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Fourteenth Amendment--The Continued Confinement of Insanity Acquittees

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FOURTEENTH AMENDMENT—THE CONTINUED CONFINEMENT OF INSANITY ACQUITTEES*

Foucha v. Louisiana, 112 S. Ct. 1780 (1992)

I. INTRODUCTION

In *Foucha v. Louisiana*,[1] the United States Supreme Court held that a state may not confine an insanity acquittee indefinitely in a mental institution once he has regained his sanity, solely on the basis of his continuing dangerousness. The Court's opinion, however, seemed to suggest two contradictory bases for its decision. First, relying on *Jones v. United States*,[2] the Court appeared to hold that Foucha was entitled to release once he had regained his sanity, and any further confinement would be unconstitutional. Later in the opinion and explicitly in the concurrence, however, the Court's reasoning attacked the statute's broadness, implying that a more narrowly tailored scheme for the detention of sane-but-dangerous insanity acquittees would be acceptable.[3]

This Note first reconciles the opinions of the majority and the concurrence by considering a reading of *Jones* that is consistent with both opinions, permitting the continued confinement of acquittees who have regained their sanity. This Note argues, however, that neither the language of *Jones* nor prior caselaw warrants such a reading. Rather, as this Note demonstrates, the broad language of *Jones* requires that an acquittee be released once he is no longer insane. This Note also challenges the Court's holding on equal protection grounds by comparing dangerous insanity acquittees to other sane-but-dangerous offenders. Finally, this Note suggests that the heightened standard of scrutiny created by Justice O'Connor in her concurrence, while appearing to protect the interests of insanity ac-

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1 112 S. Ct. 1780 (1992).

2 463 U.S. 354 (1983).

3 *Foucha*, 112 S. Ct. at 1786-87; *Id.* at 1789 (O'Connor, J., concurring in part and concurring in the judgment).

quittees, does not go far enough; ultimately, her standard will have little practical impact on their release.

II. BACKGROUND

The civil-criminal dichotomy in insanity commitment occupies an odd place in our criminal law.[4] Underlying the insanity defense is the idea that the criminal law is designed to punish the "bad" and not the "mad";[5] those who are insufficiently blameworthy are thus exempted from criminal responsibility.[6] The commitment and release proceedings following a verdict of not guilty by reason of insanity (NGRI) are considered neither essentially criminal nor essentially civil in nature.[7] Rather, the legal status of insanity acquittees is reflected by three basic viewpoints:

> (1) those who believe insanity acquittees are entitled to treatment and the opportunity to be rehabilitated in an environment that is no more restrictive than necessary to protect the public from demonstrated dangerousness; (2) those who believe that such acquittees should be treated like criminals; and (3) those who believe that treatment and rehabilitation should be afforded insane persons, but that the overriding concern is the safety of the public.[8]

The modern trend has been toward the second view, focusing more on the criminal conduct and less on the requisite culpability. While most notably demonstrated in the creation of the guilty but mentally ill verdict (GBMI),[9] this tilt toward the criminal law is reflected in the Court's decisions as well.

Early on, in *Baxstrom v. Herold*,[10] the Court struck down a New York statute that permitted the commitment of a convicted criminal at the end of his sentence without a jury determination of his current sanity. Because the Court saw no basis for distinguishing a

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4 For the purposes of this Note, "civil commitment" will refer to involuntary commitment in a mental institution. "Criminal commitment" will refer to involuntary commitment following a verdict of not guilty by reason of insanity.

5 United States v. Brawner, 471 F.2d 969, 988 (D.C. Cir. 1972), *cited in* Janet Polstein, *Throwing Away the Key: Due Process Rights of Insanity Acquittees in* Jones v. United States, 34 AM. U. L. REV. 479 (1985).

6 John Party, *The Civil-Criminal Dichotomy in Insanity Commitment and Release Proceedings:* Hinckley *and Other Matters*, 11 MENTAL & PHYS. DISAB. L. REP. 218 (1987).

7 *Id.*

8 *Id.*

9 The "guilty but mentally ill" verdict is seen as a middle ground between punishing the insane and releasing those who have committed crimes, by providing treatment of the defendant's mental illness while ensuring that the defendant will be confined—either in a mental hospital or in prison—until his sentence expires. For a general discussion of the GBMI verdict, *see* Christopher Slobogin, *The Guilty But Mentally Ill Verdict: An Idea Whose Time Should Not Have Come*, 53 GEO. WASH. L. REV. 494 (1985).

10 383 U.S. 107 (1966).

criminal nearing the end of his sentence from a civil committee, for whom such a determination was available, the Court held the statute unconstitutional as a violation of equal protection.[11]

Six years later, in *Jackson v. Indiana*,[12] the Court held that a criminal suspect could be institutionalized only so long as to determine whether the suspect could become competent to stand trial. If the suspect was to be held longer, the state had to afford him the procedural safeguards of a civil commitment hearing.[13] Similarly, in *Vitek v. Jones*,[14] the Court recognized that a convicted criminal had a liberty interest in not being transferred to a mental institution without the procedural safeguards of civil commitment.[15]

The Court articulated the constitutional standard for civil commitment in *Addington v. Texas*.[16] The Court held that, at a minimum, states were required to prove insanity and dangerousness by the heightened standard of clear and convincing evidence before an individual could be civilly committed.[17]

While the early cases seemed to indicate that insanity acquittees were entitled to the same procedural protections as civil committees, the Court's decision in *Jones v. United States*[18] took a decidedly criminal turn. In *Jones*, the Court permitted the automatic commitment of an insanity acquittee following an NGRI verdict without a *de novo* hearing as to insanity.[19] Contrary to its prior decisions, the Court held that insanity acquittees are a "special class that should be treated differently from other candidates for commitment."[20] Thus, the State could now commit an acquittee upon a preponderance of the evidence, rather than meeting the clear and convincing evidence standard of *Addington*.

III. Factual and Procedural History

Terry Foucha was charged by a bill of information with aggravated burglary and illegal discharge of a firearm.[21] The trial court appointed two experts in forensic psychiatry, Dr. Kenneth Ritter and Dr. Ignacio Medina, Jr., to conduct a pretrial examination of

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11 *Id.* at 112-14.
12 406 U.S. 715 (1972).
13 *Id.* at 738.
14 445 U.S. 480 (1980).
15 *Id.* at 495.
16 441 U.S. 418 (1979).
17 *Id.* at 433.
18 463 U.S. 354 (1983).
19 *Id.* at 366.
20 *Id.* at 370.
21 State v. Foucha, 563 So. 2d 1138, 1138-39 (La. 1990).

Foucha.[22] Four months after an initial finding that Foucha lacked the mental capacity to proceed, the trial court found Foucha competent to stand trial.[23]

On October 12, 1984, the trial court found Foucha not guilty by reason of insanity (NGRI).[24] The court found that he:

> is unable to appreciate the usual, natural, and probable consequences of his acts; that he is unable to distinguish right from wrong; that he is a menace to himself and others; and that he was insane at the time of the commission of the above crimes and is presently insane.[25]

After the NGRI verdict, the trial court held a hearing, pursuant to Louisiana statute,[26] to determine whether Foucha was dangerous[27] so as to require continued confinement. The trial court concluded that Foucha was presently dangerous and, pursuant to Article 654 of the Louisiana Code of Criminal Procedure, ordered him committed to a mental institution.[28] Foucha was admitted to the Feliciana Forensic Facility on April 30, 1985.[29]

In early 1988, the superintendent of Feliciana recommended Foucha's discharge or release, pursuant to Article 655.[30] A review

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22 *Id.* at 1139.

23 Foucha v. Louisiana, 112 S. Ct. 1780, 1782 (1992).

24 *Id.*

25 *Id.*

26 Article 654 of the Louisiana Code of Criminal Procedure provides:

> When a defendant is found not guilty by reason of insanity in any [noncapital] felony case, the court shall remand him to the parish jail or to a private mental institution approved by the court and shall promptly hold a contradictory hearing at which the defendant shall have the burden of proof, to determine whether the defendant can be discharged or can be released on probation, without danger to others or to himself. If the court determines that the defendant cannot be released without danger to others or to himself, it shall order him committed to a proper state mental institution or to a private mental institution approved by the court for custody, care, and treatment. If the court determines that the defendant can be discharged or released on probation without danger to others or to himself, the court shall either order his discharge, or order his release on probation subject to specified conditions for a fixed or an indeterminate period. The court shall assign written findings of fact and conclusions of law; however, the assignment of reasons shall not delay the implementation of judgment.

LA. CODE CRIM. PROC. ANN. art. 654 (West Supp. 1991).

27 "Dangerous to others" means the condition of a person whose behavior or significant threats support a reasonable expectation that there is a substantial risk that he will inflict physical harm upon another person in the near future. LA. REV. STAT. ANN. § 28:2(3) (West 1986).

"Dangerous to self" means the condition of a person whose behavior, significant threats, or inaction support a reasonable expectation that there is a substantial risk that he will inflict physical or sever emotional harm upon his own person. LA. REV. STAT. ANN. § 28:2(4) (West 1986).

28 *Foucha,* 112 S. Ct. at 1782. *See also supra* note 26.

29 State v. Foucha, 563 So. 2d 1138, 1139 (La. 1990).

30 *Foucha,* 112 S. Ct. at 1782. Article 655 of the Louisiana Code of Criminal Procedure provides:

panel of three doctors convened to evaluate Foucha's current condition and determine whether he could be released or placed on probation without danger to others or to himself.[31] The panel issued a report on March 21, 1988, unanimously recommending Foucha's conditional release.[32] The panel also reported no evidence of mental illness since admission.[33]

After considering the panel's report, the trial judge convened a sanity commission pursuant to Article 657.[34] The commission was comprised of Drs. Ritter and Medina, the two doctors who had conducted Foucha's pretrial examination. At a hearing on November 29, 1988, Dr. Ritter testified that there was no evidence that Foucha currently suffered from any psychosis or neurosis.[35] He also testified that upon commitment Foucha probably suffered from a drug-induced psychosis but had recovered from that temporary condition and that currently he was in "good shape" mentally.[36]

When the superintendent of a mental institution is of the opinion that a person committed pursuant to Article 654 can be discharged or can be released on probation, without danger to others or to himself, he shall recommend the discharge or release of the person in a report to a review panel comprised of the person's treating physician, the clinical director of the facility to which the person is committed, and a physician or psychologist who served on the sanity commission which recommended commitment of the person. . . .The panel shall review all reports promptly. After review, the panel shall make a recommendation to the court by which the person was committed as to the person's mental condition and whether he can be discharged, conditionally or unconditionally, or placed on probation, without being a danger to others or to himself. If the review panel recommends to the court that the person be discharged, conditionally or unconditionally, or placed on probation, the court shall conduct a contradictory hearing following notice to the district attorney.

