FOURTEENTH AMENDMENT—DUE PROCESS CLAUSE—A STATE CANNOT CONTINUE THE CONFINEMENT OF AN INSANITY ACQUITTEE WHO IS NO LONGER MENTALLY ILL ON THE BASIS THAT HE POSES A DANGER TO HIMSELF OR SOCIETY—*Foucha v. Louisiana*, 112 S. Ct. 1780 (1992).

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I. INTRODUCTION

The Due Process Clause of the Fourteenth Amendment protects an individual's liberty interest in freedom from bodily restraint.[1] Thus, constitutional limitations are imposed on state commitment statutes that provide for involuntary confinement of persons in a mental institution.[2]

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[1] U.S. CONST. amend. XIV, § 1. The Due Process Clause of the Fourteenth Amendment provides that state governments may not deprive "any person of life, liberty, or property, without due process of law. . . ." *Id. See, e.g.*, Youngberg v. Romeo, 457 U.S. 307, 315-16 (1982) (involuntarily committed mentally retarded persons have substantive liberty interests in safety and freedom from unreasonable physical restraint); Vitek v. Jones, 445 U.S. 480, 487-88 (1980) (involuntary transfer of prisoner to mental hospital implicates liberty interest protected by due process clause); Addington v. Texas, 441 U.S. 418, 425 (1979) ("[C]ivil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection.").

[2] A state's authority to commit individuals who are considered dangerous to themselves by reason of their mental illness originates from its parens patriae power. Note, *Developments in the Law: Civil Commitment of the Mentally Ill*, 87 HARV. L. REV. 1190, 1207-45 (1974). The parens patriae power generally refers to a state's role as the "guardian of persons under legal disability, such as juveniles or the insane" who are unable to take care of themselves. BLACK'S LAW DICTIONARY 1114 (6th ed. 1990). The parens patriae power has been used in a variety of contexts, including the protection of minors, establishment of guardianships, and involuntary confinement of the mentally ill. *Note, supra*, at 1208-09.

In contrast, a state's authority to commit mentally ill persons based on their dangerousness to others falls under its police power. *Id.* at 1208. Traditionally, the dangerously insane have been prime candidates for commitment under this rationale. *Id.* at 1209 n.53. A state possesses an inherent police power to enact laws and regulations to protect public health, safety, welfare, and morals. *See, e.g.*, Jacobson v. Massachusetts, 197 U.S. 11, 24-35 (1905) (upholding confinement of persons carrying infectious disease); Minnesota *ex rel* Pearson v. Probate Court, 309 U.S. 270 (1940) (upholding confinement of persons whose mental dysfunction creates danger to themselves or others). Commitment constitutes an exercise of police power when it is intended to further a societal interest rather than an individual's interest. *Note, supra*, at 1222. The societal interest implicated in most commitment statutes is the need to protect the public against the threat of harm from a dangerously insane person. *Id.* at 1223.

See generally SAMUEL JAN BRAKEL ET AL., THE MENTALLY DISABLED AND THE LAW 725-30 (1985). It has been widely recognized that in the civil commitment context,

Although some states have attempted to create a civil-criminal dichotomy[3] in their statutory confinement schemes, the United States Supreme Court has consistently invalidated statutes purporting to treat classes of commitment candidates differently because of their prior criminal backgrounds.[4] In cases involving the successful assertion of an insanity plea,[5] however, the Court's approach has been unpredictable

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the Due Process Clause requires notice of the proceedings, a judicial determination of mental illness and dangerousness, the right of cross examination, and periodic review of the commitment itself. MICHAEL L. PERLIN, MENTAL DISABILITY LAW 215-40, 380-85 (1989). In addition, the commitment of a mentally disabled person must be accompanied by a finding that he is dangerous to himself or others. *See* O'Connor v. Donaldson, 422 U.S. 563 (1975) (holding that a state cannot confine a nondangerous individual in a mental institution on the basis of his mental illness alone). For a more detailed discussion of *O'Connor*, see *infra* notes 50-56 and accompanying text.

[3] *See* June R. German & Anne C. Singer, *Punishing the Not Guilty: Hospitalization of Persons Acquitted by Reason of Insanity*, 29 RUTGERS L. REV. 1011, 1012-13 (1976); John Parry, *The Civil-Criminal Dichotomy in Insanity Commitment and Release Proceedings: Hinckley and Other Matters*, MENTAL AND PHYSICAL DISABILITY LAW REP., July-Aug. 1987, at 218, 218-19. State statutory schemes governing the disposition of persons acquitted by reason of insanity can be separated roughly into four categories. BRAKEL ET AL., *supra* note 2, at 726. The first type has no special provisions for insanity acquittees. *Id. See, e.g.*, NEV. REV. STAT. ANN. § 175.521(1) (Michie 1992); PA. STAT. ANN. tit. 18, § 314 (1983). The second approach allows automatic short-term commitment to determine whether the acquittee should be civilly committed. BRAKEL ET AL., *supra* note 2, at 726. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-3994 (1978 & Supp. 1982); NEB. REV. STAT. § 29-3701(1) (1986). The third type permits automatic commitment without procedures requiring a determination of the need for continued hospitalization. BRAKEL ET AL., *supra* note 2, at 726. *See, e.g.*, COLO. REV. STAT. ANN. § 16-8-105(4) (West 1986); KAN. STAT. ANN. § 22-3428(1) (1988). The fourth approach provides for a hearing immediately following the insanity acquittal, at which time it must be established that the acquittee is mentally ill and dangerous, or simply dangerous in order to justify commitment. BRAKEL ET AL., *supra* note 2, at 726. *See, e.g.*, IOWA R. CRIM. P. 21(8) (West 1979); WYO. STAT. § 7-11-306(d) (1977).

[4] *See, e.g.*, Baxstrom v. Herold, 383 U.S. 107 (1966); Humphrey v. Cady, 405 U.S. 504 (1972); Jackson v. Indiana, 406 U.S. 715 (1972). For a further discussion of these cases, see *infra* notes 28-48 and accompanying text.

[5] The modern insanity defense dates back to at least 1843, when Daniel M'Naghten, suffering from mental illness, murdered the secretary to the Prime Minister of England. *See* M'Naghten's Case, 8 Eng. Rep. 718, 719-20 (1843). In *M'Naghten*, the House of Lords stated:

> [T]o establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong.

and somewhat tentative.[6] In particular, the Court seemed to abandon

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Id. at 722.

The legal definition of insanity generally turns on one of several tests for criminal insanity: (1) the M'Naughten test; (2) the Durham test; or (3) the Model Penal Code test. *See generally* WAYNE R. LAFAVE & AUSTIN W. SCOTT, CRIMINAL LAW 304 (2d ed. 1986). The Durham test for legal insanity states "that an accused is not criminally responsible if his unlawful act was the product of mental disease or defect." *Id.* at 324 (citing Durham v. United States, 214 F.2d 862 (D.C. Cir. 1954)). The meaning of "product" in the Durham test has been held to require a "but for" relationship between the illegal act and the disease. *See, e.g.*, Carter v. United States, 252 F.2d 608 (D.C. Cir. 1957). The Model Penal Code test states that "[a] person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law." MODEL PENAL CODE § 4.01 (1985). The Model Penal Code formulation is commonly viewed as an easier test to satisfy than the M'Naghten test, because the former requires only a lack of "substantial capacity" while the latter requires a complete impairment. LAFAVE & SCOTT, *supra*, at 330.

A substantial majority of states recognize an affirmative insanity defense of not guilty by reason of insanity which, if successfully proven, absolves a defendant from criminal responsibility. *See, e.g.*, ARIZONA REV. STAT. ANN. § 13-502 (1989); CAL. PENAL CODE § 25 (West 1988); N.J. REV. STAT. § 2C:4-1 (1982). Seven states provide for a verdict of guilty but mentally ill, which subjects the defendant to an initial commitment followed by a post-recovery prison term. *See* ALASKA STAT. § 12.47.040 (1992); GA. CODE ANN. § 17-7-131 (Supp. 1992); ILL. ANN. STAT. ch. 38, para. 6-2 (Smith-Hurd 1989); IND. CODE ANN. §§ 35-36-2-3 (West 1983); KY. REV. STAT. ANN. § 504.130 (Michie/Bobbs-Merrill 1990); MICH. COMP. LAWS ANN. § 768.36 (West 1982); N.M. STAT. ANN. §§ 31-9-3, 31-9-4 (Michie 1982). Finally, two states have completely abolished the insanity defense. *See* IDAHO CODE § 18-207(a) (1987); MONT. CODE ANN. § 46-14-102 (1992).

[6] *See, e.g.*, Foucha v. Louisiana, 112 S. Ct. 1780 (1992); Jones v. United States, 463 U.S. 354 (1983). In the past, underlying the finding of "not guilty by reason of insanity" was an assumption that the acquittal would result in automatic confinement without the procedural safeguards generally afforded to civilly committed individuals. *See generally* James W. Ellis, *The Consequences of the Insanity Defense: Proposals to Reform Post-Acquittal Commitment Laws*, 35 CATH. U. L. REV. 961, 965 (1986); German & Singer, *supra* note 3, at 1011. This was done to protect society from future harm resulting from the acquittee's conduct. Ellis, *supra*, at 963. The insanity acquittee would be confined indefinitely in a state mental institution for the criminally insane, where the conditions often resembled those of a prison instead of a mental hospital. German & Singer, *supra* note 3, at 1011. In the 1950s, however, the advent of psychotropic medication improved dramatically the effective treatment of the mentally ill. Barbara A. Weiner, *Not Guilty by Reason of Insanity: A Sane Approach*, 56 CHI.-KENT L. REV. 1057, 1065 (1980). The use of psychotropic drugs on patients suffering from manic depression, hallucinations, and paranoid behavior, for example, enabled those patients to control their symptoms and return to the community. *Id.* Eventually, in the 1960s, a public movement recognizing the plight of institutionalized mental patients caused both legislatures and courts to afford greater rights to civilly committed mental patients. Ellis, *supra*, at 966-67. Although civil commitments today are relatively brief, averaging from three to four weeks in length, studies have shown that insanity acquittees remain hospitalized for much

its previously hostile stance toward commitment statutes that purported to create a civil-criminal dichotomy in *Jones v. United States*,[7] holding that states have a rational basis for distinguishing between insanity acquittees and civil commitment candidates.[8] In *Foucha v. Louisiana*,[9] however, the Court returned to its pre-*Jones* position by invalidating a Louisiana statute that differentiated between insanity acquittees and other candidates for commitment. The *Foucha* decision merely exacerbated the confusion already created by the Court's temporary retreat in *Jones* from the earlier line of cases mandating similar liberty rights for commitment candidates under both civil and criminal schemes.[10] The *Foucha* Court did so by failing to resolve the question of whether the Supreme Court will continue to protect the post-acquittal rights of persons found not guilty by reason of insanity.

Under Louisiana law, a criminal defendant who is found not guilty by reason of insanity[11] is committed to a mental institution unless he can

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longer periods than persons who are civilly committed. BRAKEL ET AL., *supra* note 2, at 726 n.395. For a more elaborate discussion concerning the debate, controversy, and the continued viability of the insanity defense, see HERBERT FINGARETTE & ANNE FINGARETTE HASSE, MENTAL DISABILITIES AND CRIMINAL RESPONSIBILITY (1979); NORVAL MORRIS, MADNESS AND THE CRIMINAL LAW (1982); W. WINSLADE & J. ROSS, THE INSANITY PLEA (1983); ALAN A. STONE, LAW, PSYCHIATRY & MORALITY (1984); Weiner, *supra*, at 1057.

[7] 463 U.S. 354 (1983). For a more detailed discussion of *Jones*, see *infra* notes 71-91 and accompanying text.

[8] *See Jones*, 463 U.S. at 363-64.

[9] 112 S. Ct. 1780 (1992).

[10] *See, e.g.*, Baxstrom v. Herold, 383 U.S. 107 (1966) (prisoner near the end of his sentence and thought to be mentally ill is entitled to same procedural safeguards afforded to other civil commitment candidates); Humphrey v. Cady, 405 U.S. 504 (1972) (convicted sex offender whose present confinement in mental institution is subject to renewal is entitled to same procedural safeguards afforded to other civil committees).

[11] In Louisiana, insanity is an affirmative defense that absolves the offender from criminal responsibility "[i]f the circumstances indicate that because of a mental disease or . . . defect the offender was incapable of distinguishing between right and wrong with reference to the conduct in question. . . ." LA. REV. STAT. ANN. § 14:14 (West 1986). Every criminal defendant is presumed sane at the time of the offense, and bears the burden of proving by a preponderance of the evidence that he or she was insane at the time of the offense. State v. Nealy, 450 So. 2d 634 (La. 1984); State v. Ondek, 584 So. 2d 282 (La. App. 1991). This form of the insanity defense is substantially similar to the M'Naughten test for criminal insanity. For a discussion of the various tests for criminal insanity, see *supra* note 5.

demonstrate that he is not dangerous to himself or others.[12] Following commitment, either the insanity acquittee or the hospital superintendent can initiate release proceedings by requesting a hearing at the institution before a panel of physicians.[13] If the review panel recommends that the acquittee be released, the acquittee must prove at a court hearing that

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[12] LA. CODE CRIM. PROC. ANN. art. 654 (West Supp. 1991). Article 654 provides in pertinent part:

> When a defendant is found not guilty by reason of insanity in any other 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 can be released on probation, without danger to others or to himself, it shall either order his discharge, or order his release on probation subject to specified conditions for a fixed or an indeterminate period.

Id.

[13] LA. CODE CRIM. PROC. ANN. art. 655 (West Supp. 1991). Article 655 states in relevant part:

> (A) 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 the court by which the person was committed.
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> (B) A person committed pursuant to Article 654, may make application to the court by which he was committed, for discharge, or for release on probation. Such application by a committed person may not be filed until the committed person has been confined for a period of at least six months after the commitment. If the determination of the court is adverse, the applicant shall not be permitted to file another application until one year has elapsed from the date of determination.
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> Upon receipt of such application the court shall direct the superintendent of the mental institution where the person was committed to make a report and recommendation, within a period specified, as to whether the person can be discharged or can be released on probation, without danger to others or to himself.

