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INTRODUCTION

Ever since the now famous *M'Naghten's Case*[1] set the basis for insanity as a defense to a criminal conviction, the disposition of those found "not guilty by reason of insanity" ("NGRI")[2] has been a center of controversy. While states are generally free to determine whether, and to what extent, mental illness should excuse criminal behavior,[3] the United States Supreme Court has never clearly articulated the states' right to indefinitely confine defendants found NGRI in mental institutions or hospitals. The Court has repeatedly recognized that "civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection."[4] Consequently, a state must have a constitutionally adequate purpose for such confinement.[5] Further, the Court has recognized that a finding of guilt in the commission of a crime

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[1] M'Naghten's Case, 8 Eng. Rep. 718 (1843). In 1843, Daniel M'Naghten shot and killed Edward Drummond, the secretary to the British prime minister. After pleading not guilty and claiming that he was suffering from paranoid delusions that the prime minister and the pope were conspiring against him, M'Naghten was found "not guilty by reason of insanity." On appeal, the House of Lords put forth five hypothetical questions to the common law judges concerning the trying of persons who have committed crimes while suffering from insane delusions. The judges' answers to these questions have become the basis for the modern insanity defense in most jurisdictions.

[2] Various names and acronyms are used to designate those defendants relieved of criminal responsibility on the basis of the insanity defense, including insanity acquittee and ABRI ("Acquittee By Reason of Insanity"). For purposes of convenience, the acronym NGRI ("Not Guilty by Reason of Insanity") will be used throughout the remainder of this Note.

[3] Foucha v. Louisiana, 112 S. Ct. 1780, 1790 (1992) (O'Connor, J., concurring). For an example of a state statute governing the effect of mental illness on criminal culpability, see IDAHO CODE § 18-207(a) (1987) ("Mental condition shall not be a defense to any charge of criminal conduct.").

[4] Addington v. Texas, 441 U.S. 418, 425 (1979); *see also* Jackson v. Indiana, 406 U.S. 715 (1972).

[5] *See* O'Connor v. Donaldson, 422 U.S. 563, 574 (1975); Jones v. United States, 463 U.S. 354, 361 (1983).

indicates dangerousness,[6] which justifies the automatic commitment of the defendant by a state.[7] However, the permissible length of such confinement and the standards governing the release of an NGRI acquittee that states may impose remained a mystery until the Supreme Court's holding in *Jones v. United States*.[8]

In *Jones*, the Supreme Court upheld against due process challenges a District of Columbia statute that required automatic commitment of those found NGRI. Specifically, the Court held that NGRI acquittees confined to a mental hospital need not be released merely because they have been hospitalized for a period longer than they might have served had they been convicted of the crime.[9] The Court held that the District of Columbia's statutory scheme, which required proof of insanity based on a preponderance of the evidence, followed by automatic commitment of the NGRI acquittee, comported with due process. The Court based this holding on the rationale that the defendant's commission of a crime constitutes an adequate basis for hospitalizing him as a dangerous and mentally ill person.[10] Further, the fact that the defendant has committed a criminal act justifies treating him differently than a person confined through civil commitment proceedings.[11] After *Jones*, states appeared to be free to confine NGRI acquittees "indefinitely."[12]

Some scholars have criticized the *Jones* decision as limiting the rights and due process protections afforded to NGRI acquittees.[13] As a pre-emptive counter to such an argument, the Court in *Jones* put forth the proposition that "the Due Process clause does not require Congress [or the states] to make classifications that fit every individual with the same degree of relevance."[14] Thus, it is constitutionally permissible for the states to treat criminal and civil committees differently in some respects.[15]

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[6] *See* Lynch v. Overholser, 369 U.S. 705, 714 (1962); *Jones*, 463 U.S. at 364.

[7] *Jones*, 463 U.S. at 364.

[8] 463 U.S. 354 (1983).

[9] *Id.* at 368-69.

[10] *Id.* at 363-64.

[11] *See id.* at 367.

[12] Thomas J. Brophy, Comment, Jones v. United States: *Indefinite Confinement of Insanity Acquittees*, 10 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 405, 423-31 (1984).

[13] *See* SAMUEL J. BRAKEL ET AL., THE MENTALLY DISABLED AND THE LAW, 726-29 (3d ed. 1985); Sarah Alderks Brown, Note, *Constitutional Law–Criminal Procedure Due Process and Release From Indefinite Confinement Following Acquittal By Reason of Insanity:* Jones v. United States, 32 KAN. L. REV. 843 (1984); Brophy, *supra* note 12.

[14] *Jones*, 463 U.S. at 366.

[15] *Id.* at 370.

In 1992, in its first major pronouncement regarding the states' right to confine NGRI acquittees since *Jones*, the Supreme Court struck down a Louisiana statutory provision regarding the release of NGRI acquittees. In *Foucha v. Louisiana*,[16] the Court struck down a Louisiana statute that allowed for continued confinement of an NGRI acquittee based on "dangerousness" alone, without a showing of present mental illness.[17] The Court held that when one of the bases for the original confinement no longer exists,[18] due process entitles the NGRI acquittee to constitutionally adequate procedures for either granting his release or determining the basis for his confinement.[19] In addition, a plurality of the Court held that the Equal Protection Clause prohibits states from treating NGRI acquittees differently from persons subject to civil commitment.[20]

While the *Foucha* holding may have revived some procedural due process protections that were taken away by *Jones*, it leaves the states in a myriad of confusion respecting their right to confine an NGRI acquittee. This Note examines the states' right to confine NGRI acquittees in light of the *Foucha* holding. Part I describes the Louisiana statutory scheme and outlines the Court's opinion in *Foucha*.[21] Part II critically analyzes the Court's holding in *Foucha* by comparing *Foucha* to *Jones* and pointing out the flaws in the *Foucha* Court's reasoning.[22] Part II also examines the appropriate standard of review for the Court in such confinement cases.[23] Part III seeks to determine the current state of the law in this area and the status of other state statutes similar to that of Louisiana.[24] This Note concludes that the Court's decision in *Foucha* is logically unsound, leaving the law in the area of confinement of NGRI acquittees even more unclear than it was before *Jones*. Until the Supreme Court makes another pronouncement in this area, the puzzling picture painted by *Jones* and *Foucha* leaves the following question unanswered: What is the states' right to confine an NGRI acquittee?

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[16] 112 S. Ct. 1780 (1992).

[17] *Id.* at 1785.

[18] In *Foucha*, mental illness was the basis for the original confinement and the defendant was subsequently determined to be in "'good shape' mentally." *Id.* at 1782.

[19] *Id.* at 1785.

[20] *See id.* at 1788-89.

[21] *See infra* notes 25-82 and accompanying text.

[22] *See infra* notes 83-144 and accompanying text.

[23] *See infra* notes 145-66 and accompanying text.

[24] *See infra* notes 167-218 and accompanying text.

I. *FOUCHA V. LOUISIANA*

A. Statutory Scheme

The Louisiana statute regarding the insanity defense follows the traditional "right or wrong" *M'Naghten* test.[25] In Louisiana, a person charged with a crime who seeks to claim insanity must enter a dual plea of "not guilty and not guilty by reason of insanity."[26] Such a dual plea first requires the jury to determine that the defendant has committed the crime before turning to the issue of his or her sanity.[27] The defendant must then prove his or her insanity by a preponderance of the evidence.[28] In addition, Louisiana law permits the court to adjudicate the NGRI defendant without a trial if there exists a sufficient factual basis for doing so.[29]

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[25] LA. REV. STAT. ANN. § 14:14 (West 1986) ("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."). For a good description of the major variants to the insanity defense in the United States, see ALAN A. STONE, MENTAL HEALTH AND LAW: A SYSTEM IN TRANSITION 228-30 (1975); BRAKEL ET AL., *supra* note 13, at 709-12.

The *M'Naghten* test remains in force, in its original form, in about one-third of the states. *See, e.g.*, ALASKA STAT. § 12.47.010(a) (1990); ARIZ. REV. STAT. ANN. § 13-502(A) (1989); COLO. REV. STAT. § 16-8-101 (1986); DEL. CODE ANN. tit. 11, § 401(a) (1987); FLA. R. CRIM. P. ANN. 3.217 (West 1989); GA. CODE ANN. § 16-3-2 (1992); IOWA CODE ANN. § 701.4 (West Supp. 1992); MINN. STAT. ANN. § 611.026 (West 1987); NEV. REV. STAT. § 194.010 (1991); N.J. STAT. ANN. § 2C:4-1 (West 1982); N.M. STAT. ANN. § 14-5102 (Michie 1986) (Judicial Volume J-3); OKLA. STAT. ANN. tit. 21, § 152(4) (West 1983); 18 PA. CONS. STAT. ANN. § 314(d) (1983); S.D. CODIFIED LAWS ANN. § 22-1-2(24) (1988); TEX. PENAL CODE ANN. § 8.01 (West Supp. 1992); WASH. REV. CODE ANN. § 9A.12.010(1)(b) (West 1989). In a few other states, the test is only slightly modified by statute or case law. *See, e.g.*, ALA. CODE § 13A-3-1 (1982) (Commentary: "irresistible impulse" test).

[26] LA. CODE CRIM. PROC. ANN. art. 552(3) (West 1981).

[27] *See* State v. Marmillion, 339 So. 2d 788, 796 (La. 1976).

[28] LA. CODE CRIM. PROC. ANN. art. 652 (West 1993). This should be distinguished from an alternative plea in which the defendant claims that he is either not guilty *or* not guilty by reason of insanity, thus placing the burden on the prosecution to prove his sanity. In Louisiana, once the prosecution has proven the defendant's guilt beyond a reasonable doubt, if the defendant does not prove his insanity by a preponderance of the evidence, he is automatically found guilty. *See* State v. Clark, 305 So. 2d 457, 463 (La. 1974); Harry J. Philips, Jr., Comment, *The Insanity Defense in Louisiana: Presumptions, Burden of Proof and Appellate Review*, 42 LA. L. REV. 1166, 1172 (1982).

[29] LA. CODE CRIM. PROC. ANN. art. 558.1 (West Supp. 1991) ("The court may adjudicate a defendant not guilty by reason of insanity without trial, when the district attorney consents and the court makes a finding based upon expert testimony that there is a factual basis for the plea.").

