, the NGRI patient is not treated in the same manner as those civilly committed. Senate Bill 297 in effect,

176. *See* text accompanying note 171 *supra*.
177. *See* J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW at 519 (1978).
178. *Id. See* note 211 and accompanying text *infra*.
179. OHIO REV. CODE ANN. § 2945.40 (Page Supp. 1980).
180. *Id.*
181. *Id.* § 2945.40(D).
182. *See* OHIO REV. CODE ANN. § 2945.40 (Page Supp. 1980).

places the NGRI patients into a classification whereby their basic rights to liberty and freedom are harder to regain than those civil committees similarly situated.

There are cogent reasons for the Ohio Legislature to take precautions for the public's safety especially when the NGRI patient has previously shown violent or dangerous tendencies.[183] Although an attempt to ensure the safety of the public as well as the patient may be a laudable purpose, the differing procedural requirements for NGRI patients may be subject to equal protection challenges.[184]

3. Judicial Response

In drafting S.B. 297, *United States v. Ecker I*[185] and *United States v. Ecker II*[186] were used as the basis for justifying the different release treatment for those found NGRI and civil committees.[187] The United States Court of Appeals in *Ecker I* affirmed the district court's decision to deny conditional release to Ecker who had been found NGRI on separate counts of felony murder and rape. Three years later the court of appeals in *Ecker II* again affirmed the district court's refusal to grant conditional release to Ecker. The court also upheld a constitutional attack on the District of Columbia Code which permitted different treatment for purposes of release between NGRI patients and those civilly committed.[188] The court held that differences in release

183. Under its police power, the state may confine individuals to protect the public from significant antisocial acts. O'Connor v. Donaldson, 422 U.S. 563, 582 (1975) (Burger, C.J., concurring); *see Developments in the Law—Civil Commitment of the Mentally Ill*, 87 HARV. L. REV. 1190 (1974). "Protection from the dangerously insane is a traditional use of the police power and is a prominent purpose of most modern commitment statutes." *Id.* at 1223.

184. *See* Finan Letter, *supra* note 126. In Senator Finan's opinion, a major problem with the bill may be the question of constitutionality. "A person who has been judged not guilty by reason of insanity is actually not convicted of anything. Thereafter, how much control will the Supreme Court of the United States allow us to maintain over a nonconvict?" *Id.* A similar opinion was expressed by Dr. Phillip Resnick who believes that S.B. 297 may be vulnerable to equal protection challenges because once the defendant has been determined NGRI, the trial court should not have any more to say or do with the patient. Resnick Interview, *supra* note 134.

185. 479 F.2d 1206 (D.C. Cir. 1973).

186. 543 F.2d 178 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 1063 (1977).

187. Bontempo Interview, *supra* note 128.

188. *See* 24 D.C. CODE ANN. § 301(e) (1973). This section provides for the release of NGRI patients confined in a hospital for the mentally ill. In general, the section provides that the superintendent of the hospital must certify that the patient has recovered his sanity, that he will not in the reasonable future be dangerous to himself or others, and he is entitled to unconditional release. This certificate must be filed with the clerk of the court in which the person was tried and a copy served with the prosecutor. The certificate is sufficient authorization for the court to unconditionally release the patient. Alternatively, the court may, at its discretion or upon objection by

hearings between these two classes of patients did not deny Ecker equal protection of the law.[189] The *Ecker II* court justified the difference in release treatment of Ecker based on the fact that he had in the past committed violent acts.[190] The public's safety and the patient's welfare were taken into consideration and conditional release was denied as Ecker had failed to prove to the court that he "will not in the reasonable future be dangerous to himself or others."[191]

Other court decisions support S.B. 297's procedural requirements for NGRI patients. The implication from these cases is that the NGRI acquittees are not in the same classification as their civil counterparts because they pose a greater danger to the public or themselves as evidenced by their recent anti-social acts. In *Bolton v. Harris*,[192] for example, the United States Court of Appeals for the District of Columbia held that persons found NGRI must be afforded procedures "substantially similar" to civil committees. The court, however, found no equal protection violation in allowing court review of the hospital's decision to release an NGRI patient, even though this review was not applicable to those civilly committed.[193] The court also held it was permissible for the NGRI acquittee to be committed without a hearing for the period required to determine his present mental condition.[194]