Id.

release can be achieved without danger to the acquittee or others.[14] If the panel finds that the acquittee is dangerous, then the involuntary confinement may be continued even if the acquittee is no longer mentally ill.[15]

On October 12, 1984, a Louisiana trial court ruled that Terry Foucha, a criminal defendant, was not guilty by reason of insanity and ordered him committed to a mental institution.[16] On March 21, 1988, the institution superintendent recommended Foucha's release.[17] A three-physician panel concluded that no evidence of mental illness existed, and thus concurred with the superintendent's recommendation.[18] On November 29, 1988, the trial court conducted a release hearing at which time Foucha was unable to prove that he was no longer dangerous.[19] Based on this hearing, the court ruled that Foucha's release would pose a danger to society, and consequently, ordered that his confinement be continued.[20] The Court of Appeals denied supervisory writs.[21]

The Louisiana Supreme Court affirmed, holding that Foucha failed to establish that he was not dangerous, that his release was not

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[14] LA. CODE CRIM. PROC. ANN. art. 657 (West Supp. 1991) (amended 1993). Article 657 provides in pertinent part:

> After considering the report or reports filed pursuant to Articles 655 and 656, 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 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.

Id.

[15] LA. CODE CRIM. PROC. ANN. art. 657, cmt. b (West Supp. 1991).

[16] State v. Foucha, 563 So. 2d 1138, 1139 (La. 1990), *cert. granted*, 111 S. Ct. 1412 (1991), *rev'd*, 112 S. Ct. 1780 (1992). Foucha was charged with aggravated burglary and illegal discharge of a firearm. *Id.* at 1138-39 (citing LA. REV. STAT. ANN. §§ 14:60, 14:94 (West 1986)). The trial court found Foucha not guilty by reason of insanity without a trial, as permitted by the Louisiana criminal code. *Id.* at 1139 (citing LA. CODE CRIM. PROC. ANN. art. 558.1 (West Supp. 1991)).

[17] *Id.* at 1139-40.

[18] *Id.*

[19] *Id.* at 1140.

[20] *Id.*

[21] *Id.*

mandated by *Jones*, and that the statutory provision allowing an insanity acquittee to be confined on the basis of dangerousness alone complied with the Due Process and Equal Protection Clauses.[22]

The United States Supreme Court granted certiorari to consider the due process implications of the indefinite confinement of insanity acquittees who are no longer mentally ill.[23] The Supreme Court reversed the judgment of the Louisiana Supreme Court, holding that the Louisiana statute violated the Due Process Clause because it permitted an insanity acquittee who is not mentally ill to be committed indefinitely in a mental institution until he could prove that he was not dangerous to himself or to others.[24]

II. THE EVOLUTION OF THE SUPREME COURT'S APPROACH TO CONTINUED CONFINEMENT OF INSANE PERSONS: AN ANALYTICAL FRAMEWORK

Initially, the Supreme Court applied an equal protection approach to invalidate statutory commitment schemes that purported to afford less procedural protections to certain classes of civil commitment candidates.[25] The Equal Protection Clause of the Fourteenth Amendment states in pertinent part that "[n]o State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws."[26] Later, the Court abandoned this

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[22] *See id.* at 1141-44. The Louisiana Supreme Court found that the dangerousness test of the Louisiana insanity commitment statute did not violate the Equal Protection Clause. *Id.* at 1144 (citing LA. CODE CRIM. PROC. ANN. arts. 654-57 (West Supp. 1991)). Asserting that insanity acquittees comprise a unique group that should be treated distinctly from other commitment candidates, the court concluded that the statute did not discriminate against insanity acquittees. *Id.* at 1144 (citing Hickey v. Morris, 722 F.2d 543 (9th Cir. 1983)). The court further held that the statute complied with due process, noting that the state's interest in protecting the defendant and society justifies the defendant's continued confinement. *Id.*

[23] Foucha v. Louisiana, 112 S. Ct. 1780, 1783 (1992).

[24] *See id.* at 1784-85.

[25] *See, e.g.*, Baxstrom v. Herold, 383 U.S. 107 (1966); Humphrey v. Cady, 405 U.S. 504 (1972). For a more in-depth analysis of the Court's equal protection approach, see *infra* notes 28-39 and accompanying text.

[26] U.S. CONST. amend. XIV, § 1. Essentially, this clause requires that the government treat similarly situated persons similarly. JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 570 (4th ed. 1991). Although virtually all laws must create classifications to be effective, the government may not enact or enforce laws that classify persons based upon impermissible criteria or arbitrarily burden a particular class of individuals. *Id.*

approach in favor of a due process analysis which focused on the safeguards afforded to civil commitment candidates by a particular state commitment scheme.[27]

A. EQUAL PROTECTION: THE *BAXSTROM* TRILOGY

Baxstrom v. Herold[28] was one of the earliest cases to invalidate a statutory commitment scheme based on equal protection grounds.[29] In

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The Supreme Court currently utilizes a three-tiered approach for determining the constitutionality of challenged legislative classifications. *Id.* at 578-79. Most laws, including those which primarily affect economic or social interests, are subject to the "rational basis" test, the lowest level of scrutiny. *Id.* Under this test, the state need only show that its classification bears a *rational* relationship to a *legitimate* government interest. *Id.* On the other hand, "strict scrutiny," the highest level of review, applies when legislation infringes upon a fundamental right or burdens a suspect class. *Id.* at 579. To date, the Court has identified race, alienage, and nationality as suspect classes. *See, e.g.*, Palmore v. Sidoti, 466 U.S. 429, 433 (1984) (applying strict scrutiny review to trial court's racially motivated decision to award custody of a child to the father); Loving v. Virginia, 388 U.S. 1, 11-12 (1967) (applying strict scrutiny review to a miscegenation statute that prevented marriage between persons solely on the basis of racial classification). Strict scrutiny requires that the challenged classification be *narrowly tailored* to advance a *compelling* government interest. NOWAK & ROTUNDA, *supra*, at 579. An intermediate level of review, "middle-tier" scrutiny, governs classifications based upon gender and illegitimacy. *Id. See, e.g.*, Craig v. Boren, 429 U.S. 190, 190-91 (1976) (applying middle-tier scrutiny to gender-based statute requiring a higher minimum drinking age for males). Middle-tier scrutiny requires that the challenged classification be *substantially related* to an *important* governmental interest. NOWAK & ROTUNDA, *supra*, at 579. Equal protection analysis as applied to post-acquittal schemes generally has triggered either rational basis or intermediate level scrutiny. Warren J. Ingber, 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, 291-94 (1982).

[27] *See* O'Connor v. Donaldson, 422 U.S. 563 (1975); Addington v. Texas, 441 U.S. 418 (1979). For a further discussion of *O'Connor* and *Addington*, see *infra* notes 50-64 and accompanying text.

[28] 383 U.S. 107 (1966). Chief Justice Warren delivered the opinion of the Court, in which Justices Douglas, Clark, Harlan, Brennan, Stewart, White, and Fortas, joined. *Id.* at 108. Justice Black concurred in the result. *Id.* at 115. For a further discussion of *Baxstrom*, see James D. Hutchinson, *Recent Development*, 12 VILL. L. REV. 178 (1966).

[29] *See id.* at 114-15. Prior to *Baxstrom*, it was widely assumed that a person found not guilty by reason of insanity would be committed automatically to a mental institution. German & Singer, *supra* note 3, at 1017. Indeed, courts had articulated several rationales to justify automatic and mandatory commitment, including: (1) a presumption of continuing insanity; (2) a legislative policy to deter false insanity pleas; (3) the availability of alternative release procedures; (4) the prevention of insanity acquittees claiming that they are presently recovered; and (5) a belief that insanity acquittees, because of their commission of criminal acts, are more dangerous than other mental

Baxstrom, pursuant to a New York statute that did not provide for a judicial hearing or de novo jury review that were otherwise available to persons civilly committed,[30] a prisoner was committed to a mental

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patients. *Id.* at 1017-25. For a more detailed discussion of the various justifications for automatic commitment, see Charles M. Hamann, *The Confinement and Release of Persons Acquitted by Reason of Insanity*, 4 HARV. J. ON LEGIS. 55, 62-65 (1966); Note, *Commitment and Release of Persons Found Not Guilty by Reason of Insanity: A Georgia Perspective*, 15 GA. L. REV. 1065, 1065-78 (1981).

[30] *Baxstrom*, 383 U.S. at 110. Baxstrom was committed under § 384 of the New York Correction Law, a commitment statute that applied only to prisoners who were within 30 days of the expiration of their prison sentence. *Id.* (citing N.Y. CORRECT. LAW § 384(1) (McKinney 1961) (repealed 1966)). The statute read in pertinent part:

> Within thirty days prior to the expiration of the term of a prisoner confined in the Dannemora state hospital, when in the opinion of the director such prisoner continues insane, the director shall apply to a judge of a court of record for the certification of such person as provided in the mental hygiene law for the certification of a person not in confinement on a criminal charge. The court in which such proceedings are instituted shall if satisfied that such person may require care and treatment in an institution for the mentally ill, issue an order directing that such person be committed to the custody of the commissioner of mental hygiene to be placed in an appropriate state institution of the department of mental hygiene or of the department of correction as may be designated for the custody of such person by agreement between the heads of the two departments.

N.Y. CORRECT. LAW § 384(1) (McKinney 1961).

In contrast, a civil committee was entitled to a judicial hearing on the question of dangerousness and a de novo jury review of the prior determination as to his or her sanity. *Baxstrom*, 383 U.S. at 111 (citing N.Y. MENTAL HYG. LAW §§ 72, 74 (McKinney 1951) (repealed 1969)). If the jury found that the person was sane, he or she was entitled to immediate release. *Id.*

Section 404, which replaced § 384, provides in relevant part:

> (1) Whenever an inmate committed to a hospital in the department of mental hygiene shall continue to be mentally ill and in need of care and treatment at the time of his conditional release, release to parole supervision, or when his sentence to a term of imprisonment expires, the director of the hospital may apply for the person's admission to a hospital for the care and treatment of the mentally ill in the department of mental hygiene as provided in the mental hygiene law.

N.Y. CORRECT. LAW § 404(1) (McKinney 1987). Under § 404, unlike § 384, a prisoner who is near the end of his or her sentence is entitled to the same commitment procedures as all other candidates for civil commitment. *Id.*

hospital shortly before the expiration of his criminal sentence.[31]

The Supreme Court held that the statutory procedure for committing prisoners near the expiration of their sentences violated the Equal Protection Clause because it denied this class of persons the right to a de novo jury review and a judicial determination that was available to all other civil committees.[32] The Court concluded that at least for purposes of granting a de novo jury review, a person near the end of his or her prison term is entitled to the same procedural protections afforded to any other person sought to be civilly committed.[33]

The Court reaffirmed the *Baxstrom* principle in *Humphrey v. Cady*,[34] where pursuant to the Wisconsin Sex Crimes Act,[35] a convicted sex offender was committed for compulsory psychiatric treatment in lieu of a one-year prison sentence.[36] Following the expiration of the initial

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[31] *Baxstrom*, 383 U.S. at 108-10. In April 1959, Johnnie K. Baxstrom was convicted of second degree assault and sentenced to a prison term of two and one-half to three years. *Id.* at 108. Shortly before completing his two and one-half year sentence, a prison physician certified that Baxstrom was still insane. *Id.* He was transferred from prison to Dannemora State Hospital, an institution used to confine and care for prisoners who became mentally ill while serving a penal sentence. *Id.* On December 6, 1961, in the Surrogate Court's chambers, a proceeding was held during which the assistant director at Dannemora and two physicians testified that Baxstrom was mentally ill and required care. *Id.* After Baxstrom was given an opportunity to ask questions, he was committed to the custody of the Department of Mental Hygiene and retained at Dannemora. *Id.* at 109.

[32] *Id.* at 110. Under prior New York commitment law, all civil committees, including prisoners other than those who were within 30 days of the expiration of their prison sentences, possessed the right to a de novo jury review on the insanity question and a judicial determination of dangerousness and mental illness. *Id.*

[33] *Id.* at 111-12. Although recognizing that a prisoner's dangerous or criminal propensities may be relevant for determining the appropriate type of treatment to be given, the Court nevertheless held that such propensities could not justify depriving him of a jury determination on the question of whether he was mentally ill. *Id.* at 111. Further, the Court noted that "[w]here the State has provided for a judicial proceeding to determine the dangerous propensities of all others civilly committed . . . it may not deny this right to a person solely on the ground that he was nearing the expiration of a prison term." *Id.* at 114.

[34] 405 U.S. 504 (1972). Justice Marshall, joined by Chief Justice Burger and Justices Douglas, Brennan, Stewart, White, and Blackmun, delivered the opinion of the Court. *Id.* at 506. Justices Powell and Rehnquist did not participate in the decision. *Id.* at 519.

[35] WIS. STAT. ANN. § 959.15 (West 1958), *amended in part and repealed in part by* WIS. STAT. ANN. §§ 975.01-.18 (West 1985).