If a defendant is found NGRI, he or she is automatically committed to a mental institution.[30] Upon commitment, the acquittee is entitled to a prompt hearing in order to determine whether he or she can be released.[31] If the defendant meets the burden of proof at this hearing, he or she is either discharged or released on probation; otherwise, he or she is committed indeterminately to a proper mental institution.[32] After commitment the acquittee is entitled, upon request, to another release hearing in six months and at yearly intervals thereafter.[33] The acquittee may be granted additional release hearings upon recommendation by the superintendent of the mental institution.[34] At each release hearing, a review panel is appointed to examine the acquittee and report on whether the acquittee can be safely discharged.[35] The burden at all release hearings is on the committed person "to prove that he can be discharged, or can be released on probation, without danger to others or to himself."[36] Thus, the Louisiana statutory scheme allows continued confinement of an NGRI acquittee based on a single finding of "dangerousness," without an examination into the acquittee's present mental condition. This standard was recently upheld against constitutional challenge by the Louisiana Supreme Court.[37]

B. Facts of the Case

Terry Foucha was arrested for committing aggravated burglary of an inhabited dwelling while armed with a .357 revolver.[38] He was subsequently charged with violating Louisiana Revised Statute sections 14:60[39] and

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[30] LA. CODE CRIM. PROC. ANN. art. 654 (West 1986).

[31] *Id.* ("[T]he court . . . 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.").

[32] *Id.*

[33] LA. CODE CRIM. PROC. ANN. art. 655(B) (West Supp. 1993).

[34] LA. CODE CRIM. PROC. ANN. arts. 655(A), 656 (West Supp. 1993).

[35] LA. CODE CRIM. PROC. ANN. art. 656 (West Supp. 1993). The panel would consist of the members of the original sanity commission, if available. *Id.* The acquittee may also retain his own physician for an examination, as well. *Id.*

[36] LA. CODE CRIM. PROC. ANN. art. 657 (West Supp. 1993).

[37] State v. Perez, 563 So. 2d 841, 845 (La. 1990), *cert. denied*, 112 S. Ct. 2320 (1992); State v. Foucha, 563 So. 2d 1138, 1144 (La. 1990), *rev'd*, 112 S. Ct. 1780 (1992).

[38] *Foucha*, 563 So. 2d at 1138.

[39] LA. REV. STAT. ANN. § 14:60(1) (West 1986) provides in part: "Aggravated burglary is the unauthorized entering of any inhabited dwelling, or of any structure, water craft, or movable where a person is present, with the intent to commit a felony or any theft therein, if the offender, . . . [i]s armed with a dangerous weapon . . . ."

14:94.[40] Foucha entered the dual plea of "not guilty and not guilty by reason of insanity" and the trial court appointed two experts to ascertain his sanity.[41] Although the court initially found Foucha incompetent to stand trial, four months later, he was found competent to proceed.[42] On October 12, 1984, the court found Foucha "not guilty by reason of insanity" and ordered his immediate commitment to the Feliciana Forensic Facility at Jackson, Louisiana.[43] On June 11, 1987, Foucha requested, and the superintendent of the facility recommended, that he be granted a release hearing.[44] Although the panel of doctors appointed by the court initially recommended Foucha's release, the trial court found that he was a danger to others and ordered him recommitted.[45] The court apparently relied heavily upon a doctor's testimony indicating that Foucha had an "antisocial personality" and had been involved in several altercations at the facility.[46] Thus, Foucha had not satisfied the burden of proof under article 657 of the Louisiana Code of Criminal Procedure that he was no longer a danger to others or to himself.[47]

On appeal, the Louisiana Supreme Court upheld the decision denying Foucha's release.[48] Specifically, the court upheld the Louisiana release proceedings against Equal Protection and Due Process Clause challenges. As to the Equal Protection Clause argument, the court held that "the differences in Louisiana procedure reflect justifiable distinctions between persons civilly committed and persons found not guilty by reason of

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[40] LA. REV. STAT. ANN. § 14:94 (West 1986) provides in part: "Illegal use of weapons or dangerous instrumentalities is the intentional or criminally negligent discharging of any firearm, or the throwing, placing, or other use of any article, liquid, or substance, where it is foreseeable that it may result in death or great bodily harm to a human being."

[41] *Foucha*, 563 So. 2d at 1139.

[42] *Id.*

[43] *Id.*

[44] *Id.*

[45] *Id.* at 1140. This was in accordance with the Louisiana statutory scheme. *See supra* note 29.

[46] Foucha v. Louisiana, 112 S. Ct. 1780, 1782 (1992).

[47] LA. REV. STAT. ANN. § 28:2(3), (4) (West 1989) provide, respectively, that:

> "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.
>
> "Dangerous to self" means the condition of a person whose behavior, significant threats or inaction supports a reasonable expectation that there is a substantial risk that he will inflict physical or severe emotional harm upon his own person.

[48] State v. Foucha, 563 So. 2d 1138 (La. 1990), *rev'd*, 112 S.Ct. 1780 (1992).

insanity."[49] Consequently, there was no unjustified discrimination against Foucha. In a footnote, the Court stated that the United States Supreme Court's previous holding in *Jones v. United States*[50] was not dispositive of the issue in this case for two reasons. First, the Court in *Jones* was concerned with the specific question of whether due process requires the release of the acquittee when he has been confined for a period of time longer than he would have served in prison had he been convicted,[51] rather than with the issue of whether it is constitutionally permissible to continually confine an NGRI acquittee based on "dangerousness" alone. Second, any statements questioning the "dangerousness" standard in *Jones* were based merely on the Supreme Court's interpretation of the District of Columbia's statutes and have no constitutional significance in other contexts.[52]

As to the Due Process Clause argument, the Louisiana Supreme Court held that due process is a flexible standard and that "the protection of society and defendant are constitutionally adequate purposes for continuing [the] defendant's confinement."[53] Thus, the trial court did not abuse its discretion by finding that Foucha had not met the burden of proving that he was no longer a danger to others or to himself.[54]

C. The United States Supreme Court Opinion

The United States Supreme Court subsequently granted certiorari and reversed the holding of the Louisiana Supreme Court.[55] In a 5-4 decision, the Supreme Court held that the continued confinement of an NGRI acquittee based on the standard of "dangerousness" alone is unconstitutional as a violation of the Equal Protection and Due Process Clauses of the Fourteenth Amendment.[56] In addressing the due process question, the majority[57] first noted that a state may commit a defendant automatically once it has been proven by a preponderance of the evidence

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[49] *Id.* at 1144.

[50] 463 U.S. 354 (1983).

[51] *Foucha*, 563 So. 2d at 1141 n.11.

[52] *Id.*

[53] *Id.* at 1144.

[54] *Id.*

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

[56] *See id.*

[57] Justice White, who wrote the majority opinion, was joined by Justices Blackmun, Stevens, O'Connor and Souter. There were two dissenting opinions: one written by Justice Kennedy (joined by Chief Justice Rehnquist and Justice Thomas) and the other by Justice Thomas (joined by Chief Justice Rehnquist and Justice Scalia).

that the defendant is "not guilty by reason of insanity"[58] because, from such a finding, one can infer that the defendant is still mentally ill and dangerous.[59] The Court then relied on *Jones v. United States*[60] and *O'Connor v. Donaldson*[61] for the proposition that the "committed acquittee is entitled to release when he has recovered his sanity or is no longer dangerous . . . i.e. the acquittee may be held as long as he is *both* mentally ill and dangerous, but no longer."[62]

The Court enunciated three propositions to counter the state's contention that "dangerousness" alone justified continued confinement. First, keeping Foucha against his will in a mental institution absent a determination in a civil proceeding of current mental illness and dangerousness was impermissible.[63] Second, since Foucha could no longer be held as an insanity acquittee (since he was no longer insane), *Jackson v. Indiana*[64] entitled Foucha to constitutionally adequate procedures to justify his confinement.[65] Third, due process protects an individual's liberty from bodily restraint such that the potentially "indefinite" confinement of Foucha was a wrongful, arbitrary governmental action.[66] Although the Court did note that in some cases a state may confine an individual against his or her will, such detention must be strictly limited in duration to be constitutionally permissible.[67]

A plurality[68] of the Court also held that the Louisiana statutes violated the Equal Protection Clause.[69] While the Court acknowledged that *Jones* and other cases have held that treating NGRI acquittees differently in some respects from those persons subject to civil commitment is not a violation of the Equal Protection Clause, that was not the issue in *Foucha*.[70] Since Foucha was no longer insane, he could no longer be treated as an NGRI

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[58] *See Foucha*, 112 S. Ct. at 1783.

[59] *Id.*

[60] 463 U.S. 354 (1983).

[61] 422 U.S. 563 (1975) (holding that it is unconstitutional to confine a mentally ill person who is harmless).

[62] *Foucha*, 112 S. Ct. at 1784 (citation omitted) (emphasis added).

[63] *Id.*

[64] 406 U.S. 715 (1972); *see also infra* notes 115-24 and accompanying text (distinguishing *Jackson* from *Foucha*).

[65] *Foucha*, 112 S. Ct. at 1785.

[66] *See id.*

[67] *See id.* at 1787.

[68] *Foucha*, 112 S. Ct. at 1787 (White, J., joined by Blackmun, Stevens, and Souter, J.J.).

[69] *Id.* at 1780, 1788.

[70] *Id.*

acquittee. Thus, Louisiana was now discriminating against Foucha in that, unlike sane criminal defendants who cannot prove their nondangerousness[71] or insane civil committees,[72] Louisiana permitted Foucha to be confined based on dangerousness alone. The Court stated that, absent a "particularly convincing reason," the state's discrimination against NGRI acquittees was unconstitutional.[73] This discrimination was based on treating Foucha differently than two similar groups: (1) civil committees and (2) other dangerous but sane criminals.