In a later case from the same circuit, *United States v. Brown*,[195] the court of appeals held that the proper standard to determine whether an NGRI defendant should be involuntarily committed to a mental hospital was by a preponderance of the evidence. For those civilly committed, however, the state needed to establish a higher burden of

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the United States or the District of Columbia, hold a hearing to determine the sanity and dangerousness of the patient. Upon weighing the evidence the court may order the patient unconditionally released or returned to the hospital. Similar provisions are made for conditional release.

189. 543 F.2d 178 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 1063 (1977).

190. Judge Wilkey writing for the majority stated that:

> [t]he existence of a 'substantial problem of danger in the reasonable future' provides an adequate basis for the continued detention and confinement of an insanity acquitee who, like Ecker, has committed a violent criminal act—unless the district court can make an 'affirmative finding that it is at least more probable than not that he will not be violently dangerous in the future.'

Id. at 188.

191. *Id.* at 187 (citing Hough v. United States, 271 F.2d 458, 461 (D.C. Cir. 1959)).

192. 395 F.2d 642 (D.C. Cir. 1968). Bolton was acquitted of auto theft after being found NGRI and committed to a hospital pursuant to 24 D.C. CODE ANN. § 301(d). Three months later the district court denied his petition for habeas corpus relief. He appealed, alleging that § 301(d) provisions violated equal protection because they did not provide safeguards afforded other civil committees.

193. *Id.*

194. *Id.* at 651.

195. 478 F.2d 606 (D.C. Cir. 1973).

proof before commitment could be ordered.[196] Brown had been acquitted by reason of insanity, of robbery, assault with a deadly weapon, rape, and carrying a pistol without a license. He was then committed to a mental hospital and thereafter brought an equal protection challenge claiming that for purposes of commitment, the NGRI acquittee should be governed by the same standard of proof as those civilly committed. The court struck down this challenge and justified the procedural differences in treatment based upon the fact that those persons found NGRI have committed acts which impaired the public's safety,[197] whereas those civilly committed had not posed any harm to society and should be afforded greater protection before depriving them of their liberty.[198]

Other courts, however, have expressed a contrary view and hold that procedural differences between the NGRI acquittee and the civil committee are violative of the equal protection clause of the fourteenth amendment. The case of *State v. Krol*[199] supports the contention that NGRI acquittees are subject to the same procedural protections as those civilly committed. In *Krol*, the defendant had been indicted for murder but was found NGRI by a jury verdict. Acting pursuant to New Jersey law,[200] he was committed to the Forensic Psychiatric

196. *Id.*

197. The court in *Brown* stated:

> Persons acquitted by reason of insanity have been determined to have been guilty, beyond a reasonable doubt of acts that impaired the safety of the community. They are in a different position, at least for some purposes, from persons who have not committed any such acts but are sought to be civilly committed soley because of dangers and propensities arising from mental condition.

Id. at 610.

198. Another justification offered by the court for treating the NGRI patient differently was expressed by Judge Leventhal as follows:

> The difference between the classes for purposes of burden of proof, is in the extent of possibility and consequence of error. If there is error in determination of mental illness that results in a civil commitment, a person may be deprived of liberty although he never posed any harm to society. If there is a similar error in confinement of an insanity-acquitted individual, there is not only the fact of harm already done, but the substantial prospect that the same error, ascribing the quality of mental disease to a less extreme deviance, resulted in a legal exculpation where there should have been legal responsibility for the antisocial action.

Id. at 611.

199. 68 N.J. 236, 344 A.2d 289 (1975).

