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LIMITING THE SCOPE OF STATE POWER TO CONFINE INSANITY ACQUITTEES: *FOUCHA v. LOUISIANA*

I. INTRODUCTION

Recent studies indicate that the insanity defense is raised in only one percent of all felony cases in the United States.¹ Yet this seemingly low percentage computes to an average of approximately three-hundred insanity pleas per state, or sixteen-thousand nationwide per year.² Once a criminal defendant has been found not guilty by reason of insanity, the state determines sentencing by balancing its duty to protect society from dangerous offenders and the legally innocent defendant's right to freedom. Criminal law serves the purpose of protecting society by punishing wrongdoers.³ However, the law recognizes that certain offenders should not be held responsible for their conduct.⁴

1. Andrew Blum, *Debunking Myths of the Insanity Plea*, NAT'L L.J., Apr. 20, 1992, at 9.

2. Hugh McGinley & Richard A. Pasewark, *National Survey of the Frequency and Success of the Insanity Plea and Alternate Pleas*, 17 J. PSYCHIATRY & L. 205, 208-09 (1989). The estimates are based on an average of five states: Colorado, Maine, Michigan, Minnesota, and Wyoming, which responded to a survey of the number of defendants utilizing the insanity defense in 1985. The survey indicated a large variance in the frequency with which the defense is used among jurisdictions. For example, Colorado reported only 45 insanity pleas, while Michigan reported 1,215 for the same period. *Id.* at 208.

3. Ira Mickenberg, *A Pleasant Surprise: The Guilty But Mentally Ill Verdict Has Both Succeeded in its Own Right and Successfully Preserved the Traditional Role of the Insanity Defense*, 55 U. CIN. L. REV. 943, 958-62 (1987). Six differing theories are widely recognized in criminal law as a basis for imposing criminal liability:

- (1) general deterrence—to deter the public from imitating the defendant's bad acts; (2) specific deterrence—to deter the defendant from repeating his misconduct; (3) rehabilitation—to transform the wrongdoer into a law-abiding person; (4) restitution—to restore the victims of crimes to their pre-crime position; (5) retribution—to satisfy society's need to see evil punished; and (6) incapacitation—to segregate in order to protect society from the defendant's future bad acts.

Id. at 958-59 (citations omitted). However, the author notes that only retribution is satisfied by punishing an individual who is theoretically incapable of controlling his conduct because of a mental illness. Under the retributionist perspective, moral responsibility is necessary to maintain public order even when the individual who commits a criminal act does so because of a defective mental condition. Proponents of this theory argue that attaching some form of liability to criminal acts satisfies the public's need for revenge. *Id.* at 959-60. The author rejects this theory and reports that polls indicate the general public believes that persons who are genuinely unable to control their conduct or choose between right and wrong should not be held criminally responsible. *Id.* at 964-65.

4. *Id.* at 952. The author discusses other defenses recognized by the law which also exculpate the defendant. Under the infancy defense, a minor may be held legally blameless after committing an act for which an adult would be held accountable. Similarly, an individual who commits a crime while acting under duress will not be held criminally liable for the act. *Id.* at 957.

While a successful defense means that a defendant is not legally to blame for his crime, it is not equivalent to an approval of his actions. Society may have a strong interest in restraining or confining an individual whose behavior is unacceptable, even though he is not legally responsible for his actions.⁵ The state confines an insanity acquittee in a mental institution for two primary reasons: (1) to treat and protect the rights of mentally ill citizens; and (2) to protect the remainder of society from the criminally insane.⁶

Theoretically, confinement of the criminally insane is not punitive in nature. However, some commentators have posited that lower standards for commitment of insanity acquittees than for those civilly committed, coupled with indefinite commitment periods, violate the insanity acquittee's due process and equal protection rights.⁷ It is argued that differences in treatment between those civilly committed and those committed as a result of an insanity verdict are evidence of punitive motives.⁸ Conversely, the public is often outraged when criminals perceived as violent escape punishment by pleading insanity,⁹ particularly when those individuals are released and perpetrate further violence.¹⁰

On May 18, 1992, the United States Supreme Court examined these

5. *Id.* at 953. Although the law allows certain defenses to morally exculpate the defendant, the law may restrict the freedom of those individuals in order to protect society. For example, minors who commit acts that would bear criminal responsibility if they were adults may be confined to a juvenile detention center for several years. Minors may also have to undergo psychiatric testing and treatment, further being subject to parole restrictions upon release from the detention center. Thus, defenses represent "the law's ability to assign or excuse from criminal responsibility while simultaneously protecting itself from those who may be morally blameless yet physically dangerous." *Id.*

6. *Jones v. United States*, 463 U.S. 354, 368 (1983) (stating that the purpose of the defendant's commitment was to treat his illness and to protect him and others from his potential dangerousness; therefore, the potential prison sentence he could have received was irrelevant to the time necessary for treatment).