In a concurring opinion, Justice O'Connor stated her belief that the facts of this case did not require reaching the equal protection issue.[74] Justice O'Connor's purpose for writing a separate concurrence was to emphasize four important points left unclear by the majority opinion. First, she noted that by this decision, the Court was only striking down the specific statutory scheme of Louisiana.[75] The Court was not passing judgment on other narrowly drawn laws that provide for the confinement of NGRI acquittees based upon different standards.[76] Second, O'Connor did not interpret the Court's holding to mean that Louisiana could never confine dangerous NGRI acquittees once they regained their mental health.[77] In her opinion, a more narrowly drawn statute tailored to reflect pressing safety concerns related to the acquittee's dangerousness, like that at issue in *United States v. Salerno*,[78] would survive a due process challenge.[79] Third, O'Connor interpreted the majority's holding as not placing any new restrictions on the states' freedom to determine whether, and to what extent, mental illness should excuse criminal responsibility.[80] States remain free to formulate their own insanity

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[71] *Id.* But compare WAYNE R. LAFAVE, MODERN CRIMINAL LAW (2d ed. 1988), noting that "[i]t is thus apparent that the insanity defense serves a unique purpose .... [T]he general assumption seems to be that the defense makes it possible to separate out for special treatment certain persons who would otherwise be subjected to the usual penal sanctions which may follow conviction." *Id.* at 371 n.2.

[72] *Foucha*, 112 S. Ct. at 1788; *see also* LA. REV. STAT. ANN. §§ 28:96(C), :96.1(B), :97 (1989) (dealing with the discharge of civil committees).

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

[74] *Id.* at 1790 (O'Connor, J., concurring).

[75] *Id.* at 1789.

[76] *Id.*

[77] *Id.*

[78] 481 U.S. 739 (1987) (upholding the Bail Reform Act of 1984 that provided for limited pretrial detention of dangerous felony arrestees); *see also infra* notes 187-92 and accompanying text (distinguishing *Salerno* from *Foucha*).

[79] *See Foucha*, 112 S. Ct. at 1789 (O'Connor, J., concurring).

[80] *Id.* at 1790.

defense or even to abolish the defense entirely.[81] Finally, Justice O'Connor stated that, even under the majority's analysis, statutes based on the "dangerousness" standard alone which are limited to the maximum duration of criminal confinement would not necessarily be unconstitutional.[82]

II. ANALYSIS OF EQUAL PROTECTION AND DUE PROCESS CLAUSES IN CRIMINAL CONFINEMENT CASES

A. Equal Protection Clause

The right of the states to treat NGRI acquittees differently from persons subject to civil commitment proceedings was unclear until *Jones v. United States*.[83] The *Jones* Court ruled that there is no constitutional requirement to release an NGRI acquittee at the end of his hypothetical maximum sentence and subject him to civil commitment proceedings.[84] Likewise, requiring a lower standard of proof at the criminal commitment proceeding than is required at the civil proceedings is not unconstitutional.[85] The rationale behind the *Jones* decision is that NGRI acquittees and civil committees represent two distinct classes of persons. The NGRI acquittee's commission of a criminal act places him or her in a special class that should be treated differently for purposes of commitment.[86]

In *Foucha v. Louisiana*,[87] the Supreme Court reversed its previous position by striking down the Louisiana statute as violative of the Equal Protection Clause.[88] Relying on *Jones*, the Court agreed that NGRI acquittees may be treated differently for equal protection purposes. However, because Foucha was no longer insane, he could no longer be classified as insane.[89] Thus, it would appear that the *Foucha* Court

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[81] *See, e.g.*, IDAHO CODE § 18-207(a) (Michie 1987) (abolishing the insanity defense).

[82] *See Foucha*, 112 S. Ct. at 1790 (O'Connor, J., concurring). For an example of such a state statute, see WASH. REV. CODE §§ 10.77.020(3), .110(1) (1990).

[83] 463 U.S. 354 (1983).

[84] *Id.* at 368-69.

[85] *See id.* at 367-68.

[86] *Id.* at 370.

[87] 112 S. Ct. 1780 (1992).

[88] *Id.* at 1788. However, it is important to note that this part of the Court's opinion commanded only a four vote plurality. Justice O'Connor, who joined the majority result, believed that it was unnecessary to reach the equal protection issue on the facts of this case. *Id.* at 1789.

[89] *Id.* at 1788.

believed that once the insanity that had allowed for different treatment between classes at commitment hearings no longer existed, the state could no longer treat such persons differently for purposes of release hearings. This position, however, is inconsistent with the holdings of several circuit courts of appeals.[90] Prior to the *Foucha* holding, neither the Supreme Court nor any other court had ever made the distinction between release proceedings and commitment proceedings for purposes of the Equal Protection Clause. An examination of some of these cases shows substantial support for the proposition that the *Foucha* Court invalidated–that NGRI acquittees and civil committees can be treated differently at release proceedings.[91]

In *Glatz v. Kort*,[92] the Tenth Circuit Court of Appeals examined Colorado's criminal commitment and release proceedings against Due Process and Equal Protection Clause challenges. The court held that it was not a due process violation to automatically commit an NGRI acquittee, thus denying him certain procedures afforded to a civil committee.[93] The court, relying on *Jones*, made a similar holding with respect to the release proceedings. The court stated that if the Due Process Clause does not require the same procedural safeguards for NGRI acquittees, "then there necessarily is a rational basis for equal protection purposes for distinguishing between civil commitment and commitment

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[90] United States v. LaFromboise, 836 F.2d 1149, 1151 (8th Cir. 1988) (upholding Federal Insanity Defense Reform Act); Glatz v. Kort, 807 F.2d 1514, 1517-18 (10th Cir. 1986) (upholding Colorado's release proceedings); Benham v. Ledbetter, 785 F.2d 1480, 1488 (11th Cir. 1986) (upholding Georgia's release proceedings); Hickey v. Morris, 722 F.2d 543, 546 (9th Cir. 1983) (upholding Washington statute).

[91] *But see* Francois v. Henderson, 850 F.2d 231, 236 (5th Cir. 1988) (stating in dicta that the Louisiana release proceeding is unconstitutional); Jackson v. Foti, 670 F.2d 516, 522 (5th Cir. Unit A March 1982) (requiring substantially the same protections for insanity acquittees as granted to civil committees); Reome v. Levine, 692 F. Supp. 1046, 1053 (D. Minn. 1988) (finding that confinement on a constitutionally adequate ground cannot continue when the ground ceases to exist); State v. Murphy, 760 P.2d 280, 286 (Utah 1988) (finding that in the absence of mental illness, dangerous propensity is not an appropriate justification for continuing involuntary commitment).

[92] 807 F.2d 1514 (10th Cir. 1986).

[93] *See id.* at 1517-18. An argument challenging the differences in proceedings between criminal and civil committees, although based on the Due Process Clause, is essentially an Equal Protection Clause challenge. "This, of course, is an equal protection argument (there being no rational distinction between A and B, the State must treat them the same) . . . ." Foucha v. Louisiana, 112 S. Ct. 1780, 1800 (1992) (Thomas, J., dissenting); *see also* Jones v. United States, 463 U.S. 354, 375 n.5 (1983) (Brennan, J., dissenting) (finding no differences in the forms of relief available under the two theories).

of insanity acquittees."[94] Thus, the court did not make the distinction between commitment and release proceedings that the *Foucha* Court made.

Similarly, in *Benham v. Ledbetter*,[95] the Eleventh Circuit Court of Appeals, on remand from the Supreme Court in light of the holding in *Jones*,[96] upheld Georgia's release proceedings for NGRI acquittees. The court decided that the fact that the NGRI acquittee had committed a crime justified treating him or her differently from the civil committee.[97] Other circuit courts of appeals[98] and state supreme courts[99] also agree with

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[94] *Glatz*, 807 F.2d at 1522 (quoting *Jones*, 463 U.S. at 362 n.10). The *Glatz* court also noted that:

> Insanity acquittees and involuntary civil committees are not similarly situated groups for equal protection purposes. As noted, the insanity acquittee has confessed to committing a criminal act earlier and the grand jury or the court has found probable cause to believe that he did in fact commit the act. It is not unreasonable to conclude that an insanity acquittal supports an inference of continuing mental illness.

Id. (citation omitted).

[95] 785 F.2d 1480 (11th Cir. 1986).

[96] Benham v. Edwards, 678 F.2d 511 (5th Cir. 1982), *vacated*, 463 U.S. 1222 (1983).

[97] *See Ledbetter*, 785 F.2d at 1488. The court explained in detail the similarity between equal protection and due process when applied to mental health commitment as follows:

> If the release requirements for insanity acquittees do not violate due process guarantees, they are necessarily rationally based on permissible goals. On the other hand, if the scheme fails due process analysis, no number of other rational purposes can save it. Therefore, where due process is implicated, an equal protection challenge essentially restates the claim that the legislature has infringed a liberty interest. An equal protection challenge in which no due process claim is alleged "stands on its own" as the class notes, but it also must bear the heavy burden of demonstrating the lack of a rational basis for treating civil committees and insanity acquittees differently after the requirements of due process have been met.

Id. at 1485 n.4 (citations omitted).

[98] *See* United States v. LaFromboise, 836 F.2d 1149, 1151 (8th Cir. 1988) (upholding the Federal Insanity Defense Reform Act, which places the burden on an NGRI acquittee to prove that he/she does not pose a substantial risk of bodily injury or serious property damage in order to be released); Hickey v. Morris, 722 F.2d 543, 546 (9th Cir. 1983) (upholding a Washington statute that places the burden on the NGRI acquittee to prove fitness in order to be released prior to the time period of the maximum penal term of the crime charged).

[99] *See* People v. Chavez, 629 P.2d 1040, 1053 (Colo. 1981) (stating that actual adjudication as to the insanity of an acquittee will have taken place prior to commitment); Chase v. Kearns, 278 A.2d 132, 138 (Me. 1971) (stating that procedural differences arise from a court determination of not guilty by reason of insanity), *overruled on other grounds*, Taylor v. Comm'r of Mental Health and Mental Retardation, 481 A.2d 139 (Me.

the making of such distinctions between NGRI acquittees and civil committees.