LA. CODE CRIM. PROC. ANN. art. 655(A) (West Supp. 1991).

31 *Foucha,* 112 S. Ct. at 1782.

32 *Id.* As part of Foucha's conditional release, the panel recommended that he (1) be placed on probation; (2) remain free from intoxicating and mind-altering substances; (3) attend a substance abuse clinic on a regular basis; (4) submit to regular and random urine drug screening; and (5) be actively employed or seeking employment. *Id.* at 1782 n.2.

33 *Id.*

34 *Id.* Article 657 of the Louisiana Code of Criminal Procedure provides:

After considering the report or reports filed . . . the court may either continue the commitment or hold a contradictory hearing to determine whether the committed person can be discharged, or can be released on probation, without danger to others or to himself. At the hearing the burden shall be upon the committed person to prove that he can be discharged, or can be released on probation, without danger to others or to himself. After the hearing, and upon filing written findings of fact and conclusions of law, the court may order the committed person discharged, released on probation subject to specified conditions for a fixed or an indeterminate period, or recommitted to the state mental institution.

LA. CODE CRIM. PROC. ANN. art. 657 (West Supp. 1991).

35 Brief for the Petitioner at 6, Foucha v. Louisiana, 112 S. Ct. 1780 (1992) (No. 90-5844) [hereinafter Brief for Petitioner]. It was stipulated that Dr. Medina's testimony would be essentially the same. *Id.*

36 *Foucha,* 112 S. Ct. at 1782.

However, Dr. Ritter stated that Foucha had an antisocial personality, a condition that is not a mental disease and not treatable.[37] Furthermore, the doctor testified that Foucha had been involved in several altercations with other patients at Feliciana, and that, as his doctor, he would not "feel comfortable in certifying that [Foucha] would not be a danger to himself or to other people."[38] Rejecting the panel's recommendation for Foucha's release, the trial court found that Foucha posed a danger to himself and others, and ordered him recommitted to Feliciana.[39]

The Louisiana Court of Appeals denied Foucha's application for supervisory writs by a 2-1 vote, based upon Dr. Ritter's refusal to certify that Foucha would not be dangerous to himself or others.[40] The Supreme Court of Louisiana affirmed, holding that Foucha had not carried the statutory burden of proving that he was not dangerous.[41] Moreover, the court held that the "dangerousness test" for the continued detention of insanity acquittees in Article 657 did not violate either the Due Process Clause or the Equal Protection Clause of the Fourteenth Amendment.[42] The Supreme Court granted certiorari on the question of whether the State could predicate Foucha's continued confinement in a mental facility solely on his continuing dangerousness.[43]

IV. THE SUPREME COURT OPINION

The Supreme Court, in a 5-4 decision, reversed the decision of the Louisiana Supreme Court, holding that Article 657, which authorized Foucha's confinement on the basis of his continuing dangerousness, was unconstitutional. The majority held that a statute that provided for the indefinite commitment of insanity acquittees in a mental institution on the basis of dangerousness, without regard to the acquittee's current sanity, violated both the Equal Protection and Due Process clauses of the Fourteenth Amendment.[44]

A. THE MAJORITY OPINION

Writing for the majority, Justice White[45] announced the stan-

37 *Id.*
38 *Id.* at 1782-83.
39 *Id.* at 1783.
40 Brief for Petitioner, *supra* note 35, at 7.
41 *Foucha,* 112 S. Ct. at 1783.
42 *Id.*
43 Foucha v. Louisiana, 111 S. Ct. 1412 (1991).
44 *Foucha,* 112 S. Ct. at 1784.
45 *Id.* at 1783. Justice White was joined by Justices Blackmun, Stevens, and Souter; Justice O'Connor joined Part II of the Court's opinion.

dard for civil commitment as established in *Addington v. Texas*.[46] In *Addington*, the Court held that a State must prove by clear and convincing evidence that a person sought to be civilly committed is mentally ill and that he requires hospitalization for his own welfare and the protection of others.[47] Justice White recognized, however, that in the criminal context, a state may commit an individual without meeting the rigorous "clear and convincing evidence" standard of *Addington*.[48] Relying on the Court's decision in *Jones v. United States*,[49] Justice White stated that an NGRI verdict is sufficient to permit the inference that, at the time of the verdict, the defendant is still mentally ill and dangerous. Because insanity is an affirmative defense proven only by a preponderance of the evidence, the Court thus permitted a lower standard of proof for initial commitment in the NGRI context.[50]

Justice White emphasized, however, that under *Jones*, an insanity acquittee is "entitled to release when he has recovered his sanity or is no longer dangerous."[51] The Court cited *Jones*' reliance on *O'Connor v. Donaldson*,[52] a civil case which held that the continued confinement of a mentally ill person who was not dangerous was a violation of due process, since the basis for the person's confinement no longer existed.[53] Analogously, since Foucha was not currently mentally ill, the basis for holding him as an insanity acquittee in a psychiatric facility had likewise disappeared.[54]

1. Due Process

The Court rejected the argument that the State could confine Foucha in a mental institution on the basis of his dangerousness alone. First, Justice White recognized that due process requires that the nature of commitment bear some reasonable relation to the purpose for which the individual is committed.[55] Because the purpose of Foucha's confinement was the treatment of his mental illness, it would be unconstitutional to confine Foucha in a mental institution

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46 441 U.S. 418 (1979).

47 *Id.*

48 *Foucha*, 112 S. Ct. at 1783.

49 463 U.S. 354 (1983).

50 *Id.*

51 *Foucha*, 112 S. Ct. at 1784 (citing *Jones*, 463 U.S. at 368).

52 422 U.S. 563 (1975).

53 *Id.* at 576. Thus, if Foucha had been proven mentally ill but *not* dangerous, he would be entitled to release under *O'Connor*.

54 *Foucha*, 112 S. Ct. at 1784.

55 Jones v. United States, 463 U.S. 354, 368 (1983).

once his illness had disappeared.[56] Second, if Foucha were to be confined at all, he would be entitled to constitutionally adequate procedures (i.e., those afforded in a civil commitment hearing) to establish the grounds for his confinement.[57] Third, Justice White held that the fundamental right to liberty requires that commitment for any purpose also meets the requirements of substantive due process.[58] The Court cited examples of confinement that meets the requirements of due process: the imprisonment of convicted criminals for the purposes of deterrence and retribution; the civil commitment of mentally ill and dangerous individuals, upon proof by clear and convincing evidence; and, in narrow circumstances, the limited detention of dangerous individuals prior to trial.[59]

The Court acknowledged that under Louisiana law, a person found not guilty by reason of insanity was exempt from criminal responsibility by reason of his acquittal.[60] Since the State had no punitive interest, therefore, it could not confine Foucha in prison for the purposes of deterrence or retribution.[61] Second, because Foucha was not currently insane, the State could not justify his confinement on the basis of his mental illness, as in the civil context.[62]

The State argued, however, that Foucha's continued confinement was justified by his continuing dangerousness and the societal interest in preventive detention. The State analogized from the Court's decision in *United States v. Salerno*,[63] which held that the Bail Reform Act's pretrial detention of dangerous individuals did not violate due process.[64] Because the Bail Reform Act permitted the detention of dangerous people who had not been convicted, the State argued that the continued confinement of insanity acquittees should

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56 *Foucha*, 112 S. Ct. at 1785.

57 *Id.* (citing Jackson v. Indiana, 406 U.S. 715 (1972)). *See also* Baxstrom v. Herold, 383 U.S. 107 (1966).

58 *Foucha*, 112 S. Ct. at 1785 (citing *Jones*, 463 U.S. at 361).

59 *Id.* at 1785-86.

60 *Id.* at 1785. The statute provides:

"If the circumstances indicate that because of a mental disease or mental defect the offender was incapable of distinguishing between right and wrong with reference to the conduct in question, the offender shall be exempt from criminal responsibility." LA. REV. STAT. ANN. § 14:14 (West 1986).

61 *Foucha v. Louisiana*, 112 S. Ct. 1780, 1785 (1992) (citing *Jones*, 463 U.S. at 369).

62 *Id.* at 1786.

63 481 U.S. 739 (1987).

64 The Bail Reform Act of 1984, 18 U.S.C. §§ 3141-3156 (1985), provides for the detention prior to trial of arrestees charged with certain serious felonies if the government demonstrates by clear and convincing evidence after an adversary hearing that no release conditions "will reasonably assure . . . the safety of any other person and the community." 18 U.S.C. § 3142(e) (1985).

similarly be permitted.[65]

The *Foucha* Court, however, rejected the State's argument. Justice White emphasized that the Bail Reform Act carefully limited the circumstances under which the government could seek detention,[66] and was narrowly focused on a particularly acute problem involving overwhelming government interests.[67] Furthermore, the Bail Reform Act required the government, not the defendant, to prove by clear and convincing evidence that no conditions of release would reasonably assure the safety of the community; even so, the duration of the confinement was strictly limited.[68]

By contrast, the Louisiana statute in *Foucha* placed the burden on the detainee, and not the State, to prove that he would not be dangerous.[69] In addition, Article 657 permitted Foucha's indefinite commitment based upon predictions of his future dangerousness, rather than setting an outside limit on the length of his confinement.[70] Because the Louisiana scheme of confinement was not as narrowly focused as the Bail Reform Act, the Court held that it did not fall under one of the "carefully limited exceptions permitted by the Due Process Clause."[71]

2. *Equal Protection*

Justice White[72] also held that Article 657 violated the Equal Protection Clause of the Fourteenth Amendment.[73] While acknowledging *Jones'* holding that the government may treat insanity acquittees differently from civil committees, the Court stated that, since Foucha was not presently insane, the State could no longer classify him as an insanity acquittee.[74] Instead, the Court required the government to treat Foucha equally with others who have been found beyond a reasonable doubt to have committed criminal acts—that is, to release him regardless of his future dangerousness.[75] Because

65 Foucha v. Louisiana, 112 S. Ct. 1780, 1786 (1992).

66 *Id.* Pretrial detention can only be sought in cases involving crimes of violence, offenses punishable by life imprisonment or death, serious drug offenses, or certain repeat offenders. *Salerno*, 481 U.S. at 747.