[36] *Humphrey*, 405 U.S. at 506. The petitioner was convicted of contributing to the delinquency of a minor, a misdemeanor that carried a maximum one year sentence. *Id.* Based on a finding that the crime was probably sexually motivated, the court, pursuant

commitment period, the offender was afforded commitment renewal hearings, but was not statutorily entitled to a jury determination on the renewal issue.[37] Comparing the renewal commitment to the post-sentence commitment in *Baxstrom*, Justice Marshall held that the mere fact of a criminal conviction could not alone justify depriving the petitioner of the procedural protections, such as a jury determination, that were available to other civil committees.[38] The Court determined

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to the Wisconsin Sex Crimes Act, ordered confinement in a "sexual deviate facility" located within the state prison. *Id.* (citing WIS. STAT. ANN. § 959.15 (West 1958)). The Wisconsin Sex Crimes Act permitted the trial court to either impose a criminal sentence or commit the defendant to a mental facility for treatment and custody for a period equal to the maximum prison sentence authorized for the crime. *Id.* at 507. After a person was convicted, the court could order a physical and mental examination by the Department of Public Welfare if it determined that the crime was "probably directly motivated by a desire for sexual excitement." *Id.* If the Department recommended treatment for the criminal, the court was required to hold a judicial hearing to determine whether he or she needed specialized treatment for mental or physical aberrations. *Id.* If such a need was established, the court could commit the defendant for treatment in lieu of a prison sentence for a term equal to the maximum sentence that would have been imposed for the defendant's crime. *Id.*

[37] *Id.* With regard to the procedural aspects of renewal commitment hearings, Wisconsin statute § 959.15 provided in relevant part:

> If the department applies to the committing court for the review of an order as provided in sub. (13), the court shall notify the person whose liberty is involved, and, if he be not *sui juris*, his parent or guardian as practicable, of the application, and shall afford him opportunity to appear in court with counsel and of process to compel attendance of witnesses and the production of evidence. He may have a doctor or psychiatrist of his own choosing examine him in the institution to which he is confined or at some suitable place designated by the department. If he is unable to provide his own counsel, the court shall appoint counsel to represent him. He shall not be entitled to a trial by jury.

WIS. STAT. ANN. § 959.15 (1958). Finding release to be inappropriate, the court renewed the commitment for a five-year term as permitted by the Wisconsin Sex Crimes Statute. *Humphrey*, 405 U.S. at 507. The court determined that release would pose a danger to the public due to the petitioner's "mental or physical deficiency, disorder or abnormality." *Id.* (quoting WIS. STAT. ANN. § 959.15 (1958)).

[38] *Humphrey*, 405 U.S. at 510-11. With respect to the initial commitment, the Court noted that the deprivation of the right to a jury might arguably be justified on the grounds that the conviction triggered the commitment, and that the commitment was merely an alternative to sentencing and was limited in duration to the maximum possible sentence. *Id.* With respect to the subsequent renewal proceedings, however, the Court observed that the renewal commitments were in no way limited by the maximum sentence or the nature of the crime, and therefore, the mere fact of the conviction could not justify the discrimination. *Id.* at 511.

that once a state decided to make a jury determination generally available to civil commitment candidates, it could not arbitrarily withhold that right from a particular class of individuals without violating the Equal Protection Clause.[39]

In *Jackson v. Indiana*,[40] the Court further expanded the *Baxstrom* principle to the pretrial commitment of a criminal defendant. Under the Indiana statute governing pretrial commitment of incompetent criminal defendants,[41] the trial court ordered the petitioner's indefinite

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[39] *Id.* at 512 (citing Baxstrom v. Herold, 383 U.S. 107, 110-12 (1966)). Concluding that the petitioner's constitutional challenge of the Wisconsin statute warranted an evidentiary hearing, the Court remanded the case to the District Court. *Id.* at 508. The Court opined that "[t]he equal protection claim would seem to be especially persuasive if it develops on remand that petitioner was deprived of a jury determination, or of other procedural protections, merely by the arbitrary decision of the State to seek his commitment under one statute rather than the other." *Id.* at 512 (citations omitted).

[40] 406 U.S. 715 (1972). Justice Blackmun delivered the opinion of the Court, joined by Chief Justice Burger and Justices Douglas, Brennan, Stewart, White, and Marshall. *Id.* at 717. Justices Powell and Rehnquist did not participate in the decision. *Id.* at 741. For a more in-depth discussion of *Jackson*, see N. Richard Janis, *Incompetency Commitment: The Need for Procedural Safeguards and a Proposed Statutory Scheme*, 23 CATH. U. L. REV. 720 (1974); James J. Gobert, *Competency to Stand Trial: A Pre-and Post-*Jackson *Analysis*, 40 TENN. L. REV. 659 (1973).

[41] IND. CODE ANN. § 9-1706a (Burns 1956) (repealed 1974). Section 9-1706a read in pertinent part:

> When at any time before the trial of any criminal cause or during the progress thereof and before the final submission of the cause to the court or jury trying the same, the court, either from his own knowledge or upon the suggestion of any person, has reasonable ground for believing the defendant to be insane, he shall immediately fix a time for a hearing to determine the question of the defendant's sanity and shall appoint two [2] competent disinterested physicians who shall examine the defendant upon the question of his sanity and testify concerning the same at the hearing. . . . If the court shall find that the defendant has comprehension sufficient to understand the proceedings and make his defense, the trial shall not be delayed or continued on the ground of the alleged insanity of the defendant. If the court shall find that the defendant has not comprehension sufficient to understand the proceedings and make his defense, he shall commit the defendant, whether male or female, to the division for maximum Security of the Dr. Norman M. Beatty Memorial Hospital. Whenever the defendant shall become sane the superintendent of the state psychiatric hospital shall certify the fact to the proper court, who shall enter an order on his record directing the sheriff to return the defendant, or the court may enter such order in the first instance whenever he shall be sufficiently advised of the defendant's restoration to sanity. Upon the release to court of any defendant so committed he or she shall then be placed upon trial for the criminal offense the same as if no delay or postponement had occurred by

commitment until he gained competence to stand trial.[42] The Court based this decision on a finding that the petitioner lacked a sufficient comprehension of the proceedings to present a defense.[43] At the competency hearing, two physicians testified that it was unlikely that the petitioner's mental condition would ever improve enough for him to stand trial.[44]

Writing for a unanimous court, Justice Blackmun concluded that the petitioner's indefinite confinement under § 9-1706a of Indiana's commitment statute violated both the Equal Protection and Due Process Clauses.[45] Justice Blackmun held that the petitioner was deprived of equal protection because Indiana subjected him to a more lenient commitment standard and a more stringent release standard than those generally applied to all others not charged with criminal offenses.[46]

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reason of defendant's insanity.

Id. Section 9-1706a provided that a trial court which reasonably believed a defendant to be incompetent was required to schedule a non-jury competency hearing and appoint two examining physicians to assist in determining whether the defendant was competent to stand trial. *Id.* A defendant who was found to lack "comprehension sufficient to understand the proceedings and make his defense," would be committed indefinitely to a psychiatric institution until he recovered his sanity. *Id.* The statute did not provide for a periodic review of the defendant's incompetency. *Jackson*, 406 U.S. at 720.

[42] *Jackson*, 406 U.S. at 719. In May 1968, petitioner Theon Jackson, a 27 year-old mentally defective deaf mute, was charged with two separate robberies. *Id.* at 717. Jackson had the mental ability of a pre-school child and could not read or write. *Id.* at 718-19.

[43] *Id.* at 719 (citing IND. CODE ANN. § 9-1706a (Burns 1956)).

[44] *Id.* at 718-19.

[45] *Id.* at 730-31.

[46] *Id.* at 730. The Court reasoned that if the conviction and sentence in *Baxstrom* were "insufficient to justify less procedural and substantive protection against indefinite commitment than that generally available to all others, the mere filing of criminal charges [in the present case] surely cannot suffice." *Id.* at 724. The Court then concluded that Indiana improperly condemned the petitioner under § 9-1706a to perpetual institutionalization without the showing necessary for commitment or the occasion for release afforded by § 22-1209 or § 22-1907. *Id.* at 730 (citing IND. CODE ANN. §§ 22-1209, -1907 (West 1964)).

Indiana Code § 22-1907, providing for the commitment of "feeble-minded youth," provided in relevant part:

> A reputable citizen of the county from which an application is to be made shall make an application, on forms provided by the board of trustees [commissioner of mental health] of the school, under oath, setting forth information substantially as follows: The age, sex, race, general mental and physical condition, residence and legal settlement of the applicant, whether such applicant is under the charge of a guardian or parents, and where known, the

Furthermore, the Court found that the petitioner's indefinite commitment based solely on his incompetency to stand trial violated due process of law.[47] In so holding, the Court stated that an accused who is committed solely on the basis of incompetency to stand trial can be held only for a reasonable period of time sufficient to assess the accused's likelihood of gaining competency.[48]

> cause and duration of the feeble-minded condition and such other facts regarding the applicant's personal and family history as the trustees may require; which facts shall be submitted to the judge of the circuit court having jurisdiction over that county, together with a certificate of a reputable physician that the applicant is admissible under the rules of the board of trustees [commissioner of mental health], that he or she is feeble-minded and is not insane or epileptic, and is free from any infectious or contagious disease and from vermin. When such statements shall have been filed, the said judge shall appoint two [2] medical examiners who shall be physicians of not less than three [3] years' experience in the general practice of medicine and surgery, and not related to the person for whom application is made by consanguinity or marriage. It shall be the duty of said examiners to carefully and separately examine said person for whom application is made and separately certify in writing to said judge whether said person is a feeble-minded person and is not insane or epileptic. In his discretion, the judge may call additional witnesses until fully satisfied of the conditions as to feeble-mindedness of the person under inquiry. The judge of the circuit court shall give the parent, guardian or other person having custody of said person due notice of at least five [5] days, by summons served as in other cases, of the pending of said cause, with right to defend in person and by counsel. If it shall appear to the judge that the person is feeble-minded, he shall enter an order of commitment in the proper record. . . .

IND. CODE ANN. § 22-1907 (Burns 1964). The Court explained that § 9-1706a of the Indiana statute under which the petitioner was committed differed from the other two state civil commitment statutes, § 22-1209 and § 22-1907, in that the state needed only to show the petitioner's incompetence to stand trial. Jackson v. Indiana, 406 U.S. 715, 727 (1972) (citing IND. CODE ANN. § 9-1706a (Burns 1956)). The Court noted that under the latter sections, the state had a more stringent burden of proof, requiring it to establish that a person was mentally ill under § 22-1209 or feeble-minded under § 22-1907. *Id.* at 728. Furthermore, the Court pointed out that release criteria under these civil commitment schemes appeared more lenient than those applicable under § 9-1706a. *Id.* at 729.

[47] *Id.* at 738. In so holding, the Court announced that "due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed." *Id.* The Court emphasized that the petitioner was confined for over three years despite the substantial probability that he would never attain the competency necessary to fully participate in a trial. *Id.* Further, the Court opined that if the defendant is unlikely to ever attain competency, then the state must institute formal civil commitment procedures or release him. *Id.*

[48] *Id.*

B. THE COURT'S PARALLEL DUE PROCESS APPROACH

Having previously utilized primarily equal protection grounds[49] to strike down state commitment schemes, the Court in *O'Connor v. Donaldson*[50] abandoned this approach, and instead adopted a parallel due process analysis.[51] In *O'Connor*, a civil committee who was confined

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[49] Initially, in *Baxstrom* and *Humphrey*, the Court relied solely upon an equal protection analysis framework. *See* Baxstrom v. Herold, 383 U.S. 107, 110 (1966); Humphrey v. Cady, 405 U.S. 504, 508 (1972). For a further discussion of those cases, see *supra* notes 29-39 and accompanying text. Later, in *Jackson*, the Court utilized an equal protection analysis, but also introduced a due process approach in invalidating the petitioner's commitment. *See Jackson*, 406 U.S. at 731. Finally, in *O'Connor*, the Court replaced its equal protection analysis with a due process approach. *See* Ingber, *supra* note 26, at 292 n.61; *see also* Jones v. United States, 463 U.S. 354, 362 n.10 (1983). In fact, prior to the *O'Connor* decision, the Court had discussed the Due Process Clause in several contexts that were analogous to civil commitment. *See, e.g.*, Specht v. Patterson, 386 U.S. 605 (1967) (holding that due process requires procedural safeguards when a state statute permits conversion of a sex offender's fixed sentence into an indefinite confinement); *In re* Gault, 387 U.S. 1 (1967) (holding that due process requires procedural safeguards in juvenile commitment proceedings); McNeil v. Director, Patuxent Institution, 407 U.S. 245 (1972) (holding that detention of allegedly mentally defective person beyond expiration of his prison term, following his refusal to take psychiatric examination, violates due process).

[50] 422 U.S. 563 (1975). Justice Stewart delivered the opinion of the Court, joined by Chief Justice Burger and Justices Brennan, White, Marshall, Blackmun, Powell, Rehnquist, and Stevens. *Id.* For a further discussion of *O'Connor*, see Kurt Anderson, Comment, O'Connor v. Donaldson: *Due Process Rights of Mental Patients in State Hospitals*, 6 N.Y.U. REV. L. & SOC. CHANGE 65 (1976); Sheila M. Burnstin, *Recent Development*, 51 WASH. L. REV. 764 (1976).

[51] The parallel due process approach includes both procedural and substantive components. *See* NOWAK & ROTUNDA, *supra* note 26, at 355-94, 487-513. The substantive component involves "the judicial determination of the compatibility of the substance of a law or government action with the Constitution." *Id.* at 339. The Court has applied at least two standards of review in the substantive due process context. *Id.* at 370. Most legislation, particularly if it involves economic interests, is usually upheld if it is rationally related to a legitimate government interest. *Id.* The Court will apply strict scrutiny, however, if the challenged legislation infringes upon a fundamental right. *Id.* at 370-71. Strict scrutiny involves a determination of whether the legislation is narrowly tailored to achieve a compelling government purpose. *Id.* at 378. The Supreme Court has already recognized fundamental rights in marriage, procreation, abortion, privacy, voting, interstate travel, personal liberty, and the First Amendment. *Id.* Substantive due process as applied to the commitment context considers both the deprivation of an individual's liberty interest and the importance of the competing state interest. *See* Jackson v. Indiana, 406 U.S. 715, 738 (1972). The Supreme Court has applied a rational relation test in involuntary commitment cases. *See id.* Consequently, the Court has stated that "due process requires that the nature and duration of commitment [must] bear some reasonable relation to the purpose for which the individual is committed." *Id.*

in a mental hospital for nearly fifteen years brought a civil rights action against the hospital superintendent alleging that his continued confinement violated his liberty interests.[52] The respondent's initial commitment was based upon a finding of both mental illness and dangerousness; however, the respondent argued that his continued commitment was not justified because he no longer posed a danger to himself or society.[53]

Writing for a unanimous Court, Justice Stewart stated that the respondent's continued confinement violated the Due Process Clause because a state cannot constitutionally confine a nondangerous individual based on his or her mental illness alone.[54] The Court noted that, even if the respondent's initial confinement rested on a constitutionally

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The procedural aspect of the Due Process Clause guarantees that all persons will be afforded certain legal procedures if they are deprived of life, liberty, or property. NOWAK & ROTUNDA, *supra* note 26, at 487. At a minimum, due process requires a fair procedure before a neutral decision maker and notice of government action. *See id.* at 528-34. In determining what process is due in a particular situation, a court must apply a balancing test that weighs: (1) the nature of the private interest; (2) the risk of erroneous deprivation of that interest and the probable value of additional or substitute procedural safeguards; and (3) the government's interests, including the fiscal or administrative burdens that additional or substitute procedures would entail. *Id.* (citing Matthews v. Eldridge, 424 U.S. 319, 335 (1976)). The right to be free from involuntary confinement in a mental institution is a liberty interest that is protected by the Due Process Clause. *See* O'Connor v. Donaldson, 422 U.S. 563, 580 (1975) ("[I]nvoluntary confinement to a mental hospital, like involuntary confinement of an individual for any reason, is a deprivation of liberty which the State cannot accomplish without due process of law."). The procedural safeguards required for an involuntary civil commitment include a determination of present mental illness and dangerousness, *id.* at 574-76, established by clear and convincing evidence. Addington v. Texas, 441 U.S. 418, 433 (1979).