In holding that equal protection becomes a relevant inquiry once the basis for treating the two classes differently no longer exists, the Supreme Court in *Foucha* disregarded this background and persuasive authority.[100] As a result, the *Foucha* Court's conclusion does not flow logically from previous cases in which the differences in the commitment proceedings and in the burden of proof at these proceedings were held to be based on the NGRI acquittee's dangerousness and prior criminal conduct.[101] Justice Thomas, in his *Foucha* dissent, stated that the Court's disregard for the NGRI acquittee's past conduct was unwise in that, unlike civil committees, NGRI acquittees have committed a criminal act.[102] He stated that this "real and legitimate distinction between insanity acquittees and civil committees ... justifie[d] procedural disparities."[103] Justice Thomas' point is well taken. The dangerousness and criminal activity that serve as a justification for treating an NGRI acquittee differently *before* commitment should not be disregarded at the release proceedings merely because the acquittee is no longer mentally ill.

The plurality's reliance in *Foucha* on the acquittee's current sanity is unsound in another respect. By definition, a criminal defendant found "not guilty by reason of insanity" is not necessarily insane at the time of

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1984).

[100] *See* Foucha v. Louisiana, 112 S. Ct. 1780, 1788 (1992). In fact, the Court's majority opinion made no mention of prior decisions of the United States courts of appeals. *Id.* at 1780-84.

[101] *See* Jones v. United States, 463 U.S. 354, 367-68 (1983) (finding that there is no reason to adopt the same standard of proof for the two proceedings); Williams v. Wallis, 734 F.2d 1434, 1437 (11th Cir. 1984) (finding that differences in release procedures based on dangerousness are constitutional); Hickey v. Morris, 722 F.2d 543, 548 (9th Cir. 1983) (finding that since the defendant proved his insanity, he should be required to prove his recovery); Powell v. Florida, 579 F.2d 324, 333 & n.15 (5th Cir. 1978) (finding that release of insanity acquittees should be determined by looking to continuing dangerousness); *Chavez*, 629 P.2d at 1052-53 (finding that differences in the treatment of insanity acquittees is supported by the defendant's assertion of the insanity, the probable cause determination, and the insanity adjudication).

[102] *Foucha*, 112 S. Ct. at 1800 (Thomas, J., dissenting).

[103] *Id.* Justice Thomas also noted 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." *Id.* at 1801; *see also id.* at 1804 n.11 (reiterating a belief that the two classes are different even after sanity has been restored); *id.* at 1807 (stressing the importance of the prior adjudication and the finding of the commission of crimes by these acquittees).

trial.[104] Rather, the defendant is claiming that his or her insanity at the time of the offense, some time in the past, was the reason for his or her criminal conduct.[105] With the defense of incompetency to stand trial, in contrast, the issue is the defendant's sanity at the time of trial. Thus, the distinguishing aspect between the insanity defense and the defense of incompetency to stand trial is the particular point in time at which the defendant's sanity is at issue.[106]

Under Louisiana's statutory scheme, a defendant found NGRI is automatically committed to a mental institution.[107] There is no adjudication of the defendant's sanity at the time of trial. A finding of NGRI means that the defendant has committed all of the elements of the crime but is merely exempt from criminal responsibility because of his or her insanity at the time of the offense.[108] Therefore, the NGRI acquittee's confinement is based on his or her dangerousness and criminal acts, not on his or her insanity at the time of trial.[109]

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[104] *But see infra* note 109 (noting a presumption of continuing insanity for purposes of commitment).

[105] *See* BRAKEL ET AL., *supra* note 13, at 694.

[106] *Id.* The Supreme Court had previously noted the differences between the NGRI acquittee and the defendant incompetent to stand trial in Jones v. United States, 463 U.S. 354 (1983):

> The proof beyond a reasonable doubt that the acquittee committed a criminal act distinguishes this case from Jackson v. Indiana, 406 U.S. 715 (1972), in which the Court held that a person found incompetent to stand trial could not be committed indefinitely solely on the finding of incompetency. In *Jackson*, there was never any affirmative proof that the accused had committed criminal acts or was otherwise dangerous.

Id. at 364 n.12.

[107] LA. CODE CRIM. PROC. ANN. art. 654 (West Supp. 1993).

[108] State v. Clark, 305 So. 2d 457, 461 (La. 1974) (Barham, J., dissenting).

[109] There is, however, a continuing presumption of insanity at the time of trial. *See* Jones v. United States, 463 U.S. 354, 364 (1983) (quoting S. REP. NO. 1170, 84th Cong., 1st Sess. 13 (1955), which stated a presumption of continuing insanity); Glatz v. Kort, 807 F.2d 1514, 1522 (10th Cir. 1986) (finding that it is not unreasonable to conclude that an insanity acquittal supports an inference of continuing mental illness). One commentator has recognized three justifications for the commitment of an NGRI acquittee who is presently sane. First, by raising the insanity defense, the defendant has voluntarily accepted commitment. Second, a presumption of "continuing" insanity exists for a reasonable time after the defense is raised. Third, the insanity defense is a privilege that society awards to excuse the defendant from the consequences of his criminal act. Robert Greenwald, *Disposition of the Insane Defendant After "Acquittal"—The Long Road from Commitment to Release*, 59 J. CRIM. L. & CRIMINOLOGY 583, 584 (1968).

The *Foucha* Court's reliance on the NGRI acquittee's sanity at the time of release, when it was not initially a consideration at the time of the acquittee's commitment, is troubling. The state's interest in treating NGRI acquittees differently does not disappear the instant that the acquittee becomes "sane."[110] Nonetheless, under the Court's current analysis, a "sane" NGRI acquittee can be treated differently from a civil committee at commitment hearings, but not at release proceedings. While this approach to treatment would be appropriate for a defendant found incompetent to stand trial, its application to the NGRI acquittee is illogical.[111]

B. Due Process Clause

The Supreme Court has long held that "civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection."[112] It is little wonder, then, that the issue of due process comes up frequently in the area of criminal confinement, since many states and the federal government allow for automatic commitment of defendants upon a verdict of "not guilty by reason of insanity."[113] The usual rationale behind such automatic commitment is that the defendant's insanity at the time of the offense, once established, is presumed to continue through the trial.[114] The Supreme Court's seminal pronouncement in the area of mental health confinement was *Jackson v. Indiana*.[115]

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[110] Foucha v. Louisiana, 112 S. Ct. 1780, 1801 (1992) (Thomas, J., dissenting).

[111] Although this part of the Court's decision commanded only a four-vote plurality, it raises questions concerning the Court's purported rationale for treating NGRI acquittees differently than civil committees in the first place. The error in the Court's logic stems from a confusion of the procedural aspects of the insanity defense. This error weakens the precedential value of *Foucha* for criminal release proceeding cases. One can only speculate as to the use of this logic by the current Supreme Court to strike down other schemes which provide for different release proceedings for criminal and civil committees.

[112] Addington v. Texas, 441 U.S. 418, 425 (1979).

[113] *See, e.g.*, 18 U.S.C. § 4243(a) (1988); UNIF. LAW COMMISSIONER'S MODEL INSANITY DEFENSE AND POST-TRIAL DISPOSITION ACT § 902(2) (1984); 11 U.L.A. 204 (Supp. 1992); ARIZ. REV. STAT. ANN. § 13-3994 (West 1989); COLO. REV. STAT. § 16-8-105(4) (1986); D.C. CODE ANN. § 24-301(d)(1) (1981); KAN. STAT. ANN. § 22-3428(1) (Supp. 1992); LA. CODE CRIM. PROC. ANN. art. 654 (West Supp. 1993); ME. REV. STAT. ANN. tit. 15, § 103 (West 1980); MO. ANN. STAT. § 552.040(2) (Vernon Supp. 1992); N.H. REV. STAT. ANN. § 651:8-b (Supp. 1992); WIS. STAT. ANN. § 971.17(1) (West Supp. 1992).

[114] *See* cases cited *supra* note 109.

[115] 406 U.S. 715 (1972).

In *Jackson*, the Court considered the due process claims of the petitioner, a deaf mute charged with robbery who, after being found incompetent to stand trial, was subject to automatic commitment under Indiana law.[116] Because two psychiatrists testified that Jackson would never regain competency, he was not entitled to release and was, in effect, subject to "indefinite" confinement.[117] In striking down the Indiana procedures as a violation of the Due Process Clause, the Court stated in a now famous passage, that "[a]t the least, due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed."[118] Since Jackson had not been found guilty of committing any crime, the state did not possess an interest sufficient to justify confining him indefinitely.[119]

A similar issue came before the Court in *Jones v. United States*.[120] In *Jones*, the Court held that an NGRI acquittee need not be released or subjected to civil commitment proceedings merely because he is nearing the end of his hypothetical maximum sentence.[121] The Court recognized that a state must have "a constitutionally adequate purpose for the confinement,"[122] but stated that Jones' continuing mental illness and dangerousness justified denying his release.[123] In a footnote, the Court specifically distinguished Jones' situation from that of Jackson. In *Jackson*, "there was never any affirmative proof that [the defendant] had committed criminal acts or otherwise was dangerous."[124] In *Jones*, on the other hand, there was "proof beyond a reasonable doubt" that Jones had committed the criminal act.[125] Therefore, the due process claims of the NGRI acquittee are distinguishable from that of the civil committee.

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[116] *Id.* at 717-19.

[117] *Id.* at 719.

[118] *Id.* at 738.

[119] Specifically, the Court held:

> [A] person charged by a State with a criminal offense who is committed solely on account of his incapacity to proceed to trial cannot be held more than the reasonable period of time necessary to determine whether there is a substantial probability that he will attain that capacity in the foreseeable future. If it is determined that this is not the case, then the State must either institute the customary civil commitment proceeding that would be required to commit indefinitely any other citizen, or release the defendant.

Id.

[120] 463 U.S. 354 (1983).

[121] *Id.* at 369.

[122] *Id.* at 361 (quoting O'Connor v. Donaldson, 422 U.S. 563, 574 (1975)).

[123] *See id.* at 369.

[124] *Id.* at 364 n.12.