200. The court explained the law thusly:

> The governing statute, N.J.S.A. 2A; 163-3, provides that if the jury finds the defendant not guilty by reason of insanity, it must then make a special finding as to whether defendant's 'insanity continues'; if it finds that defendant's 'insanity' does 'continue,' defendant is ordered confined to the Trenton Psychiatric Hospital 'until such time as he may be restored to reason.' This confinement is for an indefinite period of time, and may prove permanent, for 'restoration to reason'

Hospital in Trenton. Krol appealed his commitment arguing that the State must first determine whether he presently poses a significant threat of harm either to himself or to others. The Supreme Court of New Jersey held that this statute assumed that NGRI acquittees, as a class, are more likely to be dangerous than other persons, which is violative of the equal protection clause of the fourteenth amendment. In its finding the court expressed the opinion that confinement of an individual based upon dangerousness should be determined on a case by case basis and not on the basis of NGRI or committee classifications.[201] The *Krol* court cited two United States Supreme Court decision, *Baxstrom v. Herold*[202] and *Jackson v. Indiana*[203] in its opinion as an example of the Supreme Court's attempt to enunciate a broad principle: "The fact that the person to be committed has previously engaged in criminal acts is not a constitutionally acceptable basis for imposing upon him a substantially different standard or procedure for involuntary commitment. The labels 'criminal commitment' and 'civil commitment' are of no constitutional significance."[204]

Equal treatment for all persons in commitment proceedings was also ordered by the United States Supreme Court in *Baxstrom v. Herold*.[205] Baxstrom, while a prisoner, began having mental problems and was certified as insane by a prison physician. He was subsequently transferred to a state hospital used for prisoners declared mentally ill while serving sentence. Pursuant to New York law,[206] Baxstrom was civilly committed at the expiration of his prison sentence without a jury review available to all others civilly committed. The Supreme Court held that prisoners who had developed mental illness while incarcerated, and who were, as a result, being involuntarily committed to a mental hospital, were entitled to substantially the same procedural protections as all others subject to involuntary commitment. The court

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requires not merely remission of acute symptoms but complete cure of the underlying illness or personality disorder. . . . A lesser degree of improvement suffices to obtain for defendant only a 'conditional release' subject to summary revocation by the court.

Id. at 243, 344 A.2d at 293.

201. The *Krol* Court stated: "The decisive consideration where personal liberty is involved is that each individual's fate must be adjudged on the facts of his own case, not on the general characteristics of a 'class' to which he may be assigned." *Id.* at 255, 344 A.2d at 299.

202. 383 U.S. 107 (1966).

203. 406 U.S. 715 (1972).

204. 68 N.J. at 250, 344 A.2d at 297.

205. 383 U.S. 107 (1966).

206. The statute involved in *Baxstrom* was § 384 of the New York Correction Law. That section was repealed in 1966 and its subject matter is now covered by N.Y. CORREC. LAW § 404 (McKinney Supp. 1980).

held the New York statute unconstitutional as it did not afford Baxstrom his right to jury review and thus denied him equal protection of the law. The court rejected the argument that because of prior criminal conduct the patient may undergo arbitrary differences in procedures from those civilly committed.[207]

Even though the *Baxstrom* case did not deal with the standard for release, its rationale was later applied by the Court in a case involving the release of an individual. In *Jackson v. Indiana*,[208] the court addressed an issue involving a mentally defective deaf mute who was found incompetent to stand trial and evidenced little likelihood of improvement in his condition. The trial court had found that Jackson lacked comprehension sufficient to make his defense and he was therefore ordered committed until such time as he was competent to stand trial. This order in effect would have civilly committed Jackson indefinitely. On review, the Supreme Court held that this procedure deprived petitioner of equal protection because a more lenient commitment standard and a more stringent standard for release were used for Jackson as opposed to the ordinary commitment proceedings applicable to all persons not charged with offenses.[209]

The differing judicial perspectives on civil commitment standards raise the question whether past evidence of violent behavior justifies separate classification of the NGRI acquittee, stigmatizing him with heightened procedures for release and adversarial procedures during commitment.[210] To date the courts have been of little help in answering this question as they provide no clear guidelines concerning what constitutes a proper governmental objective. They likewise have failed to indicate what level of judicial review should be used to judge whether a classification based on NGRI status violates the equal protection clause of the fourteenth amendment.[211]

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207. The United States Supreme Court stated that classification of persons as either insane or dangerously insane may be relevant in determining the type of custodial or medical care necessary, but it has no relevance whatever in determining whether a person is mentally ill and in need of institutionalization. 383 U.S. at 111.