7. Janet L. Polstein, Note, *Throwing Away the Key: Due Process Rights of Insanity Acquittes in Jones v. United States*, 34 AM. U. L. REV. 479, 480-81 (1985).

8. *Id.*; see also Comment, *Commitment Following an Insanity Acquittal*, 94 HARV. L. REV. 605, 607 (urging that although courts maintain that confinement of insanity acquittees is not punitive, lower standards of proof for commitment of insanity acquittees evinces a desire to punish).

9. Mickenberg, *supra* note 3, at 943.

10. David D. Marsh, Case Note, *Criminal Law—Guilty But Mentally Ill—A Verdict of Guilty But Mentally Ill Is Constitutional, and the Associated Treatment Provisions Do Not Deprive a Defendant of Equal Protection*, 62 U. DET. L. REV. 715, 717 (1985). Marsh gives an example of two individuals who had been recently released from a mental institution where they had been committed as a result of not guilty by reason of insanity verdicts. Under the Michigan statute, a defendant was entitled to a hearing after such a verdict to determine the defendant's current mental state. The State failed to prove insanity at the hearing and the defendants were released. Within a year of release, one defendant was convicted of raping two women, and the other was convicted of murdering his wife. The public outrage was immense, and the Michigan legislature responded by creating a verdict of guilty but mentally ill. *Id.*; see *infra* pp. 554-56 for a discussion of the Michigan verdict.

issues in *Foucha v. Louisiana*.¹¹ In *Foucha*, the Court declared unconstitutional a Louisiana statute that required a defendant who has been found not guilty by reason of insanity to prove that he no longer poses a danger to himself or others before he can be released from a mental institution.¹² According to the statutory scheme, once a defendant has been acquitted by reason of insanity, he may be automatically committed to a mental institution until the court orders release based upon a doctor's recommendation. Such a recommendation is made only when the defendant proves that he would no longer pose a danger to himself or others.¹³ The Supreme Court found that placing such a burden on a defendant was a violation of the Due Process and Equal Protection Clause.¹⁴ This note examines the conflicting interests of the state in light of the *Foucha* decision: protecting the rights of mentally ill citizens while protecting the remainder of society from their potentially dangerous actions. This note then discusses possible solutions to some of the problems encountered in sentencing insanity acquittees.

II. BACKGROUND

Terry Foucha was charged with aggravated burglary and illegal discharge of a firearm.¹⁵ He entered a plea of not guilty by reason of insanity, and the trial court appointed two experts in forensic psychiatry to examine him.¹⁶ Based upon the report of the experts, the trial court

11. 112 S. Ct. 1780 (1992).

12. *Id.* at 1788.

13. Louisiana's criminal procedure provides:

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, and upon filing written findings of fact and conclusions of law, the court may order the committed person discharged, released on probation subject to specified conditions for fixed or an indeterminate period, or recommitted to the state mental institution. A copy of the judgment and order containing the written findings of fact and conclusions of law shall be forwarded to the administrator of the forensic facility. Notice to the counsel for the committed person and the district attorney of the contradictory hearing shall be given at least thirty days prior to the hearing.

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

14. *Foucha*, 112 S. Ct. at 1787-88.

15. *State v. Foucha*, 563 So. 2d 1138, 1139 (La. 1990), *rev'd*, 112 S. Ct. 1780 (1992). The *Louisiana Statute* provided that "[w]hoever commits the crime of aggravated burglary shall be imprisoned at hard labor for not less than one nor more than thirty years." LA. REV. STAT. ANN. § 14:60 (West 1986). The statutes also required "[w]hoever commits the crime of illegal use of weapons or dangerous instrumentalities shall be fined not more than one thousand dollars, or imprisoned with or without hard labor for not more than two years, or both." LA. REV. STAT. ANN. § 14:94 (West 1986). The defendant committed both crimes. *Foucha*, 563 So. 2d at 1138.