[125] *Id.*

In spite of this distinction previously made between the NGRI acquittee and the civil committee, the *Foucha* Court held that continued confinement of the NGRI acquittee violates due process where the NGRI acquittee is no longer mentally ill.[126] One possible explanation for the Court's apparent change of position is its reliance on *Jones* for the proposition that "the acquittee may be held as long as he is both mentally ill and dangerous, but no longer."[127] However, it is unclear whether that proposition was the actual holding of the *Jones* court or mere dicta *or* simply an interpretation of the District of Columbia's statutory scheme for release. As to whether or not it was mere dicta, the *Jones* Court specifically stated in a footnote that it was not asked to decide whether the District of Columbia's release procedures were constitutional.[128] The real issue before the Court in *Jones* was whether an NGRI acquittee must be released when he or she has been confined for a period longer than he or she might have served in prison if convicted.[129] Thus, to the extent that *Jones* did not address the District of Columbia's release proceedings, any statements addressing when an NGRI acquittee must be released could be viewed as dicta.

The second interpretation of the *Jones* decision–that *Jones* merely interpreted the District of Columbia's statutory scheme for release–is only expressed in *Benham v. Ledbetter*.[130] In upholding Georgia's release proceedings for NGRI acquittees, the Eleventh Circuit Court of Appeals was very critical of the *Jones* decision. The *Benham* court noted that *Jones* only dealt with the NGRI acquittee's original commitment, not his or her release.[131] The court also noted that "[b]ecause the *Jones* rationales are directed only to the automatic commitment in the District of Columbia . . . [they] must be used cautiously in analyzing Georgia's procedures for releasing

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[126] *See* Foucha v. Louisiana, 112 S. Ct. 1780, 1784 (1992).

[127] *Id.*

[128] Jones v. United States, 463 U.S. 354, 363 n.11 (1983); *see also* Reese v. United States, 614 A.2d 506, 514 (D.C. 1992) (construing the same statute that was at issue in *Jones* and stating that the *Jones* Court had not addressed the constitutionality of the release provisions).

[129] *Jones*, 463 U.S. at 354. Many courts relying on *Jones* have noted the Court's actual holding. *See* Benham v. Ledbetter, 785 F.2d 1480, 1484 (11th Cir. 1986) (counseling cautious use of *Jones* due to its limited holding); Glatz v. Kort, 807 F.2d 1514, 1519 (10th Cir. 1986) (stating that *Jones* did not address allocation of the burden of proof at release proceedings); Williams v. Wallis, 734 F.2d 1434, 1439 (11th Cir. 1984) (stating that *Jones* did not address the burden of proof at release proceedings); Hickey v. Morris, 722 F.2d 543, 548 (9th Cir. 1983) (stating that *Jones* had not directly addressed procedures for review and release of NGRI acquittees).

[130] *Benham*, 785 F.2d at 1484.

[131] *Id.*

insanity acquittees."[132] Like the *Benham* court, the Louisiana Supreme Court, in upholding Foucha's continued confinement, refused to attach constitutional significance to the *Jones* holding.[133] Thus, depending on whether or not the proposition from *Jones* can be viewed as constitutionally significant, the *Foucha* court's reliance on it may be misplaced.

A second possible explanation for the *Foucha* Court's apparent change of position may be a confusion as to the standards for civil and criminal confinement. Justice Kennedy, in his *Foucha* dissent, correctly pointed out that *Foucha* was a criminal case and that under the Louisiana statutory scheme, the dual plea of "not guilty and not guilty by reason of insanity" ensures that the burden remains on the state to prove all elements of the crime.[134] Thus, the state had already met the rigorous burden of "proof beyond a reasonable doubt."[135] Kennedy also noted that the state's satisfaction of its burden of proof "beyond a reasonable doubt" is what distinguishes *Jones* from *Jackson v. Indiana*.[136] Therefore, Justice Kennedy believed that the *Foucha* majority's reliance on civil cases such as *O'Connor v. Donaldson*[137] and *Addington v. Texas*[138] was unwise.[139] Kennedy accused the majority of "conflating" the standards between criminal and civil commitment and, in effect, overruling a principal part of *Jones*.[140]

Whether or not the *Foucha* Court actually overruled *Jones* depends on what the holding of *Jones* actually was. Justice Kennedy recognized, however, that the majority of the Court in *Foucha*, to some extent, confused the distinctions between criminal and civil cases. The

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[132] *Id.*

[133] *See* State v. Foucha, 563 So. 2d 1138, 1141-42 n.11 (La. 1990) (stating that the *Jones* Court had not considered the constitutionality of a dangerousness test for continued detention), *rev'd*, 112 S. Ct. 1780 (1992). The United States Supreme Court, however, stated that "[t]he court below was in error in characterizing the above language from Jones as merely an interpretation of the pertinent statutory law in the District of Columbia and as having no constitutional significance." Foucha v. Louisiana, 112 S. Ct. 1780, 1784 (1992).

[134] *Foucha*, 112 S. Ct. at 1792 (Kennedy, J., dissenting); *see also* State v. Clark, 305 So. 2d 457, 461 (La. 1974) (Barham, J., dissenting) (stating that the dual plea of "not guilty and not guilty by reason of insanity" still requires the state to prove that the defendant committed the crime).

[135] *Foucha*, 112 S. Ct. at 1792 (Kennedy, J., dissenting); *see also id.* at 1807 (Thomas, J., dissenting) (stating that NGRI acquittees stand in a different posture than persons who have not been found to have committed a criminal act).

[136] *Foucha*, 112 S. Ct. at 1792 (Kennedy, J., dissenting).

[137] 422 U.S. 563 (1975).

[138] 441 U.S. 418 (1979).

[139] *See Foucha*, 112 S. Ct. at 1793 (Kennedy, J., dissenting).

[140] *Id.*

rationale for holding a civil committee has always been the state's "*parens patriae* power to protect and provide for an ill individual."[141] As a result, many civil commitment statutes condition initial commitment on present insanity and a concurrent finding of dangerousness to self and/or others.[142] On the other hand, the rationale for criminal commitment is usually to ensure public safety.[143] In *Jones*, the Supreme Court had previously recognized that there is a difference between those defendants who have been found to have committed a criminal act and those who have not.[144] There is no reason for the Court now to hold that, just because an NGRI acquittee has become "sane," he or she should be treated as a civil committee. The state, having met its burden of proving all elements of the crime "beyond a reasonable doubt," should be justified in treating the NGRI acquittee differently than a civil committee. Determinations regarding the Due Process Clause should not vary on such erratic circumstances.

C. *Standard of Review*

The Supreme Court has never been entirely precise as to what the standard of review is in mental health confinement cases such as

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[141] *Id.* at 1794; *see also* BRAKEL ET AL., *supra* note 13, at 24 (stating that the state has the power to act for the protection of those who cannot care for themselves); Jackson v. Indiana, 406 U.S. 715, 736 (1972) (stating that states have traditionally had broad powers to commit the mentally ill); O'Connor v. Donaldson, 422 U.S. 563, 583 (1975) (Burger, C.J., concurring) (noting that "the States are vested with the historic *parens patriae* power, including the duty to protect 'persons under legal disabilities to act for themselves'") (quoting Hawaii v. Standard Oil Co., 405 U.S. 251, 257 (1972)).

[142] *See, e.g.*, LA. REV. STAT. ANN. § 28:54 (West Supp. 1993) ("The respondent is suffering from serious mental illness which contributes or causes him to be dangerous to himself or others, . . ."); KY. REV. STAT. ANN. § 202A.026 (Michie/Bobbs-Merrill 1991) ("No person shall be involuntarily hospitalized unless such person is a mentally ill person: (1) Who presents a danger or threat of danger to self, family or others as a result of the mental illness; . . .").

[143] *Foucha*, 112 S. Ct. at 1794 (Kennedy, J., dissenting); *see also id.* at 1806 (Thomas, J., dissenting) (stressing the long-standing belief that the states' interest in confinement of the dangerous mentally ill is legitimate); Jones v. United States, 463 U.S. 354, 366 (1983) (stating that the state has an important interest in automatic confinement); Phelps v. United States, 831 F.2d 897, 898 (9th Cir. 1987) (finding the dangerousness test to be a familiar one); Hickey v. Morris, 722 F.2d 543, 549 (9th Cir. 1983) (finding a substantial state interest in preventing early release of the dangerous).

[144] *Jones*, 463 U.S. at 364 n.12; *see also* Jones v. United States, 432 A.2d 364, 375-76 (D.C. 1981), *aff'd*, 463 U.S. 354 (1983) (stating that *Jackson v. Indiana*, 406 U.S. 715 (1972), was not applicable to the case at bar because Jackson was not tried for a crime).

Foucha where there are equal protection and due process challenges.[145] The *Foucha* Court, for example, did not define the standard of review used in evaluating the due process and equal protection challenges to the Louisiana statutory scheme.[146] Although Justice Thomas accused the majority of incorrectly applying a "strict scrutiny" standard,[147] even Thomas did not reveal what the appropriate standard should be because he felt that the Louisiana statutes under attack were "reasonable."[148] Justice O'Connor, in her concurrence, simply stated that the Louisiana legislature was deserving of some judicial deference.[149] In order for the states to determine the extent of their right, if any, to continually confine an NGRI acquittee, the states must have some understanding of what standard of review a court will apply to their statutory schemes.

The case containing the best analysis of the appropriate standard of review in mental health confinement cases is *Hickey v. Morris*.[150] In *Hickey*, the Ninth Circuit Court of Appeals interpreted the three Supreme Court cases in this area[151] as applying a "rational basis" test.[152] The *Hickey* court also noted that recent decisions applying the Equal Protection Clause in different contexts had applied the "rational basis" test with a sharper focus–a so-called "heightened scrutiny" test.[153] In *Hickey*, however, the court refused to define which was the correct standard because the statute in question satisfied both the "rational basis" and "heightened scrutiny" tests.[154]

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[145] *Foucha*, 112 S. Ct. at 1807 n.15 (1992) (Thomas, J., dissenting).

[146] It is again important to note that in the area of mental health confinement, there is essentially no difference between challenges based on the Equal Protection and Due Process Clauses. The basic argument is that, there being no rational distinction between A and B, the state must treat them the same. For a good explanation of how the constitutional challenge is formulated, see Benham v. Ledbetter, 785 F.2d 1480, 1485 n.4 (11th Cir. 1986). *See supra* notes 93, 97.

[147] *See Foucha*, 112 S. Ct. at 1807-08 (Thomas, J., dissenting). Justice Thomas' accusation is apparently based on the majority's statement that "[f]reedom from physical restraint being a fundamental right, the State must have a *particularly convincing* reason, which it has not put forward, for such discrimination against insanity acquittees who are no longer mentally ill." *Id.* at 1788.