[52] *O'Connor*, 422 U.S. at 564-65.

[53] *Id.* at 567-68. Although the release of a nondangerous person was statutorily permissible, and evidence tended to show that respondent was not dangerous, the respondent's repeated demands for release were unsuccessful. *Id.* Consequently, the respondent brought a federal civil rights action seeking compensatory and punitive damages and injunctive relief under 42 U.S.C. § 1983. *Id.* The respondent alleged that the hospital superintendent and several of his aides intentionally infringed his constitutional right to liberty. *Id.* Shortly before trial, the superintendent retired, and the respondent secured his release from the hospital with assistance from other members of the hospital staff. *Id.* at 568.

[54] *Id.* at 574-75. The Court compared involuntary confinement of a mentally ill but nondangerous person to an attempt by the state to seclude those whose ways are different or "socially eccentric," noting that "[m]ere public intolerance or animosity cannot constitutionally justify the deprivation of a person's physical liberty." *Id.* at 575 (citing Cohen v. California, 403 U.S. 15, 24-26 (1971)).

adequate basis, such confinement could not continue once that basis no longer existed.[55] Accordingly, the Court announced that "a State cannot constitutionally confine without more a nondangerous individual who is capable of surviving safely in freedom by himself or with the help of willing and responsible family members or friends."[56]

Building upon the due process approach elucidated in *O'Connor*, the Court in *Addington v. Texas*[57] set forth the standard of proof required by the Due Process Clause in a civil commitment proceeding.[58] In *Addington*, the appellant's mother sought to have her son committed indefinitely under Texas law based on his emotional difficulties and dangerous behavior.[59] At trial, the jury found clear and convincing

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[55] *Id.* at 575 (citations omitted). Specifically, in *Jackson*, the Court held that a state cannot confine an individual indefinitely solely on account of his incompetence to stand trial, unless it institutes formal civil commitment proceedings. *See Jackson*, 406 U.S. at 738.

[56] O'Connor v. Donaldson, 422 U.S. 563, 575-76 (1975). Relying on *Jackson*, the Court noted that "[t]he fact that state law may have authorized the confinement of the harmless mentally ill does not itself establish a constitutionally adequate purpose for the confinement." *Id.* at 574 (citing *Jackson*, 406 U.S. at 720-23).

[57] 441 U.S. 418 (1979). Chief Justice Burger delivered the opinion of the Court, joined by Justices Brennan, Stewart, White, Marshall, Blackmun, Rehnquist, and Stevens. *Id.* at 419. Justice Powell did not participate in the decision. *Id.* at 433. For a more thorough analysis of *Addington*, see Louis Rabaut, Note, 57 U. DET. J. URB. L. 651 (1980); James J. Ross, Note, Addington v. Texas—*Standard of Proof in Civil Commitment Proceedings—A Logical Middle Ground*, 6 OHIO N.U. L. REV. 597 (1979).

[58] *See Addington*, 441 U.S. at 427-33. According to the Court, an "individual's interest in the outcome of a civil commitment proceeding is of such weight and gravity that due process requires the state to justify confinement by proof more substantial than a mere preponderance of the evidence." *Id.* at 427.

[59] *Id.* at 420. The relevant portion of the statute under which the appellant's mother sought to have her son committed provided:

> A sworn Application for Temporary Hospitalization of a proposed patient may be filed with the county court of the county in which the proposed patient resides or is found. The Application may be made by any adult person, or by the county judge, and shall state upon information and belief that the proposed patient is not charged with a criminal offense, that he is mentally ill, and that for his own welfare and protection or the protection of others he requires observation and/or treatment in a mental hospital.

TEX. REV. CIV. STAT. ANN. art. 5547.31 (West 1958 and Supp. 1978-79) (amended 1983). Prior to the mother's filing for indefinite commitment in this case, the appellant had been committed temporarily on seven separate occasions over a period of six years. *Addington*, 441 U.S. at 420.

evidence that the appellant required hospitalization for his mental illness.[60]

Writing for a unanimous court, Chief Justice Burger declared that involuntary civil commitment proceedings require a burden of proof "equal to or greater than the 'clear and convincing' standard."[61] Justice Burger noted that this standard of proof would achieve the proper balance between the individual's liberty interest in not being confined indefinitely and the state's interest in committing the emotionally disturbed to protect the individual as well as society from potential danger arising from the individual's behavior.[62] Justice Burger stated that imposing the mere preponderance of the evidence standard would not adequately minimize the risk that an individual would be committed solely upon a few isolated incidents of unusual conduct.[63] The Justice

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[60] *Addington*, 441 U.S. at 421. The Texas Court of Civil Appeals reversed, finding that the trial court's failure to require the criminal standard of proof beyond a reasonable doubt violated the appellant's due process rights. *Id.* at 422. The Texas Supreme Court reversed the decision of the Court of Civil Appeals, holding that the preponderance of the evidence standard for civil commitment proceedings satisfies due process. *Id.*

[61] *Id.* at 433. The Court explained that the three standards of proof include the civil "preponderance of the evidence," the intermediate "clear and convincing evidence," and the criminal standard of proof "beyond a reasonable doubt." *Id.* at 423-24. The Court noted that a particular standard of proof serves to "minimize the risk of erroneous decisions" and "allocate the risk of error between the litigants." *Id.* at 423-25 (citations omitted).

[62] *Id.* at 425.

[63] *Id.* at 427. Chief Justice Burger declared that "civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection." *Id.* at 425 (citations omitted). The Chief Justice explained that involuntary commitment can subject an individual to adverse social consequences, potentially stigmatizing her as dangerous and mentally ill. *Id.* at 426. In explaining the need to safeguard an individual from the adverse consequences of an erroneous commitment, Chief Justice Burger stated:

> At one time or another every person exhibits 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. Obviously, such behavior is no basis for compelled treatment and surely none for confinement. . . . Loss of liberty calls for a showing that the individual suffers from something more serious than is demonstrated by idiosyncratic behavior. Increasing the burden of proof is one way to impress the factfinder with the importance of the decision and thereby to reduce the chances that inappropriate commitments will be ordered.

Id. at 426-27.

also rejected the higher standard of proof beyond a reasonable doubt, reasoning that uncertainties in psychiatric diagnosis would make it nearly impossible for a state to commit an individual involuntarily.[64]

One year later, in *Vitek v. Jones*,[65] the Court defined the procedural protections required by the Due Process Clause when a state prisoner is involuntarily transferred to a mental hospital.[66] Writing for the majority, Justice White stated that after a state grants prisoners a substantive liberty interest, procedural due process protections are required to protect such state-created rights against arbitrary abrogation.[67] Recognizing that state law conferred liberty rights upon

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[64] *Id.* at 432. The appellant contended that *In re* Winship, wherein the Supreme Court held that the criminal law standard of proof beyond a reasonable doubt is required in a juvenile delinquency proceeding, was the controlling precedent in the case at hand. *Id.* (citing In re Winship, 397 U.S. 358, 365-66 (1970)). Rejecting this contention, the Court pointed out that a higher standard of proof is justified for *criminal* prosecutions only, to minimize the possibility of convicting an innocent individual even at the risk of allowing some guilty persons to remain free. *Id.* at 428 (citing Patterson v. New York, 432 U.S. 197 (1977)). The Court dismissed any contention that the release of a mentally ill person is no worse than failing to convict a guilty person. *Id.* at 829. A key factor in the Court's reasoning was that "[o]ne who is suffering from a debilitating mental illness and in need of treatment is neither wholly at liberty nor free of stigma." *Id.* The Court ultimately concluded that allowing a mentally ill individual to go free is not necessarily preferable to wrongfully committing a sane person. *Id.*

[65] 445 U.S. 480 (1980). Justice White delivered the opinion of the Court with respect to Parts I, II, III, IV-A, and V, in which Justices Brennan, Marshall, Powell, and Stevens joined. *Id.* at 482. Justice White delivered Part IV-B of the opinion, joined by Justices Brennan, Marshall, and Stevens. *Id.* at 496. Justice Powell concurred with the opinion of the Court, except with respect to Part IV-B. *Id.* at 497. Justice Stewart authored a dissenting opinion in which Chief Justice Burger and Justice Rehnquist joined. *Id.* at 500 (Stewart, J., dissenting). Justice Blackmun wrote a separate dissent. *Id.* at 501 (Blackmun, J., dissenting).

[66] *See id.* at 495-96. The appellee, a prisoner serving a sentence for a robbery conviction, was transferred to a mental hospital pursuant to a Nebraska statute that applied only to prisoners. *Id.* at 484. That statute authorized the Director of Correctional Services to transfer a prisoner to a mental hospital if a physician or psychologist found that the individual "suffers from a mental disease or defect" and "cannot be given proper treatment in that facility." NEB. REV. STAT. § 83-180(1) (1976). Continued confinement extending beyond the expiration of the prisoner's sentence required the commencement of formal civil commitment proceedings. NEB. REV. STAT. § 83-180(3) (1976).

[67] *Vitek*, 445 U.S. at 489. Justice White noted that state statutes may give rise to substantive liberty interests that require the procedural protections of the Due Process Clause. *Id.* at 488. The Justice stated that the Nebraska statute conferred a liberty interest upon all prisoners, and created a reasonable expectation that transfer to a mental hospital would not occur absent a finding of mental illness. *Id.* at 487-88. Justice White explained that for example, although there is no constitutional right to parole, once a state grants this liberty to a prisoner dependent on specific parole restrictions,

the appellee,[68] the Court found that the prisoner's interest in not being stigmatized as mentally ill and not being subjected to mandatory treatment outweighed the state's interest in segregation and treatment of the mentally ill.[69] Consequently, the Court concluded that due process entitled the appellee to procedural protections, including notice of the contemplated transfer and an adversary hearing.[70]

C. *JONES*: DIMINISHING THE DUE PROCESS RIGHTS OF INSANITY ACQUITTEES

After establishing a due process approach for analyzing the civil commitment schemes in *O'Connor*, *Addington* and *Vitek*, the Supreme Court in *Jones v. United States*[71] adopted a less restrictive analysis for

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any decision to revoke parole must comply with due process protections. *Id.* at 488 (citing Morrissey v. Brewer, 408 U.S. 471 (1972)). *See also* Wolff v. McDonnell, 418 U.S. 539 (1974) (finding that a statutory right to "good-time credits" that could be abrogated only upon prisoner's misbehavior constitutes a liberty interest protected by due process); Gagnon v. Scarpelli, 411 U.S. 778 (1973) (holding that revocation of probation is subject to due process protections).

[68] The Court explained that § 83-180(1) creates the expectation that a prisoner would be transferred only if he suffered from a mental illness that could not be treated adequately in a prison. *Vitek*, 445 U.S. at 490. The Court concluded that the state statute afforded Jones a liberty interest that entitled him to appropriate procedures to determine if his mental condition warranted his transfer to a mental hospital. *Id.*

[69] *Id.* at 494-95.

[70] *Id.* at 496.

[71] 463 U.S. 354 (1983). Justice Powell delivered the opinion of the Court, in which Chief Justice Burger and Justices White, Rehnquist, and O'Connor joined. *Id.* at 356. Justice Brennan wrote a dissenting opinion, in which Justices Marshall and Blackmun joined. *Id.* at 371 (Brennan, J., dissenting). Justice Stevens authored a separate dissent. *Id.* at 387 (Stevens, J., dissenting). For a more elaborate discussion of the *Jones* decision, see Janet L. Polstein, *Throwing Away the Key: Due Process Rights of Insanity Acquittees in* Jones v. United States, 34 AMER. U. L. REV. 479 (1985).