208. 406 U.S. 715 (1972).

209. *Id.* at 730.

210. At least one commentator has said:

> The fundamental defect of Ecker II, in relying on a class distinction to justify differing methods of dealing with NGRI's and Committees, is that the fact that a NGRI may have been recently found beyond a reasonable doubt to have committed an offensive act is in no way pertinent in deciding what procedures he should be afforded at a hearing on the validity of his initial or continued confinement . . . .

Comment, *Constitutional Standards for Release of the Civilly Committed and Not Guilty by Reason of Insanity: A Strict Scrutiny Analysis*, 20 ARIZ. L. REV. 233, 276 (1978).

211. State v. Krol, 68 N.J. 236, 344 A.2d 289 (1975). The New Jersey Supreme Court stated:

4. Equal Protection Analysis—The *Blumstein* Test

By mandating these procedural distinctions between NGRI acquittees and civil committees, S.B. 297 seems to lend itself to attack under the equal protection clause of the fourteenth amendment.[212] The United States Supreme Court, in *Dunn v. Blumstein*,[213] enunciated the elements to be considered in addressing an equal protection challenge. In deciding whether a law violates the equal protection clause three factors must be considered: 1) the character of the classification in question; 2) the individual interests affected by the classification; and 3) the governmental interests asserted in support of the classification.[214]

(a) The Character of the Classification

In regard to the first element of the *Blumstein* test, the character of the classification in question, S.B. 297 in effect places the NGRI acquittee into a separate class from those civilly committed patients.[215] For purposes of committment and release under the new law, the NGRI acquittee is ordered to follow different procedural requirements which make the release or conditional release more difficult to obtain for the NGRI class. One of the major procedural changes S.B. 297 mandates is the move of the commitment and release hearings from the probate court to the trial court.[216] In so doing, the NGRI acquittee must not only prove to the hospital that he is ready for release but must also prove this fact to the trial judge who found the acquittee not

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The Supreme Court, in deciding *Jackson v. Indiana* and *Baxstrom v. Herold*, has clearly not indicated whether differences in commitment procedure between those applicable to persons acquitted by reason of insanity and those applicable to other persons subject to civil commitment must be justified by a 'compelling state interest' or whether some lesser interest will suffice. State courts considering the question have divided.

Id. at 253, 344 A.2d at 298.

212. *See* note 184 *supra.*

213. 405 U.S. 330 (1972). In *Blumstein*, the Court addressed a Tennessee law which required a one year residency requirement in the state and three months in the county as a prerequisite to vote. The Court, employing a strict scrutiny standard of review, held that the law unconstitutionally abridged the fundamental interests of the right to vote and to travel.

214. *Id.* at 335.

215. *See* OHIO REV. CODE ANN. § 2945.40 (Page Supp. 1980). This section orders the trial court, which found him NGRI, to conduct the commitment and release hearings. All others civilly committed are referred to the probate court. The NGRI acquittees' hearings are open to the public with the prosecutor able to act in an adversarial role representing the public's interest. *See* note 39, notes 50-59 and accompanying text *supra.*

216. OHIO REV. CODE ANN. § 2945.40 (Page Supp. 1980).

guilty by reason of insanity.[217] The hearing for involuntary commitment subsequent to a finding of NGRI is now also held in the trial court. The effect of these changes is to allow the criminal courts to retain some control over the NGRI acquittee even though the NGRI patient has been absolved of past actions.[218] This move from the probate court to the trial court has been viewed by some interested parties to the bill as having a negative effect on the NGRI acquittee's chances for release.[219]

Although the state, via its police power, can make laws for the protection of the public,[220] the question is whether the interests underlying this power justifies a separate classification of the NGRI patient. As was previously discussed, court interpretations vary whether the NGRI

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217. Although the trial judge will not necessarily always be the trier of fact, he is in most of the cases in which the NGRI defense is made. *See* note 134 and accompanying text *supra*.