67 *Foucha*, 112 S. Ct. at 1786.

68 *Id.* An arrestee is entitled to a prompt detention hearing, and the maximum length of detention is limited by the stringent time limits of the Speedy Trial Act. *Id.*

69 *Id.* For the relevant language from Article 657 of the Louisiana Code of Criminal Procedure, *see supra* note 34.

70 *Foucha*, 112 S. Ct. at 1787.

71 *Id.*

72 Justice White was joined by Justices Blackmun, Stevens, and Souter.

73 *Foucha*, 112 S. Ct. at 1788.

74 *Id.*

75 *Id.*

Louisiana did not allow for the continued confinement of convicted criminals based on dangerousness alone, it had thus impermissibly discriminated against insanity acquittees who have regained their sanity.[76]

Justice White stated further that in both civil commitment proceedings and in confining an insane convict beyond his criminal sentence, the State is required to prove insanity and dangerousness by clear and convincing evidence.[77] In the instant case, however, Foucha had the burden of proving that he would not be dangerous.[78] Because the State failed to justify the denial of these procedural safeguards against unwarranted confinement to sane acquittees, Justice White reasoned, Louisiana had violated equal protection.[79]

B. JUSTICE O'CONNOR'S CONCURRENCE

Justice O'Connor, while agreeing with the majority's due process analysis, wrote separately to emphasize the narrowness of the Court's due process holding.[80] Justice O'Connor stressed that the Court's opinion addressed only Louisiana's broad statutory scheme permitting indefinite confinement of insanity acquittees in mental hospitals after they have regained their sanity. The Court did not, in her view, prevent states from ever confining dangerous insanity acquittees after they regain their mental health.[81] Nor did the Court pass judgment on more narrowly drawn laws which permit the confinement of sane acquittees, or on the states' power to punish those people who commit crimes while mentally ill.[82]

Justice O'Connor recognized that although acquittees may not be incarcerated as criminals or punished for asserting the insanity defense, their prior criminal conduct sets them apart from ordinary citizens.[83] Given the uncertainty of medical diagnoses regarding mental illness, courts are required to pay "particular deference to reasonable legislative judgments about the relationship between dangerous behavior and mental illness."[84] In the instant case, Louisiana has determined that the inference of dangerousness drawn

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76 *Id.*
77 *Id.*
78 *Id.*
79 *Id.*
80 *Id.* at 1789 (O'Connor, J., concurring in part and concurring in the judgment).
81 *Id.* (O'Connor, J., concurring in part and concurring in the judgment).
82 *Id.* (O'Connor, J., concurring in part and concurring in the judgment).
83 *Id.* (O'Connor, J., concurring in part and concurring in the judgment).
84 *Id.* (O'Connor, J., concurring in part and concurring in the judgment) (citing Jones v. United States, 463 U.S. 354, 365 n.13 (1983)).

from a verdict of not guilty by reason of insanity continues even after the acquittee has regained his sanity.[85] Having made such a determination, the State may thus continue to confine a sane insanity acquittee if, as Justice O'Connor stated, "the nature and duration of detention were tailored to reflect pressing public safety concerns related to the acquittee's continuing dangerousness."[86]

Justice O'Connor proceeded to articulate certain guidelines for such a scheme. First, she said that a state may not confine an acquittee in a mental hospital without some medical justification for doing so; otherwise, there would not be the necessary connection between the nature and purposes of confinement mandated by due process.[87] Next, Justice O'Connor required that a state consider the particular crime of the acquittee in weighing the acquittee's liberty interest against the State's interest in preventive detention.[88] Finally, though not formally joining the Court's equal protection analysis, Justice O'Connor indicated her skepticism that a sane insanity acquittee could be held longer than a person convicted of the same crimes could be imprisoned.[89]

Justice O'Connor concluded by emphasizing that the Court was placing no new restrictions on the States' freedom to determine whether and to what extent mental illness should excuse criminal behavior.[90]

C. JUSTICE KENNEDY'S DISSENT

Justice Kennedy[91] criticized the majority for its failure to recognize the criminal nature of the case.[92] Unlike civil proceedings, the issue of insanity in the criminal context can only be reached after the State has proven all of the elements of the crime beyond a reason-

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85 *Id.* (O'Connor, J., concurring in part and concurring in the judgment).

86 *Id.* (O'Connor, J., concurring in part and concurring in the judgment). Justice O'Connor cited the statutory schemes in New Jersey, Washington, and Wisconsin as examples of "tailored" statutes that she would find acceptable. *See* N.J. STAT. ANN. §§ 2C:4-8(b)(3) (West 1982), 30:4-24.2 (West 1981); WASH. REV. CODE §§ 10.77-020(3), 10.77.110(1) (1990); WIS. STAT. §§ 971.17(1), (3)(c) (Supp. 1991). These statutes, unlike the one in *Foucha*, limit the maximum duration of criminal commitment to reflect the acquittee's crime and hold the acquittees in facilities appropriate to their mental condition. *Foucha*, 112 S. Ct. at 1790 (O'Connor, J., concurring in part and concurring in the judgment).

87 *Foucha*, 112 S. Ct. at 1789-90 (O'Connor, J., concurring in part and concurring in the judgment). *See also* Vitek v. Jones, 445 U.S. 480, 491-94 (1980).

88 *Foucha*, 112 S. Ct. at 1789-90 (O'Connor, J., concurring in part and concurring in the judgment).

89 *Id.* (O'Connor, J., concurring in part and concurring in the judgment).

90 *Id.* (O'Connor, J., concurring in part and concurring in the judgment).

91 Justice Kennedy was joined by Chief Justice Rehnquist.

92 *Foucha*, 112 S. Ct. at 1791 (Kennedy, J., dissenting).

able doubt, as required by *In re Winship*.[93] Once a state has met that burden, it may incarcerate on any reasonable basis, without meeting the heightened requirements of due process.[94]

Justice Kennedy accused the majority of conflating the standards for civil and criminal commitment by ignoring the fact that the State had proven beyond a reasonable doubt that Foucha had committed a crime.[95] Citing *Jones*, Justice Kennedy stressed the distinction between civil and criminal confinement, reiterating the Court's refusal to extend the protection of proof by clear and convincing evidence to the criminal context.[96] Instead, the Court in *Jones* held that due process permits automatic incarceration after a criminal adjudication without further process.[97]

Justice Kennedy also argued that the majority failed to recognize the differences between clinical insanity and criminal insanity, which is defined by state law.[98] In civil proceedings, the State uses its *parens patriae* power[99] to provide for and protect society from individuals suffering from mental illness, basing its decision on medical predictions about the committee's dangerous conduct in the future.[100] By contrast, Foucha's commitment was based on his past criminal conduct, resulting from a legal determination that Foucha could not have distinguished right from wrong at the time of his offense.[101] Thus, Justice Kennedy concluded, a finding of present sanity was irrelevant to Foucha's release.[102]

Justice Kennedy further argued that the State, while choosing not to punish insanity acquittees, still retained its interest in incapacitative incarceration.[103] Because incapacitation is a reasonable basis for confinement, and because the State had proven all of the elements of the crime beyond a reasonable doubt, the State could therefore continue to confine insanity acquittees on the basis of dan-

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93 *Id.* at 1791 (Kennedy, J., dissenting) (citing *In re* Winship, 397 U.S. 358 (1970)).

94 *Id.* at 1792 (Kennedy, J., dissenting).

95 *Id.* at 1793 (Kennedy, J., dissenting).

96 *Id.* (Kennedy, J., dissenting) (citing Jones v. United States, 463 U.S. 354, 366 (1983)).

97 *Id.* (Kennedy, J., dissenting) (citing *Jones*, 463 U.S. at 366).

98 *Id.* at 1794 (Kennedy, J., dissenting).

99 *Parens patriae* "refers traditionally to the role of state as sovereign and guardian of persons under legal disability, such as juveniles or the insane . . . It is the principle that the state must care for those who cannot take care of themselves. . . ." BLACK'S LAW DICTIONARY 769 (6th ed. 1991).

100 *Foucha*, 112 S. Ct. at 1794 (Kennedy, J., dissenting) (citing Addington v. Texas, 441 U.S. 418, 426 (1979)).

101 *Id.* (Kennedy, J., dissenting).

102 *Id.* (Kennedy, J., dissenting).

103 *Id.* at 1795 (Kennedy, J., dissenting).

gerousness, regardless of their current sanity.[104]

As a final point, Justice Kennedy argued that the nature of Foucha's confinement—in a mental hospital, as opposed to elsewhere—did not violate due process.[105] Indeed, he stated that the facts and conditions of Foucha's confinement in a psychiatric facility are attributable to his criminal conduct and his own decision to raise insanity as an affirmative defense, and not to an involuntary commitment proceeding initiated by the State.[106]

D. JUSTICE THOMAS' DISSENT

Justice Thomas[107] strongly criticized the majority for invalidating what was, in his opinion, a "quite reasonable" statutory scheme.[108] He began his dissent by questioning the grounds on which the majority found the scheme unconstitutional. Justice Thomas questioned first whether the statute was invalid because it provided for the continued confinement of sane insanity acquittees at all; or whether, as suggested by Justice O'Connor, the constitutional flaw with the statute was that it provided for their indefinite confinement in a mental facility.[109]

Justice Thomas characterized the majority's procedural due process analysis as being, in reality, an equal protection argument, since the majority argued that Foucha, upon regaining his sanity, was entitled to the same treatment as a civil committee.[110] Nonetheless, Justice Thomas rejected the argument entirely, stating that there is a "real and legitimate distinction" between insanity acquittees and civil committees that justifies the procedural differences: that the acquittee has been found, beyond a reasonable doubt, to have committed a criminal act.[111]

Justice Thomas stated that the State's interest in treating insanity acquittees differently from civil committees does not disappear upon proof of the acquittee's current sanity.[112] First, the uncertainty of diagnosis in psychiatry[113] requires the Court to defer

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104 *Id.* (Kennedy, J., dissenting).

105 *Id.* at 1796 (Kennedy, J., dissenting).

106 *Id.* (Kennedy, J., dissenting).