16. *Foucha*, 563 So. 2d at 1139.

found that Foucha lacked the mental capacity to proceed with trial.¹⁷ Four months later, the doctors reported that as a result of a drug-induced psychosis Foucha was insane and unable to distinguish right from wrong at the time he committed the offenses but was now competent to stand trial.¹⁸ The court held a hearing, and on October 12, 1984, found Foucha not guilty by reason of insanity,¹⁹ committing him to Feliciana Forensic Facility at Jackson, Louisiana, until further order of the court based upon a doctor's recommendation of release.²⁰

In 1988, the superintendent of Feliciana made a recommendation to the court that Foucha be discharged.²¹ A three-member panel at the institution reported that Foucha had displayed no evidence of mental illness since his admittance and recommended a conditional discharge.²² The trial court ordered a re-examination of the defendant by the same two doctors who had examined him prior to his commitment. Their finding was that Foucha was "in remission from mental illness," but they refused to certify that he would not pose a danger to himself or others if released.²³ The doctors refused to recommend his release because the

17. *Id.*

18. *Id.* Louisiana State's criminal procedure provides:

When a verdict of not guilty by reason of insanity is returned in a capital case, the court shall commit the defendant to a proper state mental institution or to a private mental institution approved by the court for custody, care and treatment. 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 released on probation without danger to others or to himself, the court shall either order his discharge, or order his release on probation subject to specified conditions for a fixed or an indeterminate period. The court shall assign written findings of fact and conclusions of law; however, the assignment of reasons shall not delay the implementation of judgment.

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

19. *Foucha*, 563 So. 2d at 1139. LA. REV. STAT. ANN. § 14:14 (West 1986) states "[i]f the circumstances indicate that because of a mental disease or mental defect the offender was incapable of distinguishing between right and wrong with reference to the conduct in question, the offender shall be exempt from criminal responsibility." In addition, the Louisiana Supreme Court in *Foucha* applied Louisiana criminal procedure which states that: "The court may adjudicate a defendant not guilty by reason of insanity without trial, when the district attorney consents and the court makes a finding based upon expert testimony that there is a factual basis for the plea." LA. CODE CRIM. PROC. ANN. art. 558.1 (West 1967).

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

21. *Id.*

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

23. *Id.* at 1782.

defendant had an "antisocial personality" and was experiencing paranoia.²⁴ While an antisocial personality disorder is not technically a mental illness, it did manifest itself by way of Foucha's involvement in recent altercations at the institution.²⁵ The court therefore refused to grant his release. The Louisiana Supreme Court affirmed the decision, but the United States Supreme Court held that Foucha's due process and equal protection rights were violated by requiring Foucha, who did not suffer from a mental illness, to demonstrate that he is not dangerous to himself or others before being released from a mental hospital.²⁶

The *Foucha* majority purportedly relied on relevant precedent, *Jones v. United States*, in stating that an insanity acquittee could be confined "as long as he is both mentally ill and dangerous, but no longer."²⁷ However, in emphasizing the absence of a defined mental illness, the *Foucha* Court avoided the emphasis *Jones* placed on dangerousness. This change in emphasis actually sidesteps the *Jones* decision.

The *Jones* Court found that a verdict of not guilty by reason of insanity was a "sufficient foundation for commitment of an insanity acquittee for the purposes of treatment and the protection of society."²⁸ *Jones*, who was automatically committed to a mental hospital after a verdict of not guilty by reason of insanity, claimed that the constitutional limit for his confinement was the maximum sentence he could have received if found guilty.²⁹ The *Jones* Court held that because the underlying purpose of an insanity acquittee's confinement was treatment and the protection of society, the period of his confinement depends on the continuation of his illness and dangerousness. The *Jones* Court found that the duration of commitment necessary for treatment of the illness was unrelated to the severity of the offense committed.³⁰ However, the *Jones* Court did

24. *Id.*; *State v. Foucha*, 563 So. 2d 1138, 1141 (La. 1990), *rev'd*, 112 S. Ct. 1780 (1992).

25. *Foucha v. Louisiana*, 112 S. Ct. 1780, 1782-83 (1992). The antisocial-paranoid combination is the most extreme form of the antisocial personality disorder. It is characterized by a hostile and vindictive pattern of behavior directed against society's ethics, mores and laws. Antisocial-paranoid individuals usually display "cold-blooded ruthlessness and in intense desire to achieve revenge for the real or imagined mistreatment they feel they were subjected to during some aspect of their life. . . . They usually display an arrogant contempt for the rights of others and will be devoid of any guilt or remorse for injuring others." THEODORE MILLON & GEORGE S. EVERLY, JR., PERSONALITY AND ITS DISORDERS 64-65 (1985).

26. *Foucha*, 112 S. Ct. at 1780.