[148] *Id.* at 1807 n.15 (Thomas, J., dissenting).

[149] *Id.* at 1789 (O'Connor, J., concurring).

[150] *Hickey*, 722 F.2d 543 (9th Cir. 1983).

[151] Jackson v. Indiana, 406 U.S. 715 (1972); Humphrey v. Cady, 405 U.S. 504 (1972); Baxstrom v. Herold, 383 U.S. 107 (1966).

[152] *Hickey*, 722 F.2d at 545-46.

[153] *Id.*

[154] *Id.*

An examination of equal protection challenges in other contexts reveals that "strict scrutiny" is an inappropriate standard of review in mental health confinement cases.[155] In the absence of either a suspect classification or an intrusion on a fundamental right, the traditional standard of review requires that the challenged classification "bear some rational relationship to legitimate state purposes."[156] Since suspect classifications are generally thought of as those based on nationality or race,[157] those confined to a mental institution would not constitute a suspect class. Furthermore, even though the Court has recognized that confinement to a mental institution constitutes a significant deprivation of liberty,[158] an NGRI acquittee should not enjoy a fundamental right to unrestricted liberty based upon that adjudication. A "liberty interest" is not synonymous with a "fundamental right" to be free from confinement.[159] Under statutory schemes such as those found in Louisiana, a defendant found NGRI has committed all of the elements of the crime, but is exempt from criminal responsibility because of his or her mental state. Thus, it is not unreasonable to confine him or her to a mental institution.[160] In fact, other states, similar to Louisiana, provide for automatic commitment upon a finding of NGRI.[161] Therefore, it would make little sense to hold that such an acquittee enjoys a "fundamental right" to be free from confinement in a mental institution.[162]

Several lower level courts agree that "rational basis" is the appropriate standard of review in mental health confinement cases.[163]

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[155] However, at least one commentator has advocated use of a "strict scrutiny" standard in reviewing challenges to the continued confinement of the civilly committed and the NGRI acquittee. *See* Barry Kirschner, *Constitutional Standards for Release of the Civilly Committed and Not Guilty by Reason of Insanity: A Strict Scrutiny Analysis*, 20 ARIZ. L. REV. 233, 236 (1978).

[156] San Antonio Indep. Sch. Dist. v. Rodriquez, 411 U.S. 1, 40 (1973), *reh'g denied*, 411 U.S. 959 (1973).

[157] Graham v. Richardson, 403 U.S. 365, 371-72 (1971).

[158] *See* Jones v. United States, 463 U.S. 354, 361 (1983); Addington v. Texas, 441 U.S. 418, 425 (1979).

[159] *See* Foucha v. Louisiana, 112 S. Ct. 1780, 1805 & n.12 (1992) (Thomas, J., dissenting).

[160] *See supra* notes 92-99 and accompanying text (discussing how automatic commitment of NGRI acquittees comports with equal protection).

[161] *See* sources cited *supra* note 113.

[162] *See* People v. Chavez, 629 P.2d 1040, 1052 n.22 (Colo. 1981).

[163] *See* United States v. Cohen, 733 F.2d 128, 134 (D.C. Cir. 1984); Lee v. Kolb, 449 F. Supp. 1368, 1381 (W.D.N.Y. 1978); *Chavez*, 629 P.2d at 1052; Mills v. State, 256 A.2d 752, 756 (Del. 1969); People v. Larson, 478 N.E.2d 439, 444 (Ill. App. Ct. 1985);

Even the Supreme Court in *Jones* alluded to "rational basis" as being the appropriate standard.[164] While many courts have hinted that a "heightened scrutiny" standard–one that falls between "rational basis" and "strict scrutiny"–is appropriate,[165] no court has taken the initiative in applying such a standard.[166] Thus, in the absence of a clear pronouncement by the Supreme Court, one can conclude that the "rational basis" test is applicable in cases of this nature.

III. CURRENT STATUS OF THE LAW

In striking down the Louisiana statute, the *Foucha* Court, relying on *Jones*, held that "the acquittee may be held as long as he is both mentally ill and dangerous, but no longer."[167] The Louisiana statute is not unique, however, in allowing for continued confinement of the NGRI acquittee based solely on his or her "dangerousness."[168] Eight other states currently have statutes similar to that of Louisiana which allow for continued confinement based on "dangerousness" alone.[169]

Chase v. Kearns, 278 A.2d 132, 138 (Me. 1971), *overruled on other grounds*, Taylor v. Comm'r of Mental Health and Mental Retardation, 481 A.2d 139 (Me. 1984).

[164] Jones v. United States, 463 U.S. 354, 362 n.10 (1983).

[165] *See* United States v. Sahhar, 917 F.2d 1197, 1201 (9th Cir. 1990), *cert. denied*, 111 S. Ct. 1591 (1991); Hickey v. Morris, 722 F.2d 543, 546 (9th Cir. 1983); People v. Chavez, 629 P.2d 1040, 1051 n.21 (Colo. 1981); *see also The Supreme Court, 1992 Term–Leading Cases*, 106 HARV. L. REV. 163, 218-20 (1992) (advocating a "reasonableness" scrutiny standard).

[166] Search of LEXIS, Genfed library, US file (August 15, 1993).

[167] Foucha v. Louisiana, 112 S. Ct. 1780, 1784 (1992).

[168] LA. CODE CRIM. PROC. ANN. art. 657 (West Supp. 1991) ("At the hearing the burden shall be on the committed to prove that he can be discharged, or can be released on probation, without danger to others or to himself.").

[169] *See* DEL. CODE ANN. tit. 11, §403(b) (1987) (acquittee shall be kept institutionalized until the court "is satisfied that the public safety will not be endangered by his release"); HAW. REV. STAT. § 704-415 (1985) (insanity acquittee may be released if the court is satisfied that the release can be granted "without danger to the committed . . . or to the person or property of others"); IOWA R. CRIM. P. 21.8(e) (West 1992) ("If, upon hearing, the court finds that the defendant is not mentally ill *and* no longer dangerous to the defendant's self or others, the court shall order the defendant released.") (emphasis added); KAN. STAT. ANN. § 22-3428(3) (Supp. 1991) ("If the court finds the committed person is no longer likely to cause harm to self or others, the court shall order the person discharged."); MONT. CODE ANN. § 46-14-301(3) (1991) (insanity acquittee not entitled to release until he proves that he "may safely be released"); N.J. STAT. ANN. § 2C:4-9 (West 1982) (insanity acquittee not entitled to release or discharge until the court is satisfied that he is not a "danger to himself or others"); WASH. REV. CODE § 10.77.200(2) (1990) (insanity acquittee not entitled to release until he proves that he "may

The "dangerousness" standard for confinement of NGRI acquittees had been upheld by other courts prior to the Supreme Court's decision in *Foucha*.[170] In *Hickey v. Morris*,[171] for example, the Ninth Circuit Court of Appeals upheld Washington's release procedures against equal protection and due process challenges. The court held that *Jones* was not dispositive of the issue at hand and noted that "the state has a substantial interest in avoiding premature release of persons who have already proved their dangerousness to society."[172] The court held that the "dangerousness" standard was constitutionally permissible because it was reasonable for the state to require proof that the NGRI acquittee no longer presents a danger to society.[173] Thus, under a "rational basis" test, the statute survived constitutional challenge.[174]

A few state courts have also upheld the "dangerousness" standard. In *State v. Mahone*,[175] the Wisconsin Court of Appeals held that "dangerousness" bears a "reasonable relation" to the purposes for which

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finally be discharged without substantial danger to other persons, and without presenting a substantial likelihood of committing felonious acts jeopardizing public safety or security"); WIS. STAT. ANN. § 971.17(4)(d) (West Supp. 1992) ("court shall grant [release] unless it finds by clear and convincing evidence that the person would pose a significant risk of bodily harm to himself or herself or to others or of serious property damage"). Also, three states recently amended their statutes to change from the "dangerousness" standard to one involving an inquiry into the acquittee's present mental state. *See* CAL. PENAL CODE ANN. § 1026.2 (West Supp. 1992) (effective Jan. 1, 1994); N.C. GEN. STAT. § 122C-268.1(i) (1992); VA. CODE ANN. § 19:2-181 (Michie 1990) (effective July 1, 1992).

The majority of the Court in *Foucha* criticized Justice Thomas' reliance on some of these statutes because the Court believed that the Supreme Courts of New Jersey and Delaware had given their respective statutes different constructions. *Foucha*, 112 S. Ct at 1787 n.6. However, the Court erred in this interpretation. The New Jersey Supreme Court merely gave a strict construction to "dangerousness" by requiring a "substantial risk of dangerous conduct within the reasonably foreseeable future." *See* State v. Fields, 390 A.2d 574, 586 (N.J. 1978). In a subsequent opinion addressing the constitutionality of the Delaware statute, the Delaware Supreme Court was merely quoting dicta from Mills v. State, 256 A.2d 752, 757 n.4 (Del. 1969) (merely stating that the release statute's reference to danger relates to mental illness because a person who is only dangerous could not be indeterminately confined in a mental hospital). *See In re* Lewis, 403 A.2d 1115, 1121 (Del. 1979) (citing the *Mills* footnote and dicta).

[170] Hickey v. Morris, 722 F.2d 543 (9th Cir. 1983); State v. Mahone, 379 N.W.2d 878 (Wis. Ct. App. 1985).

[171] 722 F.2d 543 (9th Cir. 1983); *see also* Harris v. Ballone, 681 F.2d 225 (4th Cir. 1982) (upholding Virginia law).

[172] *Hickey*, 722 F.2d at 548.

[173] *Id.* at 549.

[174] *Id.* at 546.