107 Justice Thomas was joined by Chief Justice Rehnquist and Justice Scalia.

108 *Foucha*, 112 S. Ct. at 1797 (Thomas, J., dissenting).

109 *Id.* (Thomas, J., dissenting).

110 *Id.* at 1800 (Thomas, J., dissenting).

111 *Id.* (Thomas, J., dissenting).

112 *Id.* at 1801 (Thomas, J., dissenting).

113 The *Jones* Court noted that "[t]he only certain thing that can be said about the present state of knowledge and therapy regarding mental disease is that science has not

as to the reasonable legislative judgments of the states.[114] In addition, the prior antisocial conduct of an insanity acquittee justifies treating him differently from a civil committee for purposes of deciding whether he should be released, as the distinction between civil committees and insanity acquittees turns on the fact that the latter have "already unhappily manifested the reality of antisocial conduct."[115] Finally, since a state need not provide an insanity defense at all, it is entitled to attach certain consequences to that defense to prevent its abuse.[116]

Justice Thomas emphasized the reasonableness of Louisiana's legislative judgment in this case by citing eleven state statutes,[117] as well as the Model Penal Code,[118] that provide for the continued confinement of insanity acquittees as long as they remain dangerous, regardless of their current sanity.

Justice Thomas also criticized the Court's argument that Foucha's continued confinement in a mental institution was improper, absent civil proceedings determining current mental illness and dangerousness.[119] He first criticized this argument as illogical, since Foucha was not insane and could not be confined on grounds of mental illness even under civil proceedings.[120] Second, he at-

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reached finality of judgment. . . ." 463 U.S. 354, 365 n.13 (1983) (internal quotation marks omitted) (citing Greenwood v. United States, 350 U.S. 366, 375 (1956)).

114 *Foucha*, 112 S. Ct. at 1801 (Thomas, J., dissenting).

115 *Id.* (Thomas, J., dissenting) (citing Dixon v. Jacobs, 427 F.2d 589, 604 (D.C. App. 1970) (Leventhal, J., concurring)).

116 *Id.* (Thomas, J., dissenting) (citing Lynch v. Overholser, 369 U.S. 705, 715 (1962)) ("Congress might have considered it appropriate to provide compulsory commitment for those who successfully invoke an insanity defense in order to discourage false pleas of insanity.").

117 *Id.* at 1802-03 n.9 (Thomas, J., dissenting). Justice Thomas cited the following statutes: CAL. PENAL CODE ANN. § 1026.2(e) (West Supp. 1992); DEL. CODE ANN. tit. 11, § 403(b) (1987); HAW. REV. STAT. § 704-415 (1985); IOWA RULE CRIM. PROC. 21.8(e); KAN. STAT. ANN. § 22-3428(3) (Supp. 1990); MONT. CODE ANN. § 46-14-301(3) (1991); N.J. STAT. ANN. § 2C:4-9 (West 1982); N.C. GEN. STAT. § 122C-268.1(i) (Supp. 1991); VA. CODE ANN. § 19.2-181(3) (Michie 1990); WASH. REV. CODE § 10.77.200(2) (1990); WIS. STAT. § 971.17(4) (Supp. 1991).

118 The Model Penal Code provides, in relevant part:

> If the Court is satisfied by the report filed pursuant to Subsection (2) of this Section and such testimony of the reporting psychiatrists as the Court deems necessary that the committed person may be discharged or released on condition without danger to himself or others, the Court shall order his discharge or his release on such conditions as the Court determines to be necessary. If the Court is not so satisfied, it shall promptly order a hearing to determine whether such person may safely be discharged or released. Any such hearing shall be deemed a civil proceeding and the burden shall be upon the committed person to prove that he may safely be discharged or released.

MODEL PENAL CODE § 4.08(3) (Proposed Official Draft 1962).

119 *Foucha*, 112 S. Ct. at 1803 (Thomas, J., dissenting) (emphasis added).

120 *Id.* (Thomas, J., dissenting).

tacked the majority's reliance on *Vitek v. Jones*.[121] Since the concern in *Vitek* was the stigmatization of the patient, and since *Jones* established that an insanity acquittal was necessarily a stigma in itself,[122] the Court's reliance on *Vitek* was misplaced.[123]

According to Justice Thomas, the Louisiana statutory scheme did not violate procedural due process because it provided for regular opportunities for the acquittee to demonstrate that he is no longer dangerous.[124] Further, the statute provided for judicial review of such determinations; and, throughout the proceedings, Foucha was provided with state-appointed counsel.[125] These procedures were sufficient, in the dissent's view, to meet the requirements of procedural due process.

Justice Thomas' analysis then turned to whether Louisiana's statutory scheme violated Foucha's substantive due process rights. Justice Thomas began by outlining the traditional analytical framework for evaluating substantive due process claims: if the claim involves a fundamental right,[126] then the legislation will be subject to strict scrutiny. A state law that abridges a fundamental right, then, will be upheld only upon a showing that the law is necessary to effect a compelling state interest.[127] If a fundamental right is not involved, however, judicial review of state legislation will not be exacting.[128] Justice Thomas criticized the majority for ignoring the framework by first failing to articulate what, if any, fundamental right is at stake; and second, by failing to disclose the applicable standard of review.[129]

Justice Thomas wrote that the majority first contradicted itself

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121 445 U.S. 480 (1980).

122 Jones v. United States, 463 U.S. 354, 367 (1983).

123 *Foucha*, 112 S. Ct. at 1803 (Thomas, J., dissenting).

124 *Id.* (Thomas, J., dissenting) For a detailed explanation of the release procedures, see LA. CODE CRIM. PROC. ANN. arts. 654, 655 and 657 (West Supp. 1991). *See also supra* notes 26, 30, 34.

125 *Foucha*, 112 S. Ct. at 1803 (Thomas, J., dissenting).

126 In determining whether a fundamental right exists, courts must look to the "traditions and [collective] conscience of our people" to determine whether a principle is "so rooted [there] as to be ranked as fundamental." Griswold v. Connecticut, 381 U.S. 479, 487 (1965) (Goldberg, J., concurring).

127 *Foucha*, 112 S. Ct. at 1804 (Thomas, J., dissenting). For examples of the Court's application of strict scrutiny analysis of fundamental rights, see *Griswold*, 381 U.S. 479 (contraception); Roe v. Wade, 410 U.S. 113 (1973) (abortion); Zablocki v. Redhail, 434 U.S. 374 (1978) (marriage); Moore v. City of East Cleveland, Ohio, 431 U.S. 494 (1977) (family living arrangements).

128 *Foucha*, 112 S. Ct. at 1804 (Thomas, J., dissenting) (citing Bowers v. Hardwick, 478 U.S. 186, 191-96 (1986)). *See also* Michael H. & Victoria D. v. Gerald D., 491 U.S. 110 (1989).

129 *Foucha*, 112 S. Ct. at 1804 (Thomas, J., dissenting).

by seemingly arguing for two different rights—the right to be free from bodily restraint (i.e., that Foucha is confined at all after regaining his sanity); or, as pointed out by Justice O'Connor, the right to be free from indefinite confinement in a mental facility.[130] In regard to the former, Justice Thomas argued that, since it is obvious that such a right does not apply to all people at all times (convicted prisoners, for example), the question must be "whether *insanity acquittees* have a fundamental right to freedom from bodily restraint," which would trigger the strict scrutiny standard.[131] Given the deferential review of state statutes involving the involuntary confinement of the mentally ill, and the "reasonable relation" requirement articulated in *Jackson v. Indiana*,[132] Justice Thomas argued that it is clear that no fundamental right exists, and that heightened judicial scrutiny was not warranted.[133]

Justice Thomas then addressed the question of whether the statute's unconstitutionality rested on its indefinite commitment of insanity acquittees in a mental institution. He argued that the "indefinite" label is misleading because, as in *Jones*, the patient is confined only as long as he cannot satisfy the substantive standards for release, regardless of whether or not the statutory maximum sentence for a criminal conviction has been exceeded.[134] Furthermore, since Foucha had only been confined for eight years, twenty-four years shorter that the maximum sentence had he been convicted, Justice Thomas considered the majority's concerns about indefinite commitment speculative at best.[135]

As a final point, Justice Thomas argued that nothing in the Due Process Clause per se prohibits continued confinement of a sane insanity acquittee in a mental institution.[136] Because many states have long provided for the continued detention of dangerous but sane insanity acquittees, and because the Court did not present any evidence that such persons were traditionally transferred out of mental institutions to other detention facilities, Justice Thomas asserted that no basis existed to recognize the fundamental right of a sane insanity acquittee to be transferred to another facility.[137]

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130 *Id.* (Thomas, J., dissenting).

131 *Id.* at 1806 (Thomas, J., dissenting) (internal quotations omitted).

132 406 U.S. 715, 738 (1972).

133 *Foucha*, 112 S. Ct. at 1807 n.15. (Thomas, J., dissenting).

134 *Id.* at 1808 (Thomas, J., dissenting).

135 *Id.* (Thomas, J., dissenting).

136 *Id.* at 1808-09 (Thomas, J., dissenting).

137 *Id.* at 1809 (Thomas, J., dissenting).

V. ANALYSIS

The danger of the *Foucha* opinion lies in the ambiguity of its holding. Initially, the Court appears to make the broad statement that a state is required to release an insanity acquittee once he has regained his sanity. The Court emphasizes repeatedly that an insanity acquittee "may be held as long as he is *both* mentally ill and dangerous, but no longer."[138] Later in the opinion and in the concurrence, however, the Court recoils from its original position. Instead, the majority seems to suggest (Justice O'Connor doing so explicitly) that the statute's constitutional flaw is not that it requires the acquittee's confinement at all, but rather that it provides for the indefinite confinement of a sane insanity acquittee in a mental facility.[139] Thus, a narrower scheme for the preventive detention of dangerous acquittees could pass constitutional muster.[140] In order to analyze the Court's decision, this apparent contradiction must be understood and, if possible, resolved.

Had the Court wanted to make a sweeping, unequivocal statement requiring the release of all sane insanity acquittees regardless of dangerousness, it could have done so explicitly. Such a statement, however, could very likely have generated the kind of backlash that resulted from John Hinckley's insanity acquittal for the attempted assassination of President Reagan in 1981.[141] State legislators who sensed that the Court had widened the insanity "loophole" would move to tighten control over the defense. States might narrow the application of the insanity defense by requiring proof of insanity beyond a reasonable doubt, by substituting a verdict of guilty but mentally ill[142] for the insanity acquittal, or by abolishing the insanity defense altogether.[143] Public fear and concern over the premature release of insanity acquittees could thus turn the impact

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138 *Id.* at 1784 (emphasis added).