218. One commentator has stated: "Other jurisdictions are re-thinking the theory [that confinement of the NGRI patient, the convict, and the civil committee occupy different places on the continuum of state interests] accepted by *Ecker II*, apparently on the assumption that the criminal law should have no influence on release decisions involving defendants who have been found not guilty." Comment, *Constitutional Standards for Release of the Civilly Committed and Not Guilty by Reason of Insanity: A Strict Scrutiny Analaysis*, 20 ARIZ. L. REV. 233, 250 (1978). The author cited the following cases in support of his statement: State v. Clemons, 110 Ariz. 79, 83, 515 P.2d 324, 328 (1973); Wilson v. State, 259 Ind. 375, 386, 287 N.E.2d 875, 881 (1972); People v. McQuillan, 392 Mich. 511, 533-35, 221 N.W.2d 569, 579-80 (1974); People v. Lally, 19 N.Y.2d 27, 35, 224 N.E.2d 87, 92, 277 N.Y.S.2d 654, 660 (1966); State *ex rel.* Kovach v. Schubert, 64 Wis. 2d 612, 622, 219 N.W.2d 341, 346-47 (1972). *See* note 203 *supra*. The NGRI acquittee at the trial court level is faced with a "quasi-criminal" proceeding, open to the public, in which the prosecutor acts in an adversarial role representing the public's interest. Interview with Attorney, Robert Goelz, Montgomery County, Assistant Prosecutor (Oct. 16, 1980) (on file with the University of Dayton Law Review office).

219. Resnick Interview, *supra* note 134. Dr. Resnick commented that one of the weak points in the Bill is having the trial judge retain control of release of insanity acquittees. He expressed concern that the trial judge, as an elected official would be subject to political pressure from the public to be more conservative in releasing individuals, albeit the trial judge is sworn to uphold the law fairly and without partiality. Dr. Resnick also stated he felt the trial judge would have less experience addressing issues of civil commitability than do probate judges. *See generally* notes 129-133 and accompanying text *supra*.

John Gulden, Legal Counsel for Ohio Retarded Citizens, expressed basically the same concerns. He believes that the probate courts have much more expertise regarding release hearings because they deal with guardianship procedures, civil commitments, etc. on a daily basis. He also believes there would be pressure from the public on the trial judge to keep the NGRI patients off the street. Interview with John Gulden, Legal Counsel for Ohio Retarded Citizens (Sept. 25, 1980) [hereinafter cited as Gulden Interview] (on file with the University of Dayton Law Review office).

220. *See* note 183 and accompanying text *supra*.

acquittees, as a class, can be ordered to undergo different procedural requirements because of their past criminal actions. There is empirical data which suggests the conclusion that special dangerousness of a class is an erroneous assumption.

> The best known studies disputing the existence of any special dangerousness of a class of patients although not dealing with NGRI's are followups of "Operation Baxstrom," under which 969 prisoner-patients in maximum security hospitals in New York state were transferred to civil hospitals as the result of a court decision. Psychiatrists had determined that these patients were too dangerous to be in civil hospitals. Nevertheless, one year after transfer, 147 had been discharged to the community, and of the other 702, only seven had been returned to maximum security conditions. Thus, less than one percent of those initially considered too dangerous for civil hospitalization proved to be so. In 1970, three years later, 27 percent were living in the community, only nine persons had been convicted of crime (including two felonies), and only three percent had been returned to a facility for the criminally insane.[221]

Considering the foregoing case law and empirical data, a strong argument can be made that the separate classification of the NGRI patient may be violative of the equal protection clause of the fourteenth amendment.

(b) Individual Interests Affected

The second element of the *Blumstein* test involves looking at the individual interests affected by the classification. Senate Bill 297 impinges upon the NGRI acquittee's basic right to liberty or to be free from confinement as guaranteed by the fourteenth amendment.[222] When analyzing whether a law is violative of the equal protection clause, the level of judicial scrutiny necessary to justify this deprivation of liberty must be considered.[223] Depending upon the court's inter-

221. German & Singer, *supra* note 138, at 1024 (citing Hunt & Wiley, *Operation Baxstrom After One Year,* 124 AM. J. PSYCHIAT. 974 (1968)); Steadman & Keveles, *The Community Adjustment and Criminal Activity of the Baxstrom Patients: 1966-70,* 129 AM. J. PSYCHIAT. 309 (1972). Mr. Robert Baylor at the state hospital for the criminally insane in Lima, Ohio stated he does not see any significant behavioral differences between the NGRI patient and those committed for other reasons. Interview with Robert Baylor, Assistant Director, Lima State Hospital (Sept. 25, 1980) (on file with the University of Dayton Law Review office).