[175] 379 N.W.2d 878 (Wis. Ct. App. 1985).

the NGRI acquittee was initially committed.[176] The court stated that the maximum duration set by the Wisconsin statute precluded the evil sought to be cured by the *Jackson* decision–namely, indefinite confinement.[177] Consequently, the court rejected the constitutional challenges to the Wisconsin release statute. Similarly, in *State v. Perez*,[178] the Louisiana Supreme Court upheld the very statute at question in *Foucha*. The court noted that "[w]hen the crime is a serious one , a court should be especially cautious before releasing an insanity acquittee."[179] The court held that the trial judge did not abuse his discretion in finding that the defendant had not met the burden of proving that he could be released without danger to himself or others.[180]

The Louisiana Supreme Court relied on the above cases in upholding Louisiana's "dangerousness" test in *State v. Foucha*.[181] Noting that due process is a flexible standard, the court examined the purpose behind the acquittee's original commitment.[182] Relying on *O'Connor v. Donaldson*[183] for the proposition that "[t]here can be little doubt that in the exercise of its police power a State may confine individuals solely to protect society from the dangers of significant antisocial acts,"[184] the court held that the "dangerousness" test satisfied due process.[185] This decision was, however, reversed by the Supreme Court in *Foucha v. Louisiana*.[186]

The question that remains following the *Foucha* decision is whether the "dangerousness" test is always unconstitutional in light of the Supreme Court's decision and, if so, why? The majority of the Court in *Foucha* dedicated a long portion of its opinion to distinguishing Louisiana's statutory scheme from the pretrial detention of dangerous arrestees that the Court upheld in *United States v. Salerno*.[187] In *Salerno*, the petitioner had

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[176] *Id.* at 884 n.4.

[177] *See id.* at 884.

[178] 563 So. 2d 841 (La. 1990), *cert. denied*, 112 S. Ct. 2320 (1992). Justices Blackmun, O'Connor, and Souter would have granted certiorari, vacated the judgment, and remanded to the Louisiana Supreme Court in light of their decision in *Foucha*. *Perez*, 112 S. Ct. at 2320.

[179] *Perez*, 563 So. 2d at 845.

[180] *Id.*

[181] *Foucha*, 563 So. 2d 1138 (La. 1990), *rev'd*, 112 S. Ct. 1780 (1992).

[182] *See id.* at 1144.

[183] 422 U.S. 563 (1975).

[184] *Foucha*, 563 So. 2d at 1144 (quoting O'Connor v. Donaldson, 422 U.S. 563, 582-83 (1975) (Burger, C.J., concurring)).

[185] *Id.*

[186] 112 S. Ct. 1780, 1789 (1992).

[187] 481 U.S. 739 (1987).

challenged portions of the Bail Reform Act of 1984,[188] which allows for courts to detain, prior to trial, arrestees charged with serious felonies if the government demonstrates that no release conditions would "reasonably assure . . . the safety of any other person and the community."[189] The *Foucha* Court held that *Salerno* had no application to the confinement of NGRI acquittees because the provisions of the Bail Reform Act are narrowly focused on an acute problem and provide for a strictly limited duration of confinement.[190] In addition, the Bail Reform Act contains many procedural safeguards, such as placing the burden on the Government to prove the defendant's dangerousness by "clear and convincing" evidence.[191] In contrast, the Louisiana statute provided for a potentially "indefinite" confinement and was only "a step away" from substituting confinement with the incarceration of those who have been proven to have committed a crime.[192]

The Court's analysis of the applicability of *Salerno* to the confinement of NGRI acquittees is flawed for two reasons. First, Louisiana's statutory scheme provides for a release hearing six months after initial commitment, every year thereafter at the request of the acquittee, and at any time upon the request of the facility superintendent.[193] Thus, it provides for "indefinite" confinement only to the extent that the NGRI acquittee is unable to satisfy the standards for release.[194] Second, Louisiana's dual plea of "not guilty and not guilty by reason of insanity" *does* indicate that the defendant has committed all elements of the crime "beyond a reasonable doubt;"[195] he or she is merely exempt from criminal responsibility because of his or her mental state at the time of the offense. Justice O'Connor, in her concurrence, stated that it may be permissible to confine an NGRI acquittee who has regained his or her sanity if the nature and duration of detention is "tailored to reflect pressing public safety concerns related to the acquittee's continuing dangerousness."[196]

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[188] 18 U.S.C. § 3142(e) (Supp. III 1992).

[189] *Id.*

[190] *See Foucha*, 112 S. Ct. at 1787.

[191] 18 U.S.C. § 3142(f) (Supp. III 1992).

[192] *See Foucha*, 112 S. Ct. at 1787.

[193] *See* LA. CODE CRIM. PROC. ANN. arts. 655-656 (West Supp. 1991).

[194] *Foucha*, 112 S. Ct. at 1808 (Thomas, J., dissenting).

[195] State v. Clark, 305 So. 2d 457, 461 (La. 1974). *See generally* Philips, *supra* note 28, at 1172 ("[T]he conditions for return of [a NGRI] verdict are *conjunctive*. For this verdict to be proper, the trier of fact must find the defendant 'guilty' of the charge beyond a reasonable doubt, *and* then find him 'legally insane' so as to excuse his conduct.").

[196] *Foucha*, 112 S. Ct. at 1789 (O'Connor, J., concurring).

Although it is not expressly stated, a close reading of the majority opinion seems to yield this same conclusion.[197]

Thus, it would appear that under some circumstances, a state could confine an NGRI acquittee based on "dangerousness" alone if the statute provided for a limited duration of confinement. Such a narrow construction might be applicable to "maximum duration" statutes like that in Washington. The Washington statute provides that "such commitment . . . cannot exceed the maximum possible penal sentence for any offense charged for which [the person] was acquitted by reason of insanity."[198] If the acquittee is still mentally ill and in need of treatment when he or she has been confined for a time period equal to the maximum possible penal sentence, the state may institute civil commitment proceedings.[199] Such "maximum duration" statutes strike a balance between the need of the state to protect society from dangerous individuals whom the court has found to have committed criminal acts and the due process rights of the NGRI acquittee who may no longer be mentally ill. These statutes also reflect a reasonable judgment on the part of state legislatures that there is a definite relationship between dangerous behavior and mental illness[200] and that persons found NGRI may need to be confined for the protection of society. Although the Court did not expressly distinguish between "maximum duration" statutes and those statutes that do not limit the duration of confinement, "maximum duration" statutes should withstand the majority's analysis in *Foucha* in that under such statutory schemes an NGRI acquittee could not be confined longer than the maximum hypothetical prison term for the crime charged.[201]

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[197] *See Foucha*, 112 S. Ct. at 1786-87.

[198] WASH. REV. CODE § 10.77.020(3) (1989).

[199] *Id.* New Jersey and Wisconsin have similar statutes–continued confinement based on "dangerousness" alone, limited by the NGRI acquittee's hypothetical prison sentence. *See* N.J. STAT. ANN. § 2C:4-8(b)(3) (West 1982) ("The defendant's continued commitment under the law governing civil commitment, shall be established by a preponderance of the evidence, during the maximum period of imprisonment that could have been imposed . . . for any charge on which the defendant has been acquitted by reason of insanity."); WIS. STAT. ANN. § 971.17(1) (West Supp. 1992) ("[T]he court shall commit the person . . . for a specified period not exceeding two-thirds of the maximum term of imprisonment that could be imposed . . . . If the maximum term of imprisonment is life, the commitment period specified by the court may be life."). Other states also provide for such maximum duration of confinement based on the acquittee's hypothetical prison sentence, but, in addition, require a showing of present mental illness. *See, e.g.*, ALASKA STAT. § 12.47.090(d) (1989); CAL. PENAL CODE § 1026.5(a) (West Supp. 1992); ILL. ANN. STAT., ch. 38, ¶ 1005-2-4(b) (Smith-Hurd Supp. 1992); OR. REV. STAT. § 161.327(1) (1991).

[200] *See* Jones v. United States, 463 U.S. 354, 365 n.13 (1983).

[201] At least one commentator has proposed the use of "maximum duration" statutes

If the grave concern about the Louisiana statute was that it provided for potentially indefinite detention without procedural due process for the NGRI acquittee, "maximum duration" statutes like Washington's should meet this objection. "Maximum duration" statutes guarantee that NGRI acquittees will not be detained in mental institutions longer than the maximum hypothetical prison term for the crime charged. Further, if the Court does apply a "rational basis" test when evaluating equal protection challenges to such statutes, judicial deference to the state legislatures that drafted such statutes should suffice to uphold their constitutionality.[202] It is logical that an NGRI acquittee's dangerousness bears a "rational basis" to the purpose for which he or she was originally committed.

"Maximum duration" statutes should also meet the objections of the remaining members of the Supreme Court. Justice O'Connor, in her *Foucha* concurrence, specifically addressed these statutes by stating that she did "not understand the Court's opinion to render such laws necessarily invalid."[203] Since Justice O'Connor's purpose in writing her concurring opinion was to express that the Court was only striking down this one narrow Louisiana statute,[204] the pressing safety concerns surrounding dangerous NGRI acquittees would likely compel her to uphold such statutes. The *Foucha* dissenters would also uphold "maximum duration" statutes because such statutes reflect the distinction between civil and criminal confinement and do not require the state to renounce its interest in confining NGRI acquittees merely because they have become "sane."[205] The dissenters' willingness to uphold Louisiana's statutory scheme on the facts before them indicates that they would agree that "maximum duration" statutes comport with both due process and equal protection requirements.

Three arguments, however, can be made against the constitutionality of statutes that allow for the continued confinement of an NGRI acquittee based on a finding of dangerousness alone, even though the maximum duration of the acquittee's confinement is expressly limited. The first

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to solve some of the procedural problems surrounding the NGRI acquittee's release. *See* Greenwald, *supra* note 109, at 592.

[202] *Cf.* Metropolitan Life Ins. Co. v. Ward, 470 U.S. 869, *reh'g denied*, 471 U.S. 1120 (1985) (upholding Alabama statute which imposes a substantially lower gross premium tax rate on domestic insurance companies than on out-of-state insurance companies); "In the equal protection context . . . if the State's purpose is found to be legitimate, the state law stands as long as the burden it imposes is found to be rationally related to that purpose, a relationship that is not difficult to establish." 470 U.S. at 881.

[203] Foucha v. Louisiana, 112 S. Ct. 1780, 1790 (1992) (O'Connor, J., concurring).

[204] *See id.* at 1789.