The *Jones* decision was decided shortly after a jury found John W. Hinckley, Jr. not guilty by reason of insanity of thirteen criminal charges arising out of the attempted assassination of former President Ronald W. Reagan. Stuart Taylor, Jr., *Hinckley Cleared But Is Declared Insane in Reagan Attack*, N.Y. TIMES, June 22, 1982, at A1. It has been suggested that the outcry over Hinckley's acquittal and possible release "is only the latest indication of the public's readiness to do away with the insanity defense." Ingber, *supra* note 26, at 283 n.12. *See* L. CAPLAN, THE INSANITY DEFENSE AND THE TRIAL OF JOHN W. HINCKLEY JR. 103 (1984) (national public opinion poll revealed that at the outset of the Hinckley trial, 87% of those polled "believed that too many murderers were using the insanity pleas to avoid jail."). Hinckley's acquittal has engendered much controversy and triggered many attempts at reform. Peter Margulies, *The "Pandemonium Between the Mad and the Bad:" Procedures for the Commitment and*

reviewing the confinement of persons found not guilty by reason of insanity in the criminal commitment context.[72] In this landmark decision involving the due process implications of an insanity acquittal, the Court distinguished between insanity acquittees and civil commitment candidates for the purpose of defining the scope of their respective due process rights.[73]

Specifically, in *Jones*, the Supreme Court upheld the indefinite confinement of a person who was involuntarily hospitalized in a mental institution for a period longer than the maximum sentence he would have served had he been convicted.[74] The petitioner entered a plea of not guilty by reason of insanity to a misdemeanor charge that carried a maximum sentence of one year.[75] The trial court found the petitioner not guilty by reason of insanity and committed him to a mental hospital pursuant to § 24-301(d)(1) of the District of Columbia criminal commitment statute.[76] After being hospitalized for more than one year,

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Release of Insanity Acquitees After Jones v. United States, 36 RUTGERS L. REV. 793, 793-94 (1984). For example, since the Hinckley verdict, eight jurisdictions have enacted legislation supplementing the insanity defense, providing the factfinder the option to find a defendant "guilty but mentally ill," which is the legal equivalent of a conviction. *Id.* at 794 n.3. Moreover, since the Hinckley verdict, state legislatures have introduced 40 bills proposing either abolition or reform of the insanity defense. Paul S. Avilla, *Mistreating a Symptom: The Legitimizing of Mandatory, Indefinite Commitment of Insanity Acquittees*—Jones v. United States, 11 PEPP. L. REV. 569, 577 (1984). For a critical evaluation of several reforms inspired by the Hinckley verdict, see David B. Wexler, *Redefining the Insanity Problem*, 53 GEO. WASH. L. REV. 528 (1985). Ironically, regardless of the strong public sentiment against the insanity defense, the defense is rarely successful. Margulies, *supra*, at 795 n.3.

[72] *See Jones*, 463 U.S. at 367-68.

[73] *Id.* at 370.

[74] *Id.*

[75] *Id.* at 360. In September 1975, the petitioner was arrested for an attempted theft of a jacket from a department store. *Id.* The petitioner was charged with attempted petit larceny, a misdemeanor punishable by a maximum sentence of one year. *Id.* (citing D.C. CODE ANN. §§ 22-103, 22-2202 (1981)).

[76] *Id.* at 360 (citing D.C. CODE ANN. § 24-301(d)(1) (1981)). Section 24-301 (d)(1) provides:

> If any person tried upon an indictment or information for an offense raises the defense of insanity and is acquitted solely on the ground that he was insane at the time of its commission, he shall be committed to a hospital for the mentally ill until such time as he is eligible for release pursuant to this subsection or subsection (e) of this section.

D.C. CODE ANN. § 24-301(d)(1) (1981). Under the District's insanity commitment statute, a criminal defendant must affirmatively establish his plea of not guilty by reason

the petitioner demanded unconditional release or recommitment under the civil commitment standard, which required a trial by jury and proof of mental illness and dangerousness by clear and convincing evidence.[77]

Writing for the majority, Justice Powell held that the Due Process Clause does not require the immediate release or civil recommitment of an insanity acquittee who was hospitalized beyond the maximum prison term.[78] Noting that a verdict of not guilty by reason of insanity

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of insanity by a preponderance of the evidence. D.C. CODE ANN. § 24-301(j) (1981). If the defendant successfully asserts the insanity defense, he is automatically committed to a mental hospital. D.C. CODE ANN. § 24-301(d)(1) (1981). Within 50 days of the commitment, the patient is entitled to a judicial release hearing at which he has the burden of proving by a preponderance of the evidence that he is no longer mentally ill or dangerous. D.C. CODE ANN. §§ 24-301(d)(2)(A),(B) (1981). Section 24-301(d)(2)(B) provides in relevant part:

> If the hearing is not waived, the court shall cause notice of the hearing to be served upon the person, his counsel, and the prosecuting attorney and hold the hearing. Within 10 days from the date the hearing was begun, the court shall determine the issues and make findings of fact and conclusions of law with respect thereto. The person confined shall have the burden of proof. If the court finds by a preponderance of the evidence that the person confined is entitled to his release from custody, either conditional or unconditional, the court shall enter such order as may appear appropriate.

D.C. CODE ANN. § 24-301(d)(2)(B) (1981). If the patient is unable to obtain release, he is entitled to subsequent release hearings at six-month intervals. D.C. CODE ANN. § 24-301(k) (1981).

[77] Jones v. United States, 463 U.S. 354, 360 (1983). The petitioner twice failed to establish his eligibility for release by preponderance of the evidence. *Id.* The petitioner argued that his hospitalization period exceeded the maximum prison term that he would have served, and demanded new commitment proceedings using the more stringent commitment standards that were afforded to candidates for civil commitment. *Id.*

[78] *Id.* at 369. Asserting that the petitioner's due process and equal protection arguments were essentially identical, the Court opined that "if the Due Process Clause does not require that an insanity acquittee be given the particular procedural safeguards provided in a civil-commitment hearing under *Addington*, then there necessarily is a rational basis for equal protection purposes for distinguishing between civil commitment and commitment of insanity acquittees." *Id.* at 362 n.10. For a harsh criticism of the Court's use of rational basis scrutiny in these instances, see Margulies, *supra* note 71, at 814-18. Margulies suggests that a middle-tier scrutiny is necessary to protect acquittees from commitment statutes that may be motivated by a concealed desire to impermissibly punish the acquittee. *Id.* at 815. Margulies argues:

> Applying this type of rubber-stamp scrutiny to a case concededly involving liberty interests smacks of judicial overkill. The Court's labeling insanity acquittees a 'special class' for equal protection purposes does not explain, but

establishes that a defendant committed a crime because of her mental illness,[79] the Court concluded that an insanity verdict is sufficiently probative of dangerousness and mental illness to justify commitment for treatment of the individual and protection of society.[80]

Furthermore, Justice Powell declared that in a criminal case, proof of the defendant's insanity by a preponderance of the evidence complies with due process.[81] The Justice explained that the procedures involved in an insanity acquittal diminish the risk of an erroneous commitment, because the defendant herself raises the insanity defense.[82] Justice Powell reasoned that, because the purposes of an insanity commitment differ from the purposes of a criminal sentence,[83] a state need not

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> merely restates, its lack of concern for acquittees' liberty interests. Indeed, the Court's free use of the phrase 'special class' as a justification for providing acquittees less process than is due convicted felons might make one wonder whether the majority, despite its assertion that acquittees cannot be punished, believes that they should be.

Id. at 817-18 (internal citations omitted). By contrast, Justice Kennedy in Foucha v. Louisiana argued that a heightened due process scrutiny should not apply once a state establishes the elements of a crime beyond a reasonable doubt. *See* 112 S. Ct. 1780, 1792 (1992) (Kennedy, J., dissenting).

[79] *Jones*, 463 U.S. at 363-64.

[80] *Id.* at 366. The Court explained that reasonable legislative judgments deserve particular deference, especially in light of the uncertainty of diagnosis prevalent in the mental health field. *Id.* at 364 n.13. The Court found it neither unreasonable nor unconstitutional for Congress to determine that a person who has committed a criminal act is dangerous. *Id.* at 364. With regard to the statutory presumption of an acquittee's continued mental illness, the Court stated that it is a matter of "common sense to conclude that someone whose mental illness was sufficient to lead him to commit a criminal act is likely to remain ill and in need of treatment." *Id.* at 366.

[81] *Id.* at 368.

[82] *Id.* at 367. The Court reasoned that the higher clear and convincing standard is not necessary because the District of Columbia insanity acquittal statute requires that the defendant himself raise the insanity defense and prove commission of the crime due to mental illness. *Id.* (citing D.C. CODE ANN. § 24-301(d)(1) (1981)). The Court noted that these proof requirements diminish the concern that an individual could be committed for idiosyncratic behavior alone. *Id.* Moreover, the Court determined that any deprivaton of liberty that would result from an improper commitment is diminished because a defendant who asserts the insanity defense is already stigmatized by the verdict itself. *Id.* at 367 n.16.

[83] *Id.* at 368-69. The Court noted that the purpose of commitment following an insanity acquittal is to treat the person's mental illness and to protect society from his probable dangerousness. *Id.* at 368. If the insanity acquittee fully recovers, then he must be released regardless of the seriousness of the crime committed. *Id.* at 369. In contrast, a prison sentence is intended to reflect the seriousness of the crime as well as considerations of retribution, deterrence, and rehabilitation. *Id.* at 368-69.

release an acquittee merely because she has been hospitalized beyond the prison sentence she would have served had she been convicted.[84]

In a vigorous dissent, Justice Brennan expressed his discontent with the Court's framing of the issue at hand.[85] Justice Brennan maintained that the issue was not whether the state could confine the petitioner in a mental hospital beyond the prison sentence he would have served had he been convicted, but rather whether an insanity verdict, without more, provides a constitutionally adequate justification for indefinite confinement in a mental institution.[86] Justice Brennan argued that neither a punishment rationale nor a finding of criminal insanity would sufficiently justify an indefinite confinement without the due process requirements associated with civil commitment.[87]

Moreover, the Justice noted that because the government interests in committing an insanity acquittee are identical to the interests involved

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Commentators have widely criticized *Jones* for failing to distinguish between violent and nonviolent mentally ill persons and for accepting a lower standard of proof for confinement of insanity acquittees. *See, e.g.*, Wexler, *supra* note 71, at 548; Ellis, *supra* note 6, at 972-80; Thomas G. Brophy, Jones v. United States: *Indefinite Confinement of Insanity Acquittees*, 10 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 405, 425 (1984); Note, *Commitment Following an Insanity Acquittal*, 94 HARV. L. REV. 605, 618 (1981) [hereinafter *Commitment Following an Insanity Acquittal*].

[84] Jones v. United States, 463 U.S. 354, 368 (1983).

[85] *Id.* at 371 (Brennan, J., dissenting).

[86] *Id.* The Justice noted that none of the Court's precedents directly address the due process implications of involuntary commitments of persons acquitted by reason of insanity. *Id.* Interpreting the holdings of *O'Connor* and *Addington*, Justice Brennan stated that these cases taken together produce a balancing test in which three factors must be analyzed: (1) the governmental interest in confining and treating the mentally ill and dangerous; (2) the government's difficult proof burden with respect to mental illness and dangerousness; and (3) the massive intrusion upon individual liberty that results from involuntary psychiatric hospitalization. *Id.* at 372 (Brennan, J., dissenting).

[87] *See id.* at 373-75 (Brennan, J., dissenting). The Justice declared that the majority's holding was inconsistent with the Court's position in other commitment contexts. *Id.* at 375 (Brennan, J., dissenting). Specifically, Justice Brennan analogized the present case to *Addington* and *Jackson*, where the petitioners were alleged to have committed criminal acts, but nevertheless were entitled to the due process safeguards associated with civil commitment. *Id.* While conceding that the petitioners in *Addington* and *Jackson* were never actually convicted of a crime, as in the case at bar, the Justice noted that *Humphrey* could not be so readily distinguished. *Id.* at 375-76 (Brennan, J., dissenting). Justice Brennan explained that in *Humphrey*, the mentally ill petitioner was likewise convicted of a crime and confined beyond the maximum sentence that he would have served. *Id.* Thus, the Justice reasoned that Jones was entitled to the same civil commitment safeguards that were afforded to the petitioner in *Humphrey*. *Id.* at 376 (Brennan, J., dissenting).

in *Humphrey*, *Baxstrom*, *O'Connor* and *Addington*, the government cannot substitute the fact findings necessary in an insanity acquittal for the civil commitment safeguards required by the Due Process Clause.[88] Justice Brennan warned the majority that an indefinite commitment based on an insanity acquittal alone would create a risk of an erroneous commitment for mere idiosyncratic behavior[89] and an increased risk of a wrongful deprivation of the acquittee's liberty interest.[90] Finally, Justice Brennan concluded that an indefinite commitment is not reasonably related to the government interest in confining insanity acquittees unless the acquittee is afforded the due process protections set forth in *Addington* and *O'Connor*.[91]

III. *FOUCHA v. LOUISIANA*: THE COURT'S RETREAT FROM ITS RECENT CURTAILMENT OF THE DUE PROCESS RIGHTS OF INSANITY ACQUITTEES

As the *Jones* decision illustrates, the Court had embraced the view

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[88] *Id.* at 377 (Brennan, J., dissenting). Justice Brennan conceded that research suggests that a recent history of violent behavior increases the probability that an individual will commit further violent acts in the future. *Id.* at 378 (Brennan, J., dissenting). However, Justice Brennan stated that there is no empirical evidence to suggest that an insanity acquittee is prone to a *higher* rate of future dangerous conduct than a civil committee who has a similar arrest record. *Id.* at 380-81 (Brennan, J., dissenting). Therefore, the Justice reasoned that "the causal connection between mental condition and criminal behavior that 'not guilty by reason of insanity' formulations universally include is more a social judgment than a sound basis for determining dangerousness." *Id.* at 381 (Brennan, J., dissenting).

Justice Brennan emphasized that researchers attempting to predict future dangerousness based on a set of facts involving violent behavior have been incorrect approximately two-thirds of the time, and that research concerning the predictive value of nonviolent behavior is practically nonexistent. *Id.* at 378-79 (Brennan, J., dissenting). According to Justice Brennan, the uncertainty evident in virtually all research in this area raises serious doubts as to the propriety of the majority's reliance on the insanity verdict to distinguish insanity acquittees and civil committees. *Id.* at 380 (Brennan, J., dissenting). For a critical analysis of a post-*Jones* sex offender statute that permits confinement beyond the prison sentence based on predictions of future dangerousness, see Gary Gleb, *Washington's Sexually Violent Predator Law: The Need to Bar Unreliable Psychiatric Predictions of Dangerousness from Civil Commitment Proceedings*, 39 U.C.L.A. L. REV. 213, 222-28 (1991). *See also* Elyce H. Zenoff, *Controlling the Dangers of Dangerousness: The ABA Standards and Beyond*, 53 GEO. WASH. L. REV. 562 (1985).

[89] Jones v. United States, 463 U.S. 354, 383-84 (1983) (Brennan, J., dissenting) (citing *Addington*, 441 U.S. at 427).