27. *Id.* at 1781.

28. *Jones v. United States*, 463 U.S. 354, 366 (1983). In *Jones*, a defendant was arrested for attempting to steal a jacket from a department store. The maximum prison term for the misdemeanor, if convicted, was one year. The defendant's condition was diagnosed as paranoid schizophrenia, and he was committed subsequent to a verdict of not guilty by reason of insanity. After the defendant had been hospitalized for more than one year, he petitioned for release. *Id.* at 368.

29. *Id.* at 360.

30. *Id.* at 368-69.

not discuss the standards for "release" of insanity acquittees because it was not at issue in that case.³¹

III. THE *FOUCHA* DECISION AND ANALYSIS

The United States Supreme Court listed three due process violations and one equal protection violation as the bases for finding that Foucha's confinement was unconstitutional. The Court held that the state violated Foucha's procedural due process rights by continuing his confinement in a mental institution once he was no longer insane, and additionally, by failing to hold civil commitment proceedings to justify his continued confinement. Furthermore, the Court held that Foucha was restrained arbitrarily, thereby violating his substantive due process and equal protection rights.

A. *The Nature of Confinement Must Be Reasonably Related to the Purpose of Confinement*

The nature of an individual's confinement must be reasonably related to the purpose for which he was confined.³² In civil commitment proceedings, the State has the burden of proving by clear and convincing evidence that an individual is mentally ill and requires hospitalization.³³ In contrast, a person who is acquitted of a crime by reason of insanity is committed without the State having to meet the clear and convincing proof standard. This is justified because once the State has proven all the elements of the crime beyond a reasonable doubt, the defendant, in order to avoid punishment, has the burden of proving by a preponderance of the evidence that he committed the act as a result of a mental illness. The verdict of not guilty by reason of insanity establishes that the defendant committed a criminal act as a result of a mental illness.³⁴

31. *Id.* at 363 n.11.

32. *Foucha v. Louisiana*, 112 S. Ct. 1780, 1785 (1992) (citing *Jones v. United States*, 463 U.S. 354, 368 (1983), and *Jackson v. Indiana*, 406 U.S. 715, 738 (1972)).

33. See *Addington v. Texas*, 441 U.S. 418 (1979). *Addington* set the precedent for requiring states to prove by "clear and convincing" proof an individual's insanity and dangerousness to himself or others before he may be committed through civil proceedings. *Id.* In *Addington*, the appellant was civilly committed after a finding of insanity by clear and convincing evidence. He asserted that the standard of proof should be "beyond a reasonable doubt." The United States Supreme Court stated that:

[h]aving concluded that the preponderance standard falls short of meeting the demands of due process and that the reasonable-doubt standard is not required, we turn to a middle level of burden of proof that strikes a fair balance between the rights of the individual and the legitimate concerns of the state.

Id. at 431.

34. *Jones*, 463 U.S. at 363.

Relying on *Jones v. United States*, the *Foucha* Court concluded that an insanity acquittee may be confined as long as he is both mentally ill and dangerous; furthermore, once he has recovered he must be released.³⁵ Since Louisiana conceded that Foucha was no longer insane, the Court found that the state could not continue to confine him in a mental institution.³⁶ The Court also relied on *Vitek v. Jones*³⁷ which held that confinement in a mental institution is “more than a loss of freedom from confinement,”³⁸ and “qualitatively different from the punishment characteristically suffered by a person convicted of [a] crime.”³⁹

Although the *Jones v. United States* Court emphasized the existence of the individual’s mental illness as an adequate basis for continued detention, this should not obscure the Court’s emphasis on the element of dangerousness as an equally compelling reason for confinement. The *Jones* Court adequately stressed the state’s dual interest in protecting the public from dangerous individuals as well as treating their illness by stating that “[t]he relative ‘dangerousness’ of a particular individual, of course, should be a consideration at the release hearings. . . . [I]t is noteworthy that petitioner’s continuing commitment may well rest in significant part on evidence independent of his acquittal by reason of insanity”⁴⁰ Although the *Foucha* Court discussed the necessary relationship between an individual’s confinement and the purpose for which he was confined, the Court apparently overlooked the purpose of protecting the public from dangerous criminals.

Furthermore, while Foucha’s antisocial condition is not medically

35. *Foucha*, 112 S. Ct. at 1783-84.

36. *Id.* at 1784.

37. 445 U.S. 480 (1980).

38. *Id.* at 492. *Vitek* involved a convicted felon who, while serving a prison term, was found by the