139 *Id.* at 1786. *See also id.* at 1789 (O'Connor, J., concurring in part and concurring in the judgment).

140 *Foucha*, 112 S. Ct. at 1786.

141 A jury found Hinckley not guilty by reason of insanity on 13 charges, ranging from attempted assassination of the President to possession of an unlicensed pistol, arising from the shooting of President Reagan and three other men on March 30, 1981. *See* N.Y. TIMES, June 22, 1982, at A1, *cited in* Peter Margulies, *The "Pandemonium Between the Mad and the Bad:" Procedures for the Commitment and Release of Insanity Acquittees After* Jones v. United States, 36 RUTGERS L. REV. 793 n.1 (1984) (hereinafter "Margulies"). In a poll conducted by the New York Times after the Hinckley verdict, 75% of the respondents said they did not favor exculpation for criminal acts based on insanity. *See* N.Y. TIMES, June 13, 1982, at B6, *cited in* Margulies at 794 n.3.

142 *See, e.g.*, ILL. REV. STAT. ch. 38 ¶ 6-2(c) (1989).

143 *See* IDAHO CODE § 18-207(a) (1987) (mental condition not a defense to criminal charges).

of a decision favoring the liberty interests of the acquittee into an abandonment of the insanity defense.[144]

Perhaps more significantly, an opinion requiring the release of insanity acquittees who have regained their mental health would not have commanded a majority of the Court. Justice O'Connor, the fifth vote in the majority opinion, would still have concurred in the judgment that the Louisiana statute is overbroad and unconstitutional. As is reflected in her concurrence in *Foucha*, however, Justice O'Connor does not view due process as preventing a state from ever confining an acquittee on the basis of dangerousness. Like the dissenters, Justice O'Connor would permit continued confinement, albeit in narrower circumstances than Justices Kennedy or Thomas would suggest. In her concurrence, Justice O'Connor cited the current schemes in New Jersey, Washington, and Wisconsin, which limit the length of confinement and hold acquittees in facilities appropriate to their mental condition, as examples of the sort of tailored statutes that would survive her due process scrutiny.[145] Thus, although the decision of *Foucha* would be the same—the invalidation of the Louisiana statute—the opinion would stand for little more than evidence of a deeply fragmented Court, with unclear implications for future lower court decisions.

Justice White's statement, however, was not so bold. The narrowness of the "carefully limited exception" of the Bail Reform Act and the Court's discussion of *Salerno*[146] would have been irrelevant if an acquittee were simply entitled to release upon regaining his sanity. Furthermore, the fact that Justice O'Connor joined in the Court's due process analysis rather than simply concurring in the judgment indicates that the Court did not take away the state's power to confine sane insanity acquittees altogether, despite Justice Kennedy's assertion to the contrary. Thus, the real question of *Foucha* is not *whether* a state may continue to confine insanity acquittees on the basis of dangerousness, but *how* it may go about doing so.

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144 For a broader discussion of the "hidden cost" of the *Foucha* decision, see Paul Robinson, *Dangerous Blameless Offenders and the Criminal-Civil Distinction*, 83 J. CRIM. L. & CRIMINOLOGY XX (1993).

145 Foucha v. Louisiana, 112 S. Ct. 1780, 1790 (1992) (O'Connor, J., concurring) (citing N.J. STAT. ANN. §§ 2C:4-8(b)(3) (West 1982), 30:4-24.2 (West 1981); WASH. REV. CODE §§ 10.77.020(3), 10.77.110(1) (1990); WIS. STAT. §§ 971.17(1),(3)(c) (Supp. 1991)).

146 *Foucha*, 112 S. Ct. at 1786-87.

A. THE PARADOXICAL HOLDING AND THE PRECEDENT OF *JONES*

The flaw with the Court's analysis is reflected in its contradictory reasoning—and particularly in its reliance on the landmark case of *Jones v. United States*.[147] In *Jones*, an insanity acquittee argued that his indefinite confinement violated the Due Process Clause because the proof of his insanity was based only on a preponderance of the evidence instead of the civil commitment standard of clear and convincing evidence.[148] The acquittee argued further that the Constitution prohibited the hospitalization of an insanity acquittee for a period longer than he might have served in prison had he been convicted.[149]

The *Jones* Court, however, rejected both arguments. First, the Court addressed the "important differences" between potential civil committees and insanity acquittees. The concern in the civil context, as articulated in *Addington v. Texas*,[150] was that members of the public could be confined on the basis of "some abnormal behavior which might be perceived by some as symptomatic of a mental or emotional disorder, but which is in fact within a range of conduct that is generally acceptable."[151] Because the possible injury to the individual would be significantly greater than any possible harm to the State, the *Addington* Court refused to require the individual to bear equally the risk of an erroneous decision.[152] Instead, the Court placed the heightened burden of clear and convincing evidence on the State.[153]

In the criminal context, however, it is the acquittee himself who raises insanity as an affirmative defense, thus lessening the concern as to the risk of error.[154] Furthermore, the *Jones* Court emphasized that proof that an acquittee committed a criminal act as a result of mental illness eliminates the risk that he is being committed for mere "idiosyncratic behavior."[155] The Court concluded, therefore, that there is no reason to adopt the same standard of proof in both civil and criminal cases.[156]

The *Jones* Court also rejected the suggestion that the length of an acquittee's hospitalization should be capped by his "hypothetical

147 463 U.S. 354 (1983).
148 *Id.* at 366-67.
149 *Id.* at 356.
150 441 U.S. 418 (1979).
151 *Id.* at 426-27.
152 *Id.* at 427.
153 *Id.*
154 Jones v. United States, 463 U.S. 354, 367 (1983).
155 *Id.* (quoting Addington v. Texas, 441 U.S. 418, 427 (1979)).
156 *Id.*

criminal sentence" (i.e., the length of time the defendant would have been imprisoned had he been convicted for the offense). The purpose of confinement following an insanity acquittal is the treatment of the individual's mental illness and the protection of both the individual and society from his potential dangerousness.[157] Because an acquittee's confinement rests on his continuing illness and dangerousness, the length of the acquittee's hypothetical criminal sentence is irrelevant to the purposes of his commitment.[158] Rather, the *Jones* Court held that an insanity acquittee may be confined to a mental institution until he has recovered his sanity or is no longer dangerous.[159]

The majority in *Foucha* used this language to require Foucha's release as a matter of due process. Since Foucha was no longer insane, the State was required to release him from the institution.[160] Justice Thomas, however, emphasized that *Jones* addressed only the length of an acquittee's confinement as compared to his hypothetical criminal sentence, not the circumstances under which an acquittee is to be released.[161] His dissent also attacked the majority and the concurrence for their interpretation of *Jones*' "holding" that an acquittee must be released once he is no longer insane. Justice Thomas wrote that "[e]ither it is true that, as a matter of substantive due process, an insanity acquittee is entitled to release when he has recovered his sanity, or it is not. The Court apparently cannot make up its mind."[162]

Only a narrow reading of *Jones* can resolve this conflict. The *Jones* Court did not address the issue of whether detention in another facility (i.e., a halfway house for insanity acquittees) would be permissible in cases where an acquittee remained dangerous after regaining his sanity; rather, the Court simply stated that the acquittee would be entitled to release from the mental institution. In order for the *Foucha* Court's analysis to be consistent with precedent, therefore, its reading of *Jones* must not prohibit an acquittee's confinement in another facility on the basis of dangerousness.

The text of the majority opinion reflects this narrow reading of *Jones*. Although Justice Thomas, as quoted above, viewed the majority's use of *Jones* to support Foucha's release as a matter of substantive due process, the context of the argument demonstrates that it

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157 *Id.* at 368.
158 *Id.* at 369.
159 *Id.* at 370.
160 Foucha v. Louisiana, 112 S. Ct. 1780, 1784 (1992).
161 *Id.* at 1806-07 (Thomas, J., dissenting).
162 *Id.* n.14 (Thomas, J., dissenting) (internal quotation marks omitted).

was procedural and not substantive.[163] The majority used *Jones* to establish that Foucha could no longer be held "in a psychiatric facility as an insanity acquittee."[164] Justice White went on to require "constitutionally adequate *procedures*" if Louisiana were to hold Foucha any longer.[165] It is evident, then, that the majority's reliance on *Jones* justified Foucha's release from a mental hospital, but not his release entirely. This interpretation of *Jones* could therefore permit confinement under certain circumstances, thus reconciling the majority and the concurrence, and leaving the State's power of preventive detention largely intact.

This reading of *Jones*, however, though consistent with both opinions, is unpersuasive as the primary foundation for the Court's decision in *Foucha*. Nothing in the language of *Jones* suggests such a narrow interpretation. The *Jones* Court's repeated statements that an acquittee's confinement "rests on his continuing *illness and dangerousness*"[166] suggest that the acquittee's confinement depends upon a finding of *both* mental illness and dangerousness. Furthermore, the Court's references to release upon recovery indicate that the acquittee may be confined only as long as he remains mentally ill.[167]

This is not to say that Justice Thomas' claim that *Jones* did not reach any question on the standard for release of insanity acquittees is any more convincing. As the majority in *Foucha* stated, the question in *Jones* was whether an insanity acquittee was entitled to release because his hospitalization exceeded the length of his hypothetical criminal sentence.[168] In rejecting the argument, the *Jones* Court twice announced the outside limits on the detention of insanity acquittees[169]—that the detainee could be held until he had regained his sanity or was no longer dangerous.[170] Though he cited the proposition twice in his criticism of the majority, Justice Thomas failed to address the question of why, under *Jones*, Foucha was not entitled to release upon regaining his sanity.[171]

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163 *Id.* at 1784. The majority's substantive due process analysis does not begin until several paragraphs later in the opinion.

164 *Id.*

165 *Id.* at 1785 (emphasis added).

166 Jones v. United States, 463 U.S. 354, 369 (1983) (emphasis added).

167 *Id.* Indeed, the Court stated as an example that under the District of Columbia statute in question, no matter how serious the criminal act committed by the acquittee, he would be entitled to release within "50 days of his acquittal *if he [had] recovered.*" *Id.* (emphasis added).

168 Foucha v. Louisiana, 112 S. Ct. 1780, 1784 n.5 (1992).

169 Ironically, this statement undercuts the majority's own holding that insanity acquitees *can* be detained after they have regained their sanity.

170 *Foucha*, 112 S. Ct. at 1784 n.5 *See also Jones*, 463 U.S. at 368.

171 *Foucha*, 112 S. Ct. at 1806-07 (Thomas, J., dissenting).

B. DUE PROCESS AND THE PROBLEM OF THE DISSENTS

The majority was clearly correct in holding, as a matter of procedural due process, that Foucha was entitled to release from the psychiatric hospital once he had recovered from his mental illness. Due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which an individual is committed.[172] Hence, even if the acquittee's original confinement were initially permissible, it could not constitutionally continue if the basis for such confinement no longer existed.[173]

The primary purpose for Foucha's commitment to a psychiatric institution was the treatment of his mental illness. Once he recovered, the basis for his commitment disappeared and he was therefore entitled to release from the facility. To be sure, the State's purpose in incapacitating dangerous individuals was also served by such confinement.[174] It is absurd to suggest, however, that an individual who is not mentally ill should be committed to a mental institution, despite the fact that he may be dangerous. Indeed, the heightened burden of clear and convincing evidence required both for civil commitment and the institutionalization of convicted criminals reflects the Court's desire to prevent the erroneous commitment of those who are not mentally ill.[175] Yet, despite testimony that no psychiatric benefit would be gained by continued confinement,[176] the dissenters would permit Foucha's detention at Feliciana for the simple reason that he is already there. This falls far short of the due process "reasonableness" requirement stated in *Jackson*.[177]

Both Justice Kennedy and Justice Thomas criticized the majority's reliance on *Vitek v. Jones* as inapplicable.[178] In *Vitek*, the Court struck down a Nebraska statute which provided for the transfer of convicted prisoners suffering from a mental disorder to a psychiatric hospital without the procedural safeguards of civil commitment.[179] The Court recognized the liberty interest of the prisoner in avoiding

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172 Jackson v. Indiana, 406 U.S. 715, 738 (1972) (State could institutionalize deaf mute only long enough to determine whether he could be cured and become competent to stand trial).

173 O'Connor v. Donaldson, 422 U.S. 563, 575 (1975) (holding that due process prevents the confinement of a harmless mentally ill person).

174 *See Foucha*, 112 S. Ct. at 1808 (Thomas, J., dissenting).

175 *See* Addington v. Texas, 441 U.S. 418 (1979); Vitek v. Jones, 445 U.S. 480 (1979).

176 Brief for Petitioner, *supra* note 35, at 7.

177 *See* Jackson v. Indiana, 406 U.S. 715, 738 (1972).

178 *Foucha*, 112 S. Ct. at 1796 (1992) (Kennedy, J., dissenting); *Id.* at 1803 (Thomas, J., dissenting).

179 *Vitek*, 445 U.S. at 493.

commitment to a mental facility without adequate proof that he was mentally ill, despite the fact that he was already incarcerated.[180]

The dissents argued that the Court's concern in *Vitek* was over the stigmatizing consequences of commitment which would warrant the heightened procedural protection.[181] Tracking what Justice Brennan called "the Court's most cynical argument" in *Jones*,[182] both Justice Kennedy and Justice Thomas stated that "a criminal defendant who successfully raises the insanity defense necessarily is stigmatized by the verdict itself."[183] Thus, the acquittee's actual commitment to a mental institution adds little to the stigma of having been found NGRI.[184] Furthermore, since Foucha had not challenged any specific conditions of confinement (i.e., being forced to share a cell with an insane person or being involuntarily treated once he has regained his mental health), the Court could not conclude that his confinement in a mental facility was a per se violation of the Due Process Clause.[185]

The dissents' analyses, however, failed to recognize that the loss of liberty resulting from involuntary commitment is not just a loss of freedom from confinement.[186] Indeed, one commentator attacked the dissents' reasoning as a callous disregard of the immediate deprivations associated with unnecessary hospitalization.[187] In *Youngberg v. Romeo*,[188] three Justices acknowledged that long periods of hospitalization, which foster dependence on an institutional environment, can result in a loss of basic living skills and self-reliance.[189] More importantly, because a mental hospital can be "replete with brutality, random violence, noise, filth, and neglect,"[190] unnecessary confinement should be avoided at all costs. Because Foucha gained no therapeutic benefit from his continued confinement in a psychiatric institution, and because the risks of unnecessary hospi-

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180 *Id.*

181 *Foucha*, 112 S. Ct. at 1796 (Kennedy, J., dissenting); *Id.* at 1803 (Thomas, J., dissenting).

182 463 U.S. at 384 (Brennan, J., dissenting).

183 *Id.* at 367 n.16.

184 *Id.*

185 *Foucha*, 112 S. Ct. at 1796 (Kennedy, J., dissenting); *Id.* at 1809 (Thomas, J., dissenting).

186 Vitek v. Jones, 445 U.S. 480, 492 (1980). The Court cited the stigmatizing social consequences of commitment and the mandatory behavior modification programs to which the committee was subjected as further infringements upon the prisoner's liberty.

187 Margulies, *supra* note 141, at 821.

188 457 U.S. 307 (1982).

189 Id. at 327-29 (Blackmun, J., concurring, joined by Brennan and O'Connor, JJ.).

190 Margulies, *supra* note 141, at 821-22.

talization were outweighed by Foucha's liberty interest, he was entitled to release from Feliciana.

Having established that Foucha cannot be confined in a mental facility, the Court turned to the question of whether Foucha may be confined at all. The majority stated that once an insanity acquittee has regained his sanity and cannot be held as such in a mental hospital, he is entitled to "constitutionally adequate procedures" to establish the grounds for his continued confinement.[191] This profoundly ambiguous statement begged the question of what procedures, if any, the Court would consider "constitutionally adequate" to allow a state to hold a sane insanity acquittee.

Citing *Jackson v. Indiana*,[192] Justice White alluded to "the protections constitutionally required in a civil commitment proceeding."[193] He failed to articulate, however, which protections (i.e., availability and frequency of release hearings, judicial review of such hearings, allocation of and standards for burdens of proof, etc.) Louisiana failed to provide.[194] More troublesome, however, was the Court's reading of *Jackson* itself. In *Jackson*, the Court held that a state can institutionalize a person who is incompetent to stand trial only long enough to determine whether there is a substantial probability that he will attain the capacity to stand trial in the foreseeable future.[195] If not, the State must either commit him in a civil proceeding or release him.[196]

The majority in *Foucha* tracked this argument in determining whether Foucha could be held in a mental institution, stating that "[K]eeping Foucha against his will in a mental institution is improper absent a determination in civil commitment proceedings of current mental illness and dangerousness."[197] The Court's full discussion of *Jackson*, however, came after the Court had determined that Foucha was entitled to release from the mental hospital, indicating that the Court must have applied *Jackson* to confinement apart from a psychiatric facility.[198] Justice White's reference to "constitutionally adequate procedures" thus divorced the constitutional pro-

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191 *Foucha*, 112 S. Ct. at 1785 (citing Jackson v. Indiana, 406 U.S. 715 (1972)). *See also* Baxstrom v. Herold, 383 U.S. 107 (1966).

192 406 U.S. 715 (1972).

193 *Foucha*, 112 S. Ct. at 1785. *See also* Jackson v. Indiana, 406 U.S. 715, 738 (1972).

194 Indeed, as Justice Thomas indicated in his dissent, the majority did not purport to examine the procedures provided by Louisiana for the release of insanity acquitees. *Foucha*, 112 S. Ct. at 1800 (Thomas, J., dissenting).

195 *Jackson*, 406 U.S. at 738.

196 *Id.*

197 *Foucha*, 112 S. Ct. at 1784.

198 *Id.* at 1785.

tections of civil commitment from the commitment process itself, without explanation (by either the majority or the dissenters) as to which procedural protections were under consideration.

One possibility is the State's allocation of the burdens of proof in commitment proceedings. As discussed above, in order for an individual to be civilly committed, the State bears the burden of proving insanity and dangerousness by clear and convincing evidence.[199] The Louisiana release procedures under consideration in *Foucha*, by contrast, placed the burden on the acquittee to prove by a preponderance of the evidence that he would not pose a danger to himself or to the community.[200] Justice White's "constitutionally adequate procedures," then, would require the State to prove dangerousness by clear and convincing evidence in order to confine the acquittee at all.

The problem in requiring an insanity acquittee to establish his non-dangerousness rests on the fact that the acquittee has already been proven to have committed a crime: "[O]nce a man has shown himself to be dangerous, it is all but impossible for him to prove the negative that he is no longer a menace."[201] The societal instinct to punish those who have committed crimes—despite the statutory prohibition—may also prejudice the factfinder against the acquittee.[202] In addition, as one commentator has noted, the fear that an acquittee will commit other crimes in the future is reflected in the unwillingness of psychiatrists to make predictions as to an individual's non-dangerousness.[203] By placing the burden of proof on the State, the Court would thus spare the acquittee the Sisyphean burden of proving the negative.

In his dissent, Justice Kennedy accused the Court of ignoring the criminal nature of the proceedings and conflating the standards for civil and criminal commitment—in effect, overruling *Jones*—by requiring the same procedural protections for sane insanity acquittees as for civil committees.[204] The *Jones* Court rejected the contention that the government had to meet the standards for civil commitment prior to incarcerating an insanity acquittee after adjudication, permitting his automatic incarceration on the basis of the NGRI verdict, where insanity was established by a preponderance of

199 Addington v. Texas, 441 U.S. 418, 426-27 (1979).

200 LA. CODE CRIM. PROC. ANN. art. 657 (West Supp. 1991).

201 Margulies, *supra* note 141, at 833 (citing Covington v. Harris, 419 F.2d 617, 629 (D.C. Cir. 1969)).

202 *Id.* at 823.

203 *Id.*

204 Foucha v. Louisiana, 112 S. Ct. 1780, 1793 (1992) (Kennedy, J., dissenting).

the evidence.[205] In Justice Kennedy's view, the majority in *Foucha* erred by ignoring *Jones*' acceptance of lower standards for criminal commitment.[206]

Justice Thomas drew on *Jones* as well. He argued that *Jones* recognized a real and legitimate distinction between insanity acquittees and civil committees that justified a procedural disparity—the fact that insanity acquittees had been found to have committed a criminal act.[207] Justice Thomas went on to state that "[w]hile a state may renounce a punitive interest by offering an insanity defense, it does not follow that, once the acquittee's sanity is 'restored,' the State is required to ignore his criminal act, and to renounce all interest in protecting society from him."[208]

As Justice Thomas himself recognized, however, the *Jones* Court addressed only the procedural differences in initial commitment proceedings, *not* the disparity in the standards for release.[209] *Jones* permitted the use of an acquittee's prior criminal act as evidence of his continuing mental illness and dangerousness, thus justifying a lower standard of proof at commitment. The criminal act's probative value, however, decreases over time.[210] Although Louisiana has determined that an inference of dangerousness drawn from an insanity verdict will continue even after the acquittee has regained his sanity, and such determination warrants judicial deference,[211] it cannot be said that the inference may continue indefinitely. Eventually, the connection between the acquittee's prior criminal act and future predictions of dangerousness will be too tenuous to sustain any procedural differences between an acquittee and a civil committee.[212]

The obvious question, then, is when this procedural convergence should occur. One commentator suggested that the hypothetical criminal sentence should serve as the guide by which the

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205 *Id.* (Kennedy, J., dissenting) (citing Jones v. United States, 463 U.S. 354, 366 (1983)).

206 *Id.* (Kennedy, J., dissenting).

207 *Id.* at 1800 (Thomas, J., dissenting). *See also* Jones v. United States, 463 U.S. 354, 367 (1983).

208 *Foucha*, 112 S. Ct. at 1801 (Thomas, J., dissenting).

209 *Jones*, 463 U.S. at 363 n.11.

210 Stephen Morse, *Excusing the Crazy: The Insanity Defense Reconsidered*, 58 S. CAL. L. REV. 777, 831 (1985). *See also* Note, *Rules for an Exceptional Class: The Commitment and Release of Persons Acquitted of Violent Offenses by Reason of Insanity*, 57 N.Y.U. L. REV. 281, 326 (1982) (hereinafter Note).

211 *Foucha*, 112 S. Ct. at 1789. Relying on *Jones*, the Court stated that the uncertainty of medical knowledge regarding mental disease warrants that courts pay particular deference to reasonable legislative judgments about the relationship between dangerous behavior and mental illness. *Id.*

212 Morse, *supra* note 210, at 835; Note, *supra* note 210, at 326-27.

acquittee's rights reach parity with the civil committee.[213] Another argued that since prison sentences are based on punitive rather than dangerousness concerns, the appropriate length of time can only be met by a reasonableness standard.[214] Yet in both cases, the dangerousness under consideration was a result of the acquittee's continuing mental illness; indeed, both commentators acknowledged that, absent a mental health reason for hospitalization, the acquittee was entitled to release.[215] In order to hold the acquittee longer, as in *Jackson*, the State would be required to afford the protections of civil commitment.[216]

After establishing the procedures by which a State could confine a sane acquittee, Justice White's analysis turned to the question of whether the acquittee's continued confinement would violate substantive due process. The Court began its discussion by emphasizing that "commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection."[217] While a state may incarcerate convicted criminals for the purposes of deterrence and retribution, no such punitive interest existed here, since Foucha was exempt from criminal responsibility.[218] Likewise, although a state may confine a person upon proof by clear and convincing evidence of mental illness and dangerousness, this did not apply, since Foucha was not insane.[219]

Justice White then acknowledged that, in certain narrow circumstances, a state may confine an individual who poses a danger to others or to the community.[220] In *United States v. Salerno*,[221] the case on which the State placed its primary reliance, the Court addressed the question of pretrial detention. The Court upheld the Bail Reform Act's authorization of confinement on the basis of dangerousness as a carefully limited exception to the Due Process Clause because of its narrow scope.[222] The circumstances under which detention could be sought were limited to only the most serious felonies;[223] and the scheme addressed an acute problem involving overwhelming government interests.[224] Under the Act, the detainee

213 Note, *supra* note 210, at 327.
214 Morse, *supra* note 210, at 835.
215 *Id.*
216 Foucha v. Louisiana, 112 S. Ct. 1780, 1785 (1992).
217 *Id.* at 1785 (citing *Jones*, 463 U.S. at 361 (internal quotation marks omitted)).
218 LA. REV. STAT. ANN. § 14:14 (West 1986).
219 *Foucha*, 112 S. Ct. at 1786.
220 *Id.*
221 481 U.S. 739 (1987).
222 *Id.* at 747.
223 *Id.* at 750.
224 *Id.*

was also entitled to an adversary hearing at which the government had to prove dangerousness by clear and convincing evidence.[225] Finally, the Act strictly limited the length of the detainee's confinement.[226]

Justice White rejected the State's analogy to *Salerno*. He argued that, unlike the Bail Reform Act, the Louisiana statute was overbroad, treating all insanity acquittees alike regardless of the charge.[227] Furthermore, the statute failed to provide for an adversary hearing at which the State bore the burden, by clear and convincing evidence, on the issue of dangerousness.[228] In her concurrence, Justice O'Connor suggested that Louisiana could provide for the confinement of sane insanity acquittees if "the nature and duration of detention were tailored to reflect pressing public safety concerns related to the acquittee's continuing dangerousness."[229] Because the current scheme was not so tailored, it could not defeat Foucha's liberty interest.[230]

The fatal flaw in the majority's analysis is evident here. *Jones* established that the acquittee's hypothetical criminal sentence should neither be used as a ceiling on the length of the acquittee's commitment, nor as a floor by which to hold an acquittee longer than his mental illness requires. In focusing on the limited scheme of confinement in *Salerno*, the Court failed to acknowledge that the length of the acquittee's confinement is determined by his mental illness alone. Instead, as Justice O'Connor made clear, the Court paved the way for states to craft another exception to an acquittee's liberty interest—the states must simply be more careful in doing so.

Both dissenters took issue with the extent of the liberty interest of an insanity acquittee. Justice Kennedy and Justice Thomas emphasized that a verdict of not guilty by reason of insanity differs dramatically from a verdict of not guilty *simpliciter*.[231] As Justice Kennedy argued, in a criminal case, the question of insanity will be addressed only after each element of the crime has been proven beyond a reasonable doubt.[232] Though an individual is entitled to heightened due process scrutiny before adjudication, once a state has met its burden, it may confine the person on any reasonable

225 *Id.* at 751.
226 *Id.* at 747.
227 Foucha v. Louisiana, 112 S. Ct. 1780, 1786 (1992).
228 *Id.*
229 *Id.* at 1789 (O'Connor, J., concurring in part and concurring in the judgment).
230 *Id.* at 1786.
231 *Id.* at 1793 (Kennedy, J., dissenting); *Id.* at 1805-06 n.3 (Thomas, J., dissenting).
232 *Id.* at 1791 (Kennedy, J., dissenting).

basis.[233] Thus, the dissent argued that the acquittee's interest was not so great as to warrant heightened scrutiny.[234] In addition, *Jones* held that the insanity acquittal itself was sufficient to warrant a lower standard of proof, and thus a lower level of due process protection, at commitment.[235]

Justice Thomas, on the other hand, attacked the Court for ignoring the well-established analytical framework for evaluating substantive due process claims.[236] Except in the case where a fundamental right is infringed (triggering strict scrutiny and requiring a compelling State interest and narrow tailoring), judicial scrutiny of the substance of state legislation under the Due Process Clause of the Fourteenth Amendment is not exacting.[237] Because many states have long provided for the continued institutionalization of insanity acquittees on the basis of dangerousness,[238] and because the Court has never applied strict scrutiny to laws involving involuntary confinement of the mentally ill or insanity acquittees,[239] Justice Thomas considered Justice O'Connor's heightened level of scrutiny[240] both unwarranted and unsupportable.[241]

A more stringent judicial standard is appropriate in reviewing legislation in the criminal commitment context, however, for several reasons. First, there is a strong likelihood that legislative classifications are not based solely on the purposes of treatment and public protection.[242] Instead, legislators may be motivated by the desire to punish the acquittee for the crime he has committed, contrary to the holding of *Jones* and to the fundamental basis of the insanity defense

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233 *Id.* (Kennedy, J., dissenting).

234 *Id.* (Kennedy, J., dissenting).

235 Jones v. United States, 463 U.S. 354, 367 (1983).

236 *Foucha*, 112 S. Ct. at 1804 (Thomas, J., dissenting).

237 *Id.* (Thomas, J., dissenting) (citing Bowers v. Hardwick, 478 U.S. 186, 191-96 (1986)).

238 *Id.* at 1806 (Thomas, J., dissenting) (citing HENRY WEIHOFEN, INSANITY AS A DEFENSE IN CRIMINAL LAW 294-332 (1933); ABRAHAM S. GOLDSTEIN, THE INSANITY DEFENSE 148-49 (1967)).

239 *Id.* (Thomas, J., dissenting). Justice Thomas acknowledged that the standard of review in cases involving insanity acquittees has not yet been settled. He noted, however, that, at most a "reasonable relation" standard applies, indicating a highly deferential judicial scrutiny. Since he considered the Louisiana scheme at the very least reasonable, there was no need for the Court to determine which standard of review was appropriate. *Id.* at 1807 n.15.

240 Justice O'Connor's standard of judicial review reflects an intermediate standard of scrutiny. Intermediate scrutiny, established in the equal protection context for cases involving classifications based on gender, requires that the legislation be "substantially related" (vs. necessary) to "important" (vs. compelling) government objectives. Craig v. Boren, 429 U.S. 190 (1976).

241 *Foucha*, 112 S. Ct. at 1807 (Thomas, J., dissenting).

242 Margulies, *supra* note 141, at 815.

itself.[243] Indeed, the dissents' focus on Foucha's criminal act seems to reflect this desire to hold Foucha accountable for his crime, despite the fact that he has been exempted from criminal responsibility by the State.

In addition, the lack of political power of insanity acquittees further justifies the need for heightened scrutiny.[244] A person's status as an insanity acquittee creates "a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry."[245]

Finally, heightened scrutiny is appropriate because of the acquittee's fundamental right to liberty. Though the dissents chided the majority for attaching talismanic significance to the fact that Foucha had not been convicted,[246] they failed to acknowledge the fundamental differences between a NGRI verdict and a verdict of guilty but mentally ill (GBMI). Louisiana law provides that "[i]f the circumstances indicate that because of a mental disease or mental defect the offender was incapable of distinguishing between right and wrong with reference to the conduct in question, the offender shall be exempt from criminal responsibility."[247] A state recognizing the GBMI verdict, however, does not relieve the offender from criminal responsibility for his conduct.[248]

An insanity acquittal thus demonstrates the intent of the state legislature to preclude criminal responsibility for the acquittee's conduct—and, as required by *Jones*, a recognition that the acquittee's detention will *not* be determined by a criminal sentence. Had Foucha been found GBMI, there would have been no question as to whether or not the State had to release him once he regained his sanity; if time had remained on his sentence, he would have been transferred to a prison.

Thus, it was only because Foucha was acquitted that the issue of his continued confinement arose at all. Once Foucha regained his sanity, under *Jones*, his liberty interest was restored; since liberty is a

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243 *Id.*

244 *Id.* at 816.

245 *Id.* at 816 n.141 (citing United States v. Carolene Products Co., 304 U.S. 144, 152-53 n.4 (1938)). *But see* Benham v. Edwards, 678 F.2d 511, 515-16 n.9 (5th Cir. 1982) (holding that insanity acquittees are no more of a suspect class than women, aliens, or illegitimate children—all classes that have been denied strict scrutiny), *cited in* Polstein, *supra* note 5, at 487-88 n.55.

246 Foucha v. Louisiana, 112 S. Ct. 1780, 1793 (1992) (Kennedy, J., dissenting); *Id.* at 1805-06 n.13 (Thomas, J., dissenting).

247 LA. REV. STAT. ANN. § 14:14 (West 1986).

248 *See, e.g.*, ILL. REV. STAT. ch. 38 ¶ 6-2(c)(1989).

fundamental right, strict scrutiny should have applied. Hence, the problem with Justice O'Connor's standard of scrutiny—and the majority's holding—was that they did not go far enough to ensure the protection of the acquittee's liberty interest.

C. EQUAL PROTECTION AND THE ERROR OF THE MAJORITY

The majority's equal protection analysis reflects the weakness of the Court's analysis as well. Justice O'Connor understandably did not join the opinion on equal protection—for if she had, she would have fallen into the same contradiction that plagued the remaining four Justices of the majority: arguing both that the State must release insanity acquittees upon regaining their sanity and that the State may, by assuming the burden of proof by clear and convincing evidence, detain them on the basis of dangerousness alone.

The thrust of the Court's equal protection argument was simple: since Louisiana did not provide for the similar confinement of other classes of persons who have committed crimes but who may still be dangerous (such as convicted criminals who have served their time), it impermissibly discriminated against sane insanity acquittees by detaining them on the grounds of their continuing dangerousness.[249] The Court went on to say, however, that because the State did not provide the same procedures (i.e., proof by the State of insanity and dangerousness by clear and convincing evidence) for the continued commitment of insanity acquittees as it did for civil committees and insane convicts at the end of their prison terms, it could not confine Foucha. This implies that, by assuming this burden of proof, further confinement would be acceptable.[250]

The contradiction here is evident. As Justice Thomas argued earlier, it is disingenuous to argue that an acquittee who is no longer insane can somehow be confined longer by requiring a heightened standard of proof of insanity. If, however, the Court is suggesting that the State need only prove dangerousness by clear and convincing evidence to confine the acquittee (as it did in the majority opinion), it has run aground of its first argument. Convicted criminals are released at the end of their sentences, regardless of their potential dangerousness.[251] As *Jones* held, in the

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249 *Foucha*, 112 S. Ct. at 1788.

250 *Id.* at 1788-89.

251 Justice Kennedy noted in his dissent that parole release provisions often use dangerousness as a criterion for release, placing the burden of proof on the prisoner to prove his lack of dangerousness. *Id.* at 1796. His dissent, however, failed to recognize that the decision to parole is discretionary; a state need not grant parole at all. *See* Greenholtz v. Inmates of the Nebraska Penal & Correctional Complex, 442 U.S. 1

context of insanity acquittals, the length of an acquittee's confinement "rests on his continuing illness and dangerousness."[252] Therefore, to treat the sane acquittee the same as a convicted criminal, the State was required to release him once the basis for his confinement no longer applied.

Justice Thomas' rejection of the Court's equal protection argument fared no better. His dissent, like Justice Kennedy's, focused primarily on the comparison between insanity acquittees and civil committees.[253] He argued that the majority erroneously equated civil committees with insanity acquittees once the latter had regained their sanity, and criticized the Court for ignoring the fact that the acquittees had been proven to have committed a crime.[254]

Justice Thomas' dissent, however, ignored the fact that many civil committees have engaged in conduct that is equally as dangerous as that of an insanity acquittee.[255] Furthermore, the fact that a person is civilly committed rather than found NGRI may in some cases mean that the prosecutor, at his or her discretion, decided not to bring a criminal action, or that the person charged with the offense was found unfit to stand trial.[256] More importantly, Justice Thomas never addressed the comparison between insanity acquittees and convicted criminals detained past the length of their sentence. Though he spent a great deal of time focusing on the acquittee's criminal act, he failed to offer any explanation why others found to have committed crimes could not be held on the basis of dangerousness alone.

D. *FOUCHA* AND THE FUTURE

The implications of *Foucha* on future cases is as unclear as its holding. On the one hand, Justice O'Connor's concurrence seems to demonstrate that a state wanting to confine insanity acquittees on the basis of their continuing dangerousness may do so if the statute is carefully crafted to meet her heightened standard of judicial scru-

(1979). The state has the power to hold a prisoner for the full length of his sentence in the interests of incapacitative incarceration. Indeed, "[t]here is no constitutional or inherent right of a convicted person to be conditionally released before the expiration of a valid sentence." *Id.* at 7. Once the prisoner has served his time, however, he must be released, dangerous or not.

252 Jones v. United States, 463 U.S. 354, 369 (1983).

253 *Foucha*, 112 S. Ct. at 1800 (Thomas, J., dissenting).

254 *Id.* (Thomas, J., dissenting).

255 Donald H.J. Hermann & Yvonne S. Sor, *Convicting or Confining? Alternative Directions in Insanity Law Reform: Guilty But Mentally Ill Versus New Rules for Release of Insanity Acquitees*, 590 B.Y.U. L. REV. 499, 607 (1983).

256 *Id.*

tiny. What is problematic, however, is that such a statute may have little practical impact. The fear of recidivism of insanity acquittees that prompted the legislation may translate into a greater willingness by psychiatrists to consider the person mentally ill because of his continuing dangerousness, even though he may have clinically regained his sanity.[257]

Yet two lower courts, in states currently providing for the continued confinement of insanity acquittees, have rejected Justice O'Connor's interpretation of the Court's decision. In *Louisiana v. Boudreaux*,[258] the Louisiana Supreme Court vacated and remanded Boudreaux's conviction to the trial court for consideration of the "constitutional principles made clear by *Foucha*."[259] These principles, as seen by the Louisiana court, provided that an insanity acquittee is entitled to release when he has recovered his sanity or is no longer dangerous, and that the state may continue confinement only if it shows by clear and convincing evidence that the acquittee is both mentally ill and dangerous.[260] Similarly, in *In re Noel*,[261] the Kansas Appellate Court remanded the case, requiring the State to prove insanity and dangerousness by clear and convincing evidence in order to justify Noel's continued commitment.[262]

Lower courts and future decisions may well resolve the conflicts of *Foucha* in favor of the insanity acquittee, as evidenced above. Furthermore, at the time of the *Foucha* decision, only eleven states had any provisions for continued confinement based on dangerousness alone.[263] Of those, however, two have been amended to release insanity acquittees who have regained their sanity, regardless of dangerousness.[264] Even so, with an ambiguous holding seemingly molded by public fear than by the Constitution, the precedent of *Foucha* remains a dangerous one for the future.

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257 Margulies, *supra* note 141, at 825 n.183. Indeed, it seems counterintuitive to argue that a person, after proof by clear and convincing evidence that there is a substantial risk that he will inflict physical harm upon another person in the near future, is not somehow mentally ill.

258 605 So. 2d 608 (La. 1992).

259 *Id.*

260 *Id.*

261 838 P.2d 336 (Kan. App 1992).

262 *Id.* at 345.

263 Foucha v. Louisiana, 112 S. Ct. 1780, 1802-03 n.9 (1992) (Thomas, J., dissenting). The statutes cited by Justice Thomas are listed *supra* note 117.

264 *Id.* at 1790 (O'Connor, J., concurring). Justice O'Connor cited CAL. PENAL CODE ANN. § 1026.2 (West Supp. 1992) (effective Jan. 1, 1994) and VA. CODE § 19.2-182.5 (Supp. 1991) (effective July 1, 1992).

VI. CONCLUSION

The release of insanity acquittees and the surrounding controversy reflects what is at the heart of the debate about the insanity defense itself: whether we, as a society, believe in the moral culpability of the mentally ill. From its inception, the insanity defense spurred public outrage:

> Ye people of England: exult and be glad,
> For ye're now at the will of the merciless mad.
> Why say ye that but three authorities reign—
> Crown, Commons, and Lords!—You omit the insane!
> They're a privileg'd class, whom no statute controls,
> And their murderous charter exists in their souls.
> Do they wish to spill blood—they have only to play
> A few pranks—get asylum'd a month and a day
> —They heigh! to escape from the mad-doctor's keys,
> And to pistol or stab whomsoever they please.[265]

Public fears about the premature release of those found NGRI and doubts about medical science's ability to determine whether a person really is sane lead courts to err on the side of caution in their decisions to approve the release of acquittees.

Yet, once an acquittee has regained his sanity, it is the Constitution which mandates his release. While it is inevitable that psychiatrists will make mistakes, and likely that a number of insanity acquittees will commit future crimes, our system does not criminally confine based on what may happen in the future. As long as there remains an insanity defense which acquits the defendant and exempts him from criminal responsibility, the acquittee's illness will determine the length of his sentence. And once he has been cured, he must, in the interests of liberty, be released.

ELLEN M. PAPADAKIS

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[265] Thomas Campbell, *Congratulations on a Late Acquittal*, STANDARD, Mar. 7, 1843, at 1, *cited in* Hermann & Sor, *supra* note 255, at 500.