[205] *See id.* at 1801 (Thomas, J., dissenting).

argument is based on the difficulty that the NGRI acquittee would face in proving at a release hearing that he or she is not dangerous.[206] As a practical matter, the acquittee has to prove a negative–that he or she is no longer dangerous. Even if the acquittee is only subject to a preponderance of the evidence standard, the burden on the acquittee to prove the absence of "danger to self or others" may be an extremely difficult one to meet. However, to use this argument to strike down the "dangerousness" standard in every situation would be a mistake. It is just as difficult for the state to prove "dangerousness" as it is for the acquittee to prove his "nondangerousness." Thus, this argument is primarily against the burden of proof, rather than against the "dangerousness" standard itself. This potential problem could be eliminated by placing the burden on the state to prove "dangerousness" once it has been determined that the NGRI acquittee is no longer insane.

A second argument against statutes like that of Washington is that they allow for continued confinement of a "sane" NGRI acquittee to a mental health institution. Some might argue that such acquittees should be removed from mental health institutions and transferred to minimum security prisons. The basis of such an argument is that remaining in a mental health institution "stigmatizes" the acquittee as an insane person.[207] As a general rule, the Due Process Clause requires no procedural protections when a prison inmate is transferred from one prison to another within the same state, even if from a medium security to a maximum security prison.[208] However, problems

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[206] *See* Covington v. Harris, 419 F.2d 617, 627 (D.C. Cir. 1969) ("[D]angerousness is a many splendored thing. . . . Moreover, once 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."). For a good analysis of the difficulties for the NGRI acquittee of proving his nondangerousness, see generally Joseph Goldstein & Jay Katz, *Dangerousness and Mental Illness–Some Observations On The Decision To Release Persons Acquitted By Reason Of Insanity*, 70 YALE L.J. 225 (1960).

[207] But see Jones v. United States, 463 U.S. 354, 367 n.16 (1983), in which the Court noted: "A criminal defendant who successfully raises the insanity defense necessarily is stigmatized by the verdict itself, and thus the commitment causes little additional harm in this respect."

[208] The court in Meachum v. Fano, 427 U.S. 215, *reh'g denied*, 429 U.S. 873 (1976) stated:

> Confinement in any of the State's institutions is within the normal limits or range of custody which the conviction has authorized the State to impose. That life in one prison is much more disagreeable than in another does not in itself signify that a Fourteenth Amendment liberty interest is implicated when a prisoner is transferred to the institution with the more severe rules.

Id. at 225; *see also* Hewitt v. Helms, 459 U.S. 460 (1983) (upholding a transfer to administrative segregation which occurred without a formal evidentiary hearing). *But cf.*

could result in transferring the sane NGRI acquittee to a prison, even if only a minimum security prison.

In many jurisdictions where insanity is treated as an affirmative defense, once the defendant puts forth evidence of insanity, the burden shifts to the government to prove sanity beyond a reasonable doubt.[209] Thus, a verdict of not guilty by reason of insanity indicates that the government has failed to prove all elements of the offense by not proving mens rea beyond a reasonable doubt. In this situation, a transfer of the NGRI acquittee who has regained his or her sanity would surely violate the Due Process Clause, as the acquittee is truly "not guilty" by reason of insanity. In jurisdictions such as Louisiana, on the other hand, where the dual plea places the burden on the defendant to prove his or her insanity by a preponderance of the evidence,[210] the NGRI acquittee is found beyond a reasonable doubt to have committed the act. He or she is exempt from criminal responsibility merely because of his or her mental state at the time of the offense.[211] Therefore, transferring the sane NGRI acquittee to a penal institution does not create the same due process problems in jurisdictions with a dual plea as it does in jurisdictions in which insanity is treated as an affirmative defense.[212]

The third and final argument against the constitutionality of "maximum duration" statutes like that in Washington is that they make provisions for what the Court in *Jones v. United States* said was not required by due process. Although the *Jones* Court felt that the length of the acquittee's hypothetical prison sentence was irrelevant to the purpose of his or her initial commitment,[213] "maximum duration" statutes require that at the end of the NGRI acquittee's hypothetical prison sentence, the state either release the acquittee or subject him or her to civil commitment proceedings. However, in light of the Court's belief in

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Vitek v. Jones, 445 U.S. 480 (1980) (holding that involuntary transfer of a prisoner to a state mental institution implicates a liberty interest that is protected by the Due Process Clause; therefore, procedural protections are required).

[209] *See, e.g.*, United States v. Samuels, 801 F.2d 1052 (8th Cir. 1986) (Missouri law); Hall v. State, 568 So. 2d 882 (Fla. 1990) (Florida law); Roundtree v. State, 568 So. 2d 1173 (Miss. 1990) (Mississippi law); State v. Smith, 379 S.E.2d 287 (S.C. 1989) (South Carolina law); State v. Massey, 359 S.E.2d 865 (W. Va. 1987) (West Virginia law).

[210] LA. CODE CRIM. PROC. ANN. art. 652 (West 1993).

[211] *See, e.g.*, State v. Fletcher, 717 P.2d 866 (Ariz. 1986) (Arizona law); Wilson v. State, 359 S.E.2d 891 (Ga. 1987) (Georgia law); State v. Davis, 361 S.E.2d 724 (N.C. 1987) (North Carolina law).

[212] A fundamental premise of this Note, however, is that such a transfer is not constitutionally required.

[213] Jones v. United States, 463 U.S. 354, 369 (1983).

Foucha that there is not a sufficient distinction for equal protection purposes between the "sane" NGRI acquittee and the criminal defendant who cannot prove that he or she is no longer dangerous,[214] it is unclear whether the Court would now reach the same conclusion as it did in *Jones* if a similar case came before it. Further, when such a provision has been expressly provided for by a state legislature, it should survive a constitutional challenge, whether the reviewing standard is "rational basis" or "heightened scrutiny."[215] Indeed, it would seem anomalous if a state were free to abolish the insanity defense entirely (thus allowing a finding of guilt and the incarceration of an insane defendant), while it could not confine a dangerous NGRI acquittee for the duration of his hypothetical maximum sentence.

On the other hand, the constitutional status of the six other state statutes that provide for potentially "indefinite" confinement of the NGRI acquittee based on "dangerousness" alone[216] is unclear. This is especially true considering that the defendant in *Foucha* did not prove that he was not a "dangerous" individual.[217] Since this did not appear to be a consideration in the Court's analysis of the constitutionality of the Louisiana statute, the likely conclusion is that these other statutes are currently unconstitutional as violative of the Due Process Clause.[218]

CONCLUSION

In dealing with an area of the law that has always been controversial, the Supreme Court in *Foucha v. Louisiana* struck down a Louisiana statute that provided for continued confinement of a "sane" NGRI

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[214] *See* Foucha v. Louisiana, 112 S. Ct. 1780, 1788 (1992).

[215] *See* cases cited *supra* note 202.

[216] See the statutes from Delaware, Hawaii, Iowa, Kansas, Montana, and North Carolina, respectively, cited *supra* note 169.

[217] *See Foucha*, 112 S. Ct. at 1782-83; *id.* at 1797 (Kennedy, J., dissenting); State v. Foucha, 563 So. 2d 1138, 1141 (La. 1990), *rev'd*, 112 S. Ct. 1780 (1992).

[218] In one of the first cases since *Foucha* concerning a statute providing for indefinite confinement based on the sole finding of "dangerousness," the Kansas Court of Appeals held KAN. STAT. ANN. § 22-3428(3) (Supp. 1991), to be unconstitutional. *In re* Noel, 838 P.2d 336 (Kan. Ct. App. 1992). Specifically, the court held:

> The current statutory scheme used to determine the need for continued commitment of insanity acquittees violates the Due Process and Equal Protection Clauses of the 14th Amendment by not placing the burden of proof upon the State to show by clear and convincing evidence *both* the committed person's continued insanity and dangerousness. As required by *Foucha v. Louisiana*, we engraft such requirements into the Kansas statutory scheme.

Id. at 345 (emphasis added).

acquittee based on his "dangerousness" to society and himself. By undertaking a complete turnaround in its analysis of the Equal Protection and Due Process Clauses and conflating the differences between civil and criminal confinement, the Court has left the law surrounding mental health confinement in a state of confusion. Until the Court makes a clearer pronouncement, issues such as the appropriate standard of review to be applied in mental health confinement cases where there are equal protection and/or due process challenges and the continued vitality of the *Jones* decision will remain unanswered.

Statutes based on "dangerousness" alone that have a maximum confinement duration based on the acquittee's hypothetical prison sentence appear to be constitutional. Such statutes take into consideration the genuine differences that exist between criminal and civil committees and recognize that the defendant found "not guilty by reason of insanity" has committed a criminal act, but is merely exempt from criminal responsibility due to his or her mental state at the time of the offense. Further, these statutes recognize the strong state interest in protecting society from dangerous individuals who have committed criminal acts.

If *Foucha* is limited solely to its facts, statutes like that in Washington[219] should remain constitutional, especially if a "rational basis" standard of review is applied, whereas statutes providing for "indefinite" confinement based on "dangerousness" alone, like that in Delaware[220] and Iowa,[221] are not likely to survive equal protection or due process challenges.[222] However, if the *Foucha* case is given broad constitutional significance, an anomaly will result. According to *Jones*, an NGRI acquittee may be confined "indefinitely" regardless of the nature or seriousness of his offense as long as he remains "insane" in the legal sense of the term.[223] On the other hand, according to *Foucha*, a dangerous NGRI acquittee who has committed a serious crime is allowed to go free at any time, once he can show that he is no longer mentally ill.[224] Until the Supreme Court makes a clear pronouncement in this

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[219] WASH. REV. CODE § 10.77.020(3) (1989).

[220] DEL. CODE ANN. tit. 11, § 403(b) (1987).

[221] IOWA R. CRIM. P. 21.8(e) (West 1992).

[222] See *supra* notes 83-166 and accompanying text.

[223] *See* Jones v. United States, 463 U.S. 354, 369 (1983) ("The length of the acquittee's hypothetical criminal sentence therefore is irrelevant to the purposes of his commitment.").

[224] *See* Foucha v. Louisiana, 112 S. Ct. 1780, 1808 (Thomas, J., dissenting) ("If the Constitution did not require a cap on the acquittee's confinement in *Jones*, why does it require one here?").

area, this anomaly will persist, leaving unanswered the question: What is the states' right to confine an NGRI acquittee?

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