222. *See* notes 168-175 and accompanying text *supra.*

223. Dunn v. Blumstein, 405 U.S. 330 (1972).

pretation, the state may be held to the strict scrutiny standard or the less stringent rational basis test.[224] At this time the courts are divided as to which standard is appropriate in justifying involuntary commitment of a person. The United States Supreme Court has not explicitly addressed the issue but in *Baxstrom v. Herold*[225] implied that the rational basis test could be used to justify the classification of civilly insane or criminally insane and a legitimate state interest would be sufficient to overcome a constitutional challenge.[226]

Other jurisdictions would hold that since S.B. 297 impinges on the basic right of liberty protected by the Constitution, it would follow that the standard of strict scrutiny would be applicable to determine if the state's interest is sufficient to warrant the classification.[227] Under the strict scrutiny test, the state must show a compelling state interest in its distinction between classes similarly situated and must use the least restrictive alternative for effectuating its objectives.[228]

Although the individual interests affected by the classification of the NGRI acquittee, as mandated by S.B. 297, pertains to the acquittee's basic right to liberty, it is difficult to comment on the bill's equal protection validity as the courts are not in agreement on which standard of judicial scrutiny to use.

(c) Governmental Interests Asserted

The final factor under *Blumstein*, the governmental interests asserted in support of the classification, must be considered to determine if the state's purpose for the classification possesses either a legitimate state interest to comply with the rationale basis test or a compelling state interest if the strict scrutiny test is applied. The legislative history of S.B. 297 indicates that the purpose of the bill is to protect the welfare and safety of the public as well as the NGRI patient himself.[229] The Ohio General Assembly was of the opinion that the

224. *See generally* J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW at 522 (1978).

225. 383 U.S. 107 (1966).

226. The United States Supreme Court in *Baxstrom* stated: "Equal protection does not require that all persons be dealt with identically, but it does require that a distinction made have some relevance to the purpose for which the classification is made." *Id.* at 111.

227. People v. McQuillan, 392 Mich. 511, 221 N.W.2d 569 (1974). The court stated: "We acknowledge the premise of the amicus equal protection position that since a 'fundamental interest' (defendant's liberty) is involved, the State must have a 'compelling state interest' to justify the differences in treatment." *Id.* at 533 n.4, 221 N.W.2d at 579 n.4.

228. San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 16 (1973).

229. Bontempo Interview, *supra* note 128.

prior law, which allowed the NGRI patient to voluntarily sign himself out of the hospital, was a weakness in the law which needed rectification.[230] The legislature also felt the public's interest should be represented in the release of the NGRI patient.[231]

While some argue that protecting the public is a compelling state interest sufficient to pass the strict scrutiny test, some courts have found that classification for procedural purposes between the NGRI acquittees and civil committees does not even pass the rational basis test as a legitimate state interest. The court in *State v. Krol*[232] stated that a decision was not necessary on whether the classification of the NGRI acquittee and civil committee was based on a compelling state interest as "[t]he distinction between the standard for involuntary commitment for persons acquitted by reason of insanity and other persons lacks even a rational basis."[233] In *People v. McQuillan*,[234] the court held an automatic commitment procedure unconstitutional in that it failed to provide substantially equal treatment in terms of commitment and release procedures for those committed as NGRI and those civilly committed. The court stated that "as we believe the 'rational basis' test is not met here, discussion of 'compelling state interest' is unnecessary."[235]