[90] *Id.*

[91] *Id.* at 386 (Brennan, J., dissenting) (describing the substantive and procedural due process protections).

that an insanity acquittal is sufficiently probative of mental illness and dangerousness to justify an acquittee's indefinite confinement without the higher standards required for a civil commitment.[92] Thereafter, in *Foucha v. Louisiana*,[93] the Court considered whether a state can continue to confine an insanity acquittee who has recovered his sanity but still remains a danger to society.[94]

Writing for a sharply divided court, Justice White reviewed the due process standards for civil commitment proceedings, which require a state to prove by clear and convincing evidence that an individual is mentally ill and dangerous to himself or others.[95] Justice White noted that, although *Jones* permits a state to commit an insanity acquittee to a mental institution without satisfying the dual requirements of *Addington*,[96] an acquittee must be released if he later recovers his sanity or is no longer dangerous.[97] Justice White reasoned that, because Louisiana failed to establish Foucha's mental illness at the time of his release hearing, the state could no longer detain Foucha as an "insane" acquittee.[98]

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[92] For an in-depth analysis of *Jones*, see *supra* notes 71-91 and accompanying text.

[93] 112 S. Ct. 1780 (1992). Justice White delivered the opinion of the Court with respect to Parts I and II, in which Justices Blackmun, Stevens, O'Connor, and Souter joined. *Id.* at 1781. Justice White delivered Part III of the opinion, joined by Justices Blackmun, Stevens, and Souter. *Id.* at 1788. Justice O'Connor concurred in Parts I and II and concurred in the judgment in Part III of the opinion. *Id.* at 1789 (O'Connor, J., concurring). Justice Kennedy wrote a dissenting opinion in which Chief Justice Rehnquist joined. *Id.* at 1791 (Kennedy, J., dissenting). Justice Thomas authored a separate dissent, in which Chief Justice Rehnquist and Justice Scalia joined. *Id.* at 1797 (Thomas, J., dissenting).

[94] *See id.* at 1782.

[95] *Id.* at 1783 (citing *Addington v. Texas*, 441 U.S. 418, 420-27 (1979)).

[96] *Id.* (citing Jones v. United States, 463 U.S. 354, 364-65 (1983)). *See supra* note 78 and accompanying text (discussing the parallel due process approach to insanity commitments elucidated in *Addington*).

[97] *Foucha*, 112 S. Ct. at 1784 (citing *Jones*, 463 U.S. at 368). Justice White recognized that the not guilty by reason of insanity verdict establishes that a defendant committed a criminal act and that he committed the act because of a mental illness. *Id.* at 1783. The Justice pointed out that a defendant's mental illness and dangerousness could be inferred from the insanity verdict and would justify the initial commitment. *Id.* Justice White indicated, however, that the confinement could not continue once the acquittee recovered his sanity or was no longer dangerous. *Id.* at 1784.

[98] *Id.* at 1784. Relying on the *Jones* holding that an acquittee "is entitled to release when he has recovered his sanity or is no longer dangerous," Justice White proclaimed that "the acquittee may be held as long as he is both mentally ill and dangerous, but no longer." *Id.* (citing *Jones*, 463 U.S. at 368).

In rejecting the state's argument that Foucha's antisocial personality justified his continued confinement, the majority held that dangerousness alone is not a constitutionally adequate basis upon which to confine an insanity acquittee.[99] First, Justice White opined that Foucha's involuntary confinement at a mental institution is improper unless a civil commitment proceeding is held to determine whether he is currently mentally ill and dangerous.[100] Observing that due process requires a reasonable relationship between the nature of the commitment and the purpose for which the individual is committed, the Court stated that, because Foucha is no longer mentally ill, he cannot reasonably be confined as an insanity acquittee.[101]

Second, the majority postulated that if Foucha could no longer be committed on the ground that he was mentally ill, then *Jackson v. Indiana* required that Foucha be afforded "constitutionally adequate procedures" to determine the reason for his continued confinement.[102] Stressing that both a criminal defendant who is incompetent to stand trial and a convicted criminal who is serving the end of his prison term are entitled to the protections afforded by civil commitment proceedings, the Court concluded that an insanity acquittee must also be entitled to the same protections.[103]

Finally, Justice White proclaimed that the substantive component of the Due Process Clause protects an insanity acquittee's interest in freedom from bodily restraint.[104] Recognizing that a state can confine convicted criminals or mentally ill persons pursuant to its police powers, the Court reasoned that Foucha could not be confined because he had

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[99] *Id.* at 1784.

[100] *Id. See* Vitek v. Jones, 445 U.S. 480, 493 (1980) (holding that a prisoner has a liberty interest protected by the Due Process Clause that prohibits his transfer to a mental institution unless compliance with certain procedural safeguards is achieved). After *Vitek*, many commentators adopted the view that insanity acquittees were entitled to the same procedural protections as those afforded to civil commitment candidates. *See* Parry, *supra* note 3, at 218.

[101] Foucha v. Louisiana, 112 S. Ct. 1780, 1785 (1992) (citing Jones v. United States, 463 U.S. 354, 368 (1983)).

[102] *Id.* (citing Jackson v. Indiana, 406 U.S. 715, 738 (1972)). *See supra* notes 40-48 and accompanying text (discussing in detail the constitutionally adequate protections pronounced in *Jackson*).

[103] *Id.*

[104] *Id.* at 1785-86. Justice White recognized that "the Due Process Clause contains a substantive component that bars certain arbitrary, wrongful government actions 'regardless of the fairness of the procedures used to implement them.'" *Id.* at 1785 (quoting Zinermon v. Burch, 494 U.S. 113, 125 (1990)).

not been previously convicted and was not currently mentally ill.[105]

The majority distinguished the *Foucha* decision from *United States v. Salerno*[106] on the basis that the latter involved the pretrial detention of arrestees under a "carefully limited" statute that required clear and convincing evidence of an arrestee's dangerousness as a prerequisite for pretrial detention.[107] Furthermore, Justice White rejected the argument that Foucha may be confined indefinitely solely because he committed a crime and is considered dangerous.[108] The majority explained that if it permitted such a justification, both insanity acquittees and convicted criminals could be confined indefinitely based solely on a dangerousness rationale.[109] Justice White postulated that because a confinement scheme based on dangerousness alone[110] conflicts with our current

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[105] *Id.* at 1785-86. For further discussion of the state's authority to commit mentally ill individuals under its police power, see *supra* note 1.

[106] 481 U.S. 739, 749 (1987). In *Salerno*, several criminal defendants were detained without bail pursuant to the Bail Reform Act of 1984, a federal statute providing for the detainment of pretrial arrestees without bail. *Id.* at 743. The arrestees claimed that the Act violated the Due Process Clause and was unconstitutional on its face. *Id.* at 744-45. In upholding the statute, the Supreme Court noted that the Act applied only to limited detentions for serious crimes, and required the government to prove by clear and convincing evidence that an arrestee posed an articulable threat to the community or an individual. *Id.* at 751. The Court concluded that under these narrow circumstances, the government's compelling interest in preventing danger to the community would justify the detainment of a pretrial arrestee and outweigh her liberty interest under the Due Process Clause. *Id.* at 749-51.

[107] Foucha v. Louisiana, 112 S. Ct. 1780, 1786 (1992) (citing *Salerno*, 481 U.S. at 747). The Court acknowledged that under certain narrow circumstances, such as those in *Salerno*, an individual may be confined temporarily on the basis of his dangerousness alone. *Id.* The Court explained that in *Salerno*, the pretrial detention statute implicated the government's compelling interest in preventing crime by arrestees, and was carefully limited to serious crimes. *Id.* Moreover, the Court explained that the statutory scheme in *Salerno* involved strictly limited detention periods, and required the government to prove by clear and convincing evidence that an arrestee poses a danger to an individual or to the community. *Id.* at 1786 (citing *Salerno*, 481 U.S. at 751). Justice White observed that, unlike in *Salerno*, the Louisiana statute at issue in *Foucha* was not carefully limited and did not impose upon the state the burden of proving that continued detention was justified. *Id.* at 1787.

[108] *Id.* at 1787.

[109] *Id.*

[110] It has been argued that a state's interest in treatment does not justify commitment of a dangerous person who is not mentally ill. *See* Joseph M. Livermore et al., *On the Justifications for Civil Commitment*, 117 U. PA. L. REV. 75, 86 (1968). One commentator has asserted that the fact that an insanity acquittee has committed an act that is normally punishable "does not necessarily make him more dangerous than those facing civil

criminal law system that mandates proof beyond a reasonable doubt, the Louisiana statute is not the type of carefully limited exception that the Due Process Clause permits.[111]

Writing separately for a plurality, Justice White, joined by Justices Blackmun, Stevens and Souter, maintained that the Louisiana scheme violates the Equal Protection Clause by treating Foucha differently from other persons subject to civil commitment.[112] Defining freedom from physical restraint as a fundamental right, Justice White articulated that there is no constitutionally adequate justification for denying an insanity acquittee the procedural safeguards currently afforded to mentally ill persons and convicted criminals.[113]

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commitment." *Commitment Following An Insanity Acquittal, supra* note 83, at 609. The author argues:

> Defendants are acquitted by reason of insanity for many types of crimes, not only violent ones. Although it is admittedly disreputable to attempt to steal a coat or knowingly to draw small checks on insufficient funds, defendants who have done these things are hardly so dangerous as to be classified wholly apart from candidates for civil commitment. . . .
>
> Finally, even if all insanity acquittees had committed dangerous acts that prospective civil patients had not, there is some question whether they would continue to be dangerous in the future. In some cases crimes may be the product of stresses that are unlikely to recur. Some researchers who have observed populations of the criminally insane, in fact, have concluded that they are not significantly more dangerous than others. This undermines the assumption that insanity acquittees pose a greater threat to public safety than do ordinary civil commitment patients.

Id. at 610-611 (internal citations omitted).

[111] *Foucha*, 112 S. Ct. at 1787.

[112] *Id.* at 1788.

[113] *Id.* Commentators have suggested various rationales to justify affording less procedural protections to insanity acquittees. *See infra* note 29 (articulating several rationales justifying automatic and mandatory commitment of insanity acquittees). Prior to *Jones*, some courts had sustained lower commitment or release standards for insanity acquittees. *See, e.g.*, Hickey v. Morris, 722 F.2d 543 (9th Cir. 1983) (upholding Washington statute permitting release of insanity acquittee only if there exists no substantial danger to other persons or no substantial danger of commission of dangerous felonies); Harris v. Ballone, 681 F.2d 225, 228 (4th Cir. 1982) (upholding Virginia statute permitting release of insanity acquittee only if acquittee recovers sanity and release would pose no danger to public or himself); Warren v. Harvey, 632 F.2d 925, 932 (2d Cir. 1980), *cert. denied*, 449 U.S. 902 (1980) (permitting preponderance of the evidence standard for commitment of insanity acquittee, justified by acquittee's commission of criminal act and risk of abuse of insanity defense); State v. Mahone, 379 N.W.2d 878, 883-85 (Wis. Ct. App. 1985) (upholding Wisconsin statute allowing release of insanity acquittee only if there would be no danger to himself or others). *But see, e.g.*, Benham v. Edwards, 678 F.2d 511, 542 (5th Cir.1982) (holding that insanity acquittees and civil

Justice O'Connor wrote separately to emphasize that the Court's holding only addresses Louisiana's statutory scheme and leaves open the possibility that a more narrowly drawn statute might be constitutionally permissible.[114] Justice O'Connor reasoned that, although insanity acquittees are not punishable as criminals, the requisite preliminary finding of criminal conduct under Louisiana law "sets them apart from ordinary citizens."[115] In light of this distinction, Justice O'Connor asserted that the permissibility of confining an insanity acquittee who is not currently mentally ill depends upon the nature and duration of the detention, the state's medical justification, and the nature of the particular crime.[116]

In a vehement dissent, Justice Kennedy, joined by Chief Justice Rehnquist, found that the Louisiana scheme vindicated legitimate state interests and comported with due process.[117] Justice Kennedy criticized the majority for failing to address the fact that a verdict of not guilty by reason of insanity, like a criminal conviction, requires the state to prove

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commitment candidates are both entitled to procedural safeguards of commitment hearing); Bolton v. Harris, 395 F.2d 642, 651 (D.C. Cir. 1968) (holding that insanity acquittees are entitled to commitment hearings that are substantially similar to those afforded to civil commitment candidates).

[114] Foucha v. Louisiana, 112 S. Ct. 1780, 1789 (1992) (O'Connor, J., concurring). Justice O'Connor noted that "courts should pay particular deference to reasonable legislative judgments" concerning the relationship between dangerousness and mental illness. *Id.* (citing Jones v. United States, 463 U.S. 354, 365 n.13 (1983)). Justice O'Connor further explained that the Court's holding would not necessarily invalidate the eleven statutory schemes to which Justice Thomas alluded in his dissenting opinion. *Id.* at 1790 (O'Connor, J., concurring). *See infra* note 136 (listing eleven state statutes that provide for continued confinement of insanity acquittees who are dangerous but no longer mentally ill).

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

[116] *Id.* at 1789-90 (O'Connor, J., concurring). Justice O'Connor hypothesized that a scheme could constitutionally provide for confinement of an insanity acquittee who had regained his sanity if the nature and duration of the confinement were "tailored to reflect pressing public safety concerns related to the acquittee's continuing dangerousness." *Id.* (citing United v. Salerno, 481 U.S. 739, 747-51 (1987)). Justice O'Connor explained that in *Salerno*, the Supreme Court upheld a statute permitting pretrial detention of arrestees for a limited time and only for certain types of serious offenses. *Id.* at 1790 (O'Connor, J., concurring). *See also* Schall v. Martin, 467 U.S. 253, 264-71 (1984) (upholding statutes authorizing detention of juveniles limited to period of seventeen days and only to protect the child and society from future criminal acts).

[117] *Foucha*, 112 S. Ct. at 1791 (Kennedy, J., dissenting).

all of the elements of a crime.[118]

Furthermore, Justice Kennedy argued that the Court's failure to characterize this case as criminal in nature "leads it to conflate the standard for civil and criminal commitment in a manner not permitted by our precedents."[119] Justice Kennedy contended that, by requiring

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[118] *Id.* Justice Kennedy argued that "[the *Jones*] distinction between civil and criminal commitment is both sound and consistent with long-established precedent." *Id.* at 1793 (Kennedy, J., dissenting). The dissenting Justice asserted that regardless of whether a defendant enters a plea of insanity, the state still shoulders the initial burden of proving the elements of the underlying offense under *In re* Winship. *Id.* (citing In re Winship, 397 U.S. 358, 364 (1970) (holding that the state bears the burden of proving guilt beyond a reasonable doubt in all criminal cases, including those in which the defendant is a juvenile)). Justice Kennedy explained that in Leland v. Oregon, for example, the Court upheld a state law requiring the defendant to prove insanity beyond a reasonable doubt provided that the state met its initial burden of proving all elements of the criminal offense. *Id.* at 1791-92 (Kennedy, J., dissenting) (citing 343 U.S. 790, 795-96 (1952)). *See also* Patterson v. New York, 432 U.S. 197, 206 (1977) (defendant's insanity defense is considered only after the state proves all elements of the crime beyond a reasonable doubt). Justice Kennedy noted that deprivations of physical liberty *after* a criminal adjudication are not subject to a heightened due process scrutiny. *Foucha*, 112 S. Ct. at 1792 (Kennedy, J., dissenting) (citing *Salerno*, 481 U.S. at 750-51; Jackson v. Indiana, 406 U.S. 715, 738 (1972)). The Justice reasoned that because the state complied with the *Winship* burden of proof with respect to all elements of the crime, Foucha could be incarcerated on any reasonable basis. *Id.*

[119] *Id.* at 1793 (Kennedy, J., dissenting). Justice Kennedy asserted that in this criminal case, the majority erred in relying on *O'Connor* and *Addington*, which defined the due process limits on involuntary *civil* commitment. *Id.* at 1791 (Kennedy, J., dissenting). Emphasizing the fact that Foucha was armed, the Justice described in greater detail the facts out of which the criminal charges arose: "It began one day when petitioner, brandishing a .357 revolver, entered the home of a married couple, intending to steal. He chased them out of their home and fired on police officers who confronted him as he fled." *Id.* (citations omitted). Indeed, several commentators have suggested that there are valid justifications for treating insanity acquittees charged with violent crimes differently from all other individuals who may require treatment in a mental institution. *See, e.g.*, Weiner, *supra* note 6, at 1067; Ingber, *supra* note 26, at 294. For instance, Ingber argues:

> The state's basic interest in protecting the public from harmful acts justifies special procedures for classes of persons that the legislature, in exercising its factfinding competence, identifies as likely to be particularly dangerous due to mental illness. Persons recently acquitted of violent offenses by reason of insanity are, as a group, more dangerous than candidates for civil commitment in general. . . . The recent commission of a violent act significantly increases the probability that an individual will commit further such acts in the future. This judgment is not simply a popular notion; the clinical consensus is that a history of violent behavior in an individual is the single best predictor of future violence. This view is supported by studies of insanity acquittees, which indicate a recidivism rate equal to that of prison populations.

civil confinement proceedings for insanity acquittees, the majority effectively overrules *Jones*.[120]

Moreover, Justice Kennedy disagreed with the Court's reliance on the fact that Louisiana does not claim that Foucha is now mentally ill.[121] Noting that Louisiana's test for insanity turns on the defendant's mental condition at the time the offense is committed, Justice Kennedy maintained that Foucha's present condition is simply irrelevant in determining whether continued confinement is justified.[122]

Justice Kennedy argued that the Louisiana confinement scheme is legitimate, because in addition to satisfying the reasonable doubt standard, the state has established a reasonable basis for "incapacitative incarceration" based on the dangerousness of the insanity acquittee.[123]

> In contrast, the class of civil commitment candidates includes many individuals with no history of violent behavior. Although some may have displayed a potential for violence through an "overt act," civil commitments often are imposed on the basis of threats of violence, which are relatively poor predictors of future violence.

Ingber, *supra* note 26, at 294-96.

[120] Foucha v. Louisiana, 112 S. Ct. 1780, 1793 (Kennedy, J., dissenting). Justice Kennedy argued that the Court ignored the principle that "the Due Process Clause permits automatic incarceration after a criminal adjudication and without further process." *Id.*

[121] *Id.* at 1794-95 (Kennedy, J., dissenting).

[122] *Id.* at 1795 (Kennedy, J., dissenting). Justice Kennedy maintained that present sanity would be relevant only if Foucha was committed in civil proceedings, where confinement is based on predictions of future behavior. *Id.* at 1794-95 (Kennedy, J., dissenting). The Justice pointed out that Foucha was committed on the basis of his past criminal conduct and past insanity. *Id.* at 1795 (Kennedy, J., dissenting). Therefore, Justice Kennedy concluded that Foucha's present sanity was not relevant to his confinement. *Id.* The dissenting Justice further explained that although Louisiana has declined to punish insanity acquittees, it has not relinquished its interest in incapacitative confinement. *Id.* *See generally* Ingber, *supra* note 26, at 284-85, 294-303.

[123] *Foucha*, 112 S. Ct. at 1795 (Kennedy, J., dissenting). Justice Kennedy observed that "[t]he Constitution does not require any particular model for criminal confinement . . ." *Id.* (citing Harmelin v. Michigan, 111 S. Ct. 2680, 2685-86 (1991) (Kennedy, J., concurring)). Therefore, the Justice reasoned that once a state proves the elements of a crime beyond a reasonable doubt, the state may incarcerate an individual on any reasonable basis. *Id.* Noting that a dangerousness rationale is a widely accepted basis for the confinement of insanity acquittees, Justice Kennedy concluded that Foucha's incarceration for the protection of society was reasonable. *Id.* Moreover, Justice Kennedy found no constitutional significance in the fact that Foucha, a presently sane person, was confined in an institution for the mentally ill. *Id.* at 1796 (Kennedy, J., dissenting). The Justice noted that "[a] criminal defendant who successfully raises the insanity defense necessarily is stigmatized by the verdict itself, and thus the commitment

Addressing the majority's concern that the confinement represents an "indefinite detention," Justice Kennedy noted that Foucha has been incarcerated for less than one-third the maximum prison sentence and has been unable to establish his nondangerousness.[124]

Justice Thomas, joined by Chief Justice Rehnquist and Justice Scalia, authored a scathing dissent.[125] Justice Thomas criticized the Court for failing to closely examine Louisiana's statutory scheme and its application to this case.[126] The Justice explained that under the Louisiana commitment scheme, a verdict of not guilty differs substantially from a verdict of not guilty by reason of insanity.[127] Justice Thomas observed that the latter establishes that the defendant committed the elements of a crime but was exempted from criminal responsibility due to his mental condition.[128] Justice Thomas reasoned that Foucha's continued confinement is consistent with the Due Process Clause because Foucha was afforded the procedural and substantive protections required by the Louisiana commitment statute.[129]

Justice Thomas further argued that the Court's procedural due

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causes little additional harm in this respect." *Id.* at 1796 (citing *Jones*, 463 U.S. at 367 n.16). Some commentators maintain, however, that commitment constitutes a further stigmatization of the acquittee:

> Rather than being freed of the stigma of a criminal label, the acquitted patient finds himself doubly cursed as both a "criminal" and "mental patient" and doubly neglected, for mental illness has been used to deny him the strict due process safeguards normally accorded prisoners, while his connection with the criminal justice system diminishes his chances for release when in-patient treatment is no longer medically indicated.

German & Singer, *supra* note 3, at 1011-12.

[124] *Foucha*, 112 S. Ct. at 1796-97 (Kennedy, J., dissenting). Agreeing with Justice Thomas, Justice Kennedy stated that "this is not a case in which the period of confinement exceeds the gravity of the offense or in which there are reasons to believe the release proceedings are pointless or a sham." *Id.* at 1796 (Kennedy, J., dissenting). *See supra* notes 125-145 and accompanying text (discussing Justice Thomas' dissent in detail). Given that Foucha failed to demonstrate his harmlessness, and the fact that the panel responsible for reviewing his request for release indicated that he never exhibited signs of mental illness after his admission, Justice Kennedy suggested the Foucha may have "feigned" his initial claim of insanity. *Foucha*, 112 S. Ct. at 1797 (Kennedy, J., dissenting).

[125] *Foucha*, 112 S. Ct. at 1797 (Thomas, J., dissenting).

[126] *Id.*

[127] *Id.* at 1797-98 (Thomas, J., dissenting).

[128] *Id.* *See supra* note 5 and accompanying text (discussing the elements of the insanity defense).

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

process analysis actually amounted to an equal protection approach.[130] Justice Thomas explained that an insanity acquittee differs from a civil committee because the former has been convicted of a crime based on proof beyond a reasonable doubt.[131] Based on this distinction, Justice Thomas argued that a state confinement scheme which grants lesser procedural rights to an insanity acquittee than to a civil committee does not violate the Equal Protection Clause.[132] Justice Thomas asserted that the majority circumvented *Jones* by effectively holding that a State's interest in confinement of insanity acquittees ceases after an acquittee recovers his sanity.[133]

Moreover, Justice Thomas proffered that a state scheme[134] calling

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[130] *Id.*

[131] *Id.* Justice Thomas noted that *Jones* permits a state to treat insanity acquittees differently from other candidates for commitment. *Id.* at 1801 (Thomas, J., dissenting) (citing Jones v. United States, 463 U.S. 354, 370 (1983)). The Justice averred that regardless of civil commitment standards, the not guilty by reason of insanity verdict creates a reasonable inference of dangerousness and insanity to support automatic commitment, and justifies indefinite commitment without proof of insanity by clear and convincing evidence. *Id.* at 1800 (Thomas, J., dissenting). For a more elaborate discussion of the *Jones* holding, see *supra* notes 71-91 and accompanying text.

[132] Foucha v. Louisiana, 112 S. Ct. 1780, 1800, 1804 n.11 (1992) (Thomas, J., dissenting).

[133] *Id.* at 1801 (Thomas, J., dissenting). Justice Thomas suggested several justifications for treating insanity acquittees differently from civil commitment candidates regardless of their current diagnosed mental condition. *Id.* For example, the Justice opined that in light of the level of uncertainty inherent in the diagnosis and treatment of mental disease, it would be "unwise, given our present understanding of the human mind, to suggest that a determination that a person has 'regained sanity' is precise." *Id.* Furthermore, Justice Thomas stated that an acquittee's prior dangerous conduct manifested through his commission of a criminal act is more relevant to the issue of his continued confinement than his present sanity. *Id.*

[134] Justice Thomas explained that Article 657 of the Louisiana Code of Criminal Procedure is substantially similar to a provision of the current Model Penal Code, which permits continued confinement of insanity acquittees based on dangerousness alone. *Id.* at 1802 n.8 (Thomas, J., dissenting) (citing LA. CODE CRIM. PROC. ANN. art. 657 (West Supp. 1991)); MODEL PENAL CODE § 4.08(3) (Proposed Official Draft 1962)). Several commentators have proposed that special commitment statutes applying only to acquittees charged with *violent* crimes would reduce the risks associated with the premature release of acquittees who remain dangerous. *See, e.g.*, Weiner, *supra* note 6, at 1072-76 (proposing Model Legislation for Proceedings After Being Found Not Guilty by Reason of Insanity); Ellis, *supra* note 6, at 983-90 (discussing the official position statement on the insanity defense issued by the American Psychiatric Association). Similarly, the American Bar Association, in a comprehensive body of proposals addressing the problems of the mentally ill within the criminal justice system, has recommended that commitment schemes differentiate between violent and non-violent

for continued confinement of any dangerous insanity acquittee as a means to deter intentional abuse of the insanity defense falls within constitutional limits.[135] The Justice supported his position by noting that eleven states other than Louisiana provide for continued commitment of an insanity acquittee who remains dangerous, regardless of his sanity.[136]

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insanity acquittees. *See* ABA CRIMINAL JUSTICE MENTAL HEALTH STANDARDS (1984). Section 7-7.3 of the Mental Health Standards proposes:

> (a) Each state should adopt a separate set of special procedures ("special commitment") for seeking the civil commitment of those acquittees who were acquitted by reason of mental nonresponsibility [insanity] of felonies involving acts causing, threatening, or creating a substantial risk of death or serious bodily harm.
> (b) States may seek the civil commitment of mental nonresponsibility [insanity] acquittees who were acquitted of felonies which did not involve acts causing, threatening, or creating a substantial risk of death or serious bodily harm, or of misdemeanors, only by using those procedures ("general commitment") used for the civil commitment of persons outside the criminal justice system, provided that those procedures satisfy the requirements of due process of law.

ABA CRIMINAL JUSTICE MENTAL HEALTH STANDARDS § 7-7.3 (1984). In recommending a dichotomy in the commitment procedures afforded to violent as opposed to non-violent felons who are acquitted on the basis of insanity, the Commentary to § 7-7.3 explains:

> It is undisputed that the public feels threatened by the potential release of mental nonresponsibility [insanity] acquittees. . . . Increasingly, general commitment statutes have been amended to reduce unnecessary institutionalization; the procedures they authorize are structured to facilitate the release of patients as swiftly as possible. This objective accomplished, among other means, through frequent, rigorous periodic review and discretionary, liberal release procedures. Though these provisions are appropriate and arguably constitutionally mandated by due process for patients who pose relatively little danger to others, they may protect the public safety insufficiently in instances involving patients who have committed violent acts in the past.

Id.

[135] *Foucha*, 112 S. Ct. at 1801-02 (Thomas, J., dissenting). Justice Thomas argued that "the citizenry would not long tolerate the insanity defense if a serial killer who convinces a jury that he is not guilty by reason of insanity is returned to the streets immediately after trial by convincing a different factfinder that he is not in fact insane." *Id.*

[136] *Id.* at 1802 n.9 (Thomas, J., dissenting) (citing CAL. PENAL CODE § 1026.2(e) (West Supp. 1992); DEL. CODE ANN. tit. 11, § 403(b) (1987); HAW. REV. STAT. § 704-415 (1985); IOWA R. CRIM. P. 21.8(e) (1979); 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

Justice Thomas concluded that based on the statutory provisions for release hearings, Foucha received a "fair hearing" and the due process clause did not entitle him to additional procedural protection.[137]

Turning to the substantive due process issue, Justice Thomas criticized the majority for failing to identify exactly which substantive right is implicated and whether this right is a fundamental one.[138] Consequently, Justice Thomas suggested two substantive due process rights upon which the Court may have relied in invalidating the Louisiana scheme, and proceeded to attack each.[139]

First, Justice Thomas stated that neither society nor the Court's precedent has ever recognized a "fundamental right to freedom from bodily restraint applicable to *all* persons in *all* contexts."[140] Noting that the Court has never applied strict scrutiny to state laws involving commitment of mentally ill persons or insanity acquittees, Justice Thomas argued that the Louisiana confinement scheme bears a

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1990); WASH. REV. CODE § 10.77.200(2) (1990); WIS. STAT. § 971.17(4) (Supp. 1991). Both the majority and concurrence questioned the accuracy and completeness of Justice Thomas' description of the state statutes because of recent enactments and state court decisions modifying those statutes. *Id.* at 1787-88 n.6, 1790. Justice Thomas responded by stating that the list was cited "only to show that the legislative judgments underlying Louisiana's scheme are far from unique or freakish, and that there is no well-established practice in our society . . . of automatically releasing sane-but-dangerous insanity acquittees." *Id.* at 1802-03 n.9 (Thomas, J., dissenting).

[137] *Id.* at 1803 (Thomas, J., dissenting).

[138] *Id.* at 1804 (Thomas, J., dissenting).

[139] *Id.*

[140] Foucha v. Louisiana, 112 S. Ct. 1780, 1805 (Thomas, J., dissenting). Justice Thomas explained that although liberty interests are protected by the Due Process Clause, few of these liberty interests are classified as fundamental rights. *Id.* The dissenting Justice noted that an alleged deprivation of a fundamental right triggers a heightened strict scrutiny analysis. *Id.* at 1804 (Thomas, J., dissenting). Justice Thomas acknowledged that "freedom from bodily restraint" in the commitment context is a fundamental right under certain circumstances. *Id.* at 1805 n.12 (Thomas, J., dissenting) (citing Youngberg v. Romeo, 457 U.S. 307, 316 (1982)). The Justice opined, however, that "freedom from bodily restraint" was not intended to include *all* types of involuntary confinement. *Id.* Justice Thomas distinguished the restraint involved in *Youngberg* from that in the present case on the ground that the former involved placement of shackles on the arms of a mentally-retarded patient, while Foucha's confinement involved no such unjustified restraint. *Id.* Consequently, Justice Thomas concluded that recovered insanity acquittees do not have a general fundamental right to be free from any type of bodily restraint. *Id.* at 1806 (Thomas, J., dissenting).

reasonable relation to the purposes of the commitment.[141] Finally, Justice Thomas warned that if the Court's holding is interpreted to require the application of strict scrutiny to any restriction on the freedom from bodily restraint, then all commitment statutes for civil acquittees and insanity acquittees would require "revamping" to comply with this heightened standard of judicial review.[142]

Second, Justice Thomas rejected the view that Louisiana's statutory scheme violates some more limited right—the right to be free from indefinite confinement in a mental facility.[143] The Justice stated that it is misleading to characterize Louisiana's confinement scheme as requiring "indefinite" commitment, because an insanity acquittee is entitled to periodic release hearings and must be released if he establishes that he is no longer dangerous.[144] Concluding that Louisiana did not violate Foucha's right to freedom from indefinite confinement, Justice Thomas reasoned that the statutory scheme is "substantively reasonable," and, accordingly, complies with substantive due process.[145]

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[141] *Id.* Justice Thomas noted that the purposes of commitment include the treatment of mental illness and the protection of society. *Id.* The Justice explained that "rational basis" review was applied to the commitments in *Jackson*, *O'Connor*, and *Jones*. *Id.* Further, disputing the majority's assertion that *Jones* required the release of the acquittee when he either recovered his sanity or was no longer dangerous, Justice Thomas argued that what *Jones* really decided was "whether it is permissible to hold an insanity acquittee for a period longer than he could have been incarcerated if convicted, *not* whether it is permissible to hold him once he becomes 'sane.'" *Id.* at 1806-07 (Thomas, J., dissenting).

[142] *Id.* at 1807-08 (Thomas, J., dissenting). Justice Thomas explained that, for example, "the *automatic* commitment of insanity acquittees that we expressly upheld in *Jones* would be clearly unconstitutional, since it is inconceivable that such commitment of persons who may well *presently* be sane and nondangerous could survive strict scrutiny." *Id.* at 1808 (Thomas, J., dissenting) (emphasis in original).

[143] *Id.* Justice Thomas contended that although policy considerations may arguably justify transferring acquittees from mental institutions to other confinement facilities, no legal or historical basis supports a fundamental right for a insanity acquittee who is not presently mentally ill to be transferred out of a mental facility. *Id.* at 1809 (Thomas, J., dissenting).

[144] *Id.* at 1808 (Thomas, J., dissenting).

[145] *Id.* at 1809 (Thomas, J., dissenting). Further, Justice Thomas argued that because the Court did not find that the Louisiana law was unconstitutionally applied in this case, the Court has improperly invalidated a statute on the basis that it *might* be applied unconstitutionally under some hypothetical circumstances. *Id.* at 1808 (Thomas, J., dissenting). The Justice noted that Foucha had thus far been confined for eight years, in comparison to the maximum prison term of 32 years which could have been imposed had he been convicted. *Id.* Justice Thomas reasoned that because Foucha's confinement did not constitute an indefinite commitment, the statute was not applied

IV. CONCLUSION

The *Foucha* decision illustrates that the Supreme Court has failed to provide a clear and principled approach for states to follow in determining the constitutionality of statutory commitment schemes for persons acquitted by reason of insanity. After *Foucha*, it still remains unclear as to whether and to what extent a state may confine a dangerous insanity acquittee who has subsequently recovered his sanity. Undoubtedly, the *Foucha* holding limits a state's ability to set forth more restrictive release standards for insanity acquittees than for civil commitment candidates. An examination of other decisions involving involuntary confinement of mentally ill individuals reveals, however, that *Foucha* invites future uncertainty in this area.

Forming a foundation for future insanity cases, the *Baxstrom* trilogy demonstrated the Supreme Court's willingness to invalidate commitment schemes on equal protection grounds.[146] Later, in *O'Connor* and *Addington*, the Court developed a parallel due process analysis for protecting an individual's liberty interests against involuntary confinement under a statutory civil commitment scheme.[147] This series of liberty-protective cases, however, was interrupted by *Jones*, a landmark decision addressing the due process rights of an insanity acquittee.[148] In *Jones*, the Court mandated less stringent due process safeguards for the commitment of insanity acquittees, creating a bifurcated approach that distinguished between insanity acquittees in criminal cases and candidates subject to civil commitment.[149] The Court's recent pronouncement in *Foucha* ignores the spirit of *Jones* by invalidating a Louisiana scheme that requires less stringent safeguards for the release of insanity acquittees than for civil committees. The fact that *Jones* and *Foucha* are closely decided five-to-four decisions suggests that the Court remains deeply divided on the issue of whether and for how long to subject insanity acquittees to continued confinement.

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unconstitutionally. *Id.*

[146] *See supra* notes 28-33 and accompanying text (discussing the *Baxstrom* decision in detail).

[147] *See supra* note 77 and accompanying text (discussing the Court's parallel due process approach).

[148] *See supra* notes 71-91 and accompanying text (discussing the *Jones* decision in greater detail).

[149] *See supra* note 113 and accompanying text (discussing several lower court decisions upholding statutes that afforded less procedural protection to insanity acquittees than to civil commitment candidates).

Indeed, the failure of *Jones* and *Foucha* to yield a cohesive, unified approach exacerbates the fragmented views embodied within the *Foucha* decision itself. The fragile five-to-four *Foucha* majority holds that a statute allowing continued confinement of an insanity acquittee on the basis of his antisocial personality alone, after the acquittee no longer exhibits signs of mental illness, violates due process of law.[150] The *Foucha* Court thus concludes that an insanity acquittee who exhibits antisocial behavior must be released if he recovers his sanity, thereby reaffirming the existence of an acquittee's liberty interests.[151] Read broadly, this holding mandates that the same conjunctive test for continued confinement[152] be applied to both civil committees and insanity acquittees despite the recognition in *Jones* that an acquittee's commission of a criminal act distinguishes him from others.[153] Unfortunately, by requiring the same standard of release for both insanity acquittees and civil committees, *Foucha* defies the logic and reasoning of *Jones*, which permits a lower standard of proof for commitment of insanity acquittees than for civil committees.[154]

Moreover, the majority fails to explain the appropriate standard of review for problematic confinements or the particular elements of an acquittee's liberty interest.[155] In separate dissents, Justice Kennedy and Justice Thomas indicate that proof of the commission of a criminal act beyond a reasonable doubt justifies continued confinement because it

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[150] Foucha v. Louisiana, 112 S. Ct. 1780, 1787 (1992).

[151] *See id.* at 1784-87. In *O'Connor*, the Court held that a nondangerous person cannot be confined on the basis of mental illness alone. *See* O'Connor v. Donaldson, 422 U.S. 563, 575 (1975). In contrast, *Foucha* holds that a sane person cannot be confined on the basis of antisocial behavior alone. *See Foucha*, 112 S. Ct. at 1784-87.

[152] *O'Connor* held that the state must prove that a civil commitment candidate is both mentally ill *and* dangerous before confining him in a mental institution. *O'Connor*, 422 U.S. at 574-75.

[153] *See* Jones v. United States, 463 U.S. 354, 364-66 (1983).

[154] *See id.* at 370. In *Jones*, the Court stated that insanity acquittees should be treated differently from all others subject to involuntary commitment. *Id.* Accordingly, *Jones* held that an insanity acquittee may be committed to a mental institution based upon proof of insanity by a preponderance of the evidence, even though the "clear and convincing" standard is required for the commitment of civil committees. *Id.* at 366-67.

[155] Justice Thomas noted that the majority failed to elaborate upon the nature of the liberty interests implicated in an insanity commitment. *See* Foucha v. Louisiana, 112 S. Ct. 1780, 1805-06 (1992) (Thomas, J., dissenting). The Court discussed freedom from bodily restraint and freedom from indefinite confinement without distinguishing the two concepts, thus implying that these interests are interchangeable liberty interests. *See id.* at 1804-06.

establishes a reasonable inference of dangerousness.[156] Adopting an intermediate position, Justice O'Connor states in a concurring opinion that, although a finding of criminal conduct distinguishes insanity acquittees from ordinary citizens, the Louisiana statute violates due process.[157] Justice O'Connor concludes, however, that a more narrowly drawn statute might be constitutional.[158]

Faced with the confusing tandem of *Jones* and *Foucha*, states whose confinement schemes are similar to the Louisiana statute may encounter difficulty in ascertaining the impact of *Foucha*. For example, a state legislature may decide that its legitimate concern for public safety would best be solved by tailoring a statute to permit confinement of an insanity acquittee based on dangerousness alone only where the acquittee was charged with a violent crime. Because the inference of dangerousness based on the commission of a violent act such as a homicide is clearly stronger than an inference based on the mere antisocial behavior exhibited by the petitioner in *Foucha*, the result under *Foucha* may be that a more narrowly tailored statute based on the commission of a violent crime would survive due process scrutiny. In fact, five Justices apparently would agree that such a scheme would pass constitutional muster under *Foucha*.[159] Such a narrow reading of *Foucha* is also supported by the *Jones* Court's recognition that "courts should pay particular deference to reasonable legislative judgments."[160]

On the other hand, some states may decide that it is preferable to abolish the insanity plea altogether rather than to risk the release of dangerous acquittees permitted under *Foucha*. States that elect to retain the insanity defense and adopt the changes necessary to comply with *Foucha* may experience an increase in the number of insanity pleas

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[156] *See supra* notes 123, 131 and accompanying text.

[157] *See supra* notes 115, 116 and accompanying text.

[158] *See supra* note 114 and accompanying text.

[159] The concurrence and both dissents indicated that acquittees who have committed violent criminal acts may be treated differently than civil committees for confinement purposes. *See Foucha*, 112 S. Ct. at 1789-91, 1801-02.

[160] Jones v. United States, 463 U.S. 354, 364 n.13 (1983). In *Jones*, the Court deferred to Congress' determination that an "insanity acquittal supports an inference of continuing mental illness." *Id.* at 366. The *Foucha* Court did not defer to Louisiana's determination that dangerousness justifies continued confinement. *See* Foucha v. Louisiana, 112 S. Ct. 1780, 1802 (1992). Equal protection concerns aside, however, one queries whether the *Foucha* decision would warrant judicial deference to a legislative determination that an insanity acquittal in a multiple homicide or sexual assault case supports an inference of continuing dangerous behavior. *See* Wexler, *supra* note 70, at 549-61.

because compliance with *Foucha* may in fact facilitate the release of insanity acquittees.

Ultimately, the Court must continue to recognize that a finding of criminal conduct sets an insanity acquittee apart from an ordinary citizen. The Due Process Clause protects an individual's liberty interests when a state legislature attempts to condition confinement on antisocial behavior alone. However, state legislatures may also have a legitimate concern for public safety if adequate safeguards are not built into its commitment scheme to deter abuse of the insanity defense. As *Foucha* now demonstrates, the Court seems willing to entertain due process challenges to state insanity commitment legislation despite *Jones'* deference to state legislative judgments regarding the dangerousness of acquittees. Unfortunately, by failing to set forth a particular standard of review or defining what type of conduct would give rise to a permissible inference of dangerousness, the Court has created substantial confusion regarding the extent to which the Due Process Clause applies with regard to the release standards for insanity acquittees. Consequently, the Supreme Court may soon be compelled to re-evaluate its position on the issue of commitment and release standards for insanity acquittees, and to resolve the uneasy conflict between *Jones* and *Foucha*.