Assuming that the state's interest in providing for the welfare and safety of its citizens is a compelling state interest, yet another question to be answered is whether classifying the NGRI acquittee is the least restrictive alternative possible to protect that interest.[236] It is possible to argue that if the state is interested in protecting its citizens from the NGRI patient voluntarily signing himself out of a mental institution without a hearing, a change from the probate court to the trial court is not necessary. The situation could be corrected by a measure which simply prohibits voluntary release by the NGRI patient.[237] Although "[d]oubts must be resolved in favor of protecting the public, . . . the court should not, by its order, infringe upon defendant's liberty or autonomy any more than appears reasonably necessary to accomplish

230. *Id.*
231. *Id.*
232. 68 N.J. 236, 344 A.2d 289 (1975).
233. *Id.* at 253, 344 A.2d at 298.
234. 392 Mich. 511, 221 N.W.2d 569 (1974).
235. *Id.* at 533 n.4, 221 N.W.2d at 579 n.4.
236. San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 16 (1973).
237. Attorney John Gulden, counsel for Ohio Retarded Citizens, commented that the loophole in the law regarding the NGRI patient signing himself out could have been remedied by simply including a provision which prohibits voluntary release. Gulden Interview, *supra* note 219.

this goal."[238] Therefore, one can also question whether moving the NGRI's hearings to the trial court, which allows the public and press to be present,[239] is necessary for the public's interest to be represented. Seemingly this interest would be sufficiently protected by moving the commitment and release hearings from the probate division of the Allen County Common Pleas Court[240] to the probate court of the county in which the trial took place.[241] The interests of the people within that particular community could be safeguarded by the judge without the prejudice to the NGRI patient that is inherent in the current procedures.[242]

It seems clear that S.B. 297 contains many issues, constitutional and otherwise, that will need to be resolved. Senator Richard H. Finan, in his comments about S.B. 297, stated: "[t]he possible effect on the public is probably an issue wherein the jury is still out."[243]

V. CONCLUSION

S.B. 297's inception emerged from two paramount concerns expressed by the Ohio General Assembly. The first involved public safety which was felt to be significantly endangered under prior Ohio provisions for NGRI commitment. The second concern was for more adequate treatment and procedural protections for the NGRI patient involved. Concentration of legislative efforts seems to have been placed on the former.

Through numerous procedural changes, coupled with significant jurisdictional revision and the closing of the existing loopholes in the voluntary commitment area, the public safety concern seems to have been squarely and adequately confronted by the legislature. Retention in the civil commitment and conditional release hearings, by the same trial judge who made the initial NGRI finding, and the inclusion of the prosecutor as a party to these hearings, are developments designed to fashion a procedure which provides greater accountability to the public. The effect of these changes will most likely culminate in a greater awareness and sensitivity to any seemingly potential dangers resulting from release, either outright or conditional, of a person found NGRI.

Concomitant with the aforementioned changes, the legislature,

238. State v. Krol, 68 N.J. 236, 261-62, 344 A.2d 289, 303 (1975).
239. OHIO REV. CODE ANN. §§ 2945.40, 5122.15 (Page Supp. 1980).
240. *See* note 8 *supra*.
241. *See* note 149 and accompanying text *supra*.
242. *See* notes 131-149 and 160-165 and accompanying text *supra*.
243. Finan Letter, *supra* note 126.

through the addition of a provision for conditional release, sought to provide more adequate treatment for those committed following an NGRI verdict. Though seemingly significant facially, the provision is unfortunately lacking in two respects; most notably, from openendedness in the setting of conditions and from statutory conflict between the provision itself and the actual commitment standards. Although actual application will be solely determinative of the effectiveness of this provision, these flaws take much of the bite out of its intended purpose.

Finally, although the bill may raise equal protection concerns regarding the classification of NGRI patients as opposed to other civil committees, S.B. 297 stands at least as a positive clarification of the existing law, providing a clear set of specific procedures to be followed. Whether this stability and clarity coupled with the public safety factor is sufficient to counterbalance the lack of procedural safeguards provided the NGRI patient, is a viable question yet to be resolved.

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Code Sections Affected: 2945.37, .371, .38, .39, .40, 5119.74, 5120.11, 5120.11, 5120.16, 5122.01, .02, .05, .06, .10, .11, .12, .141, .15, .20, .21, .22, 5123.68, .69, .71, .72, .76, .79, .80, 5125.03, .05, .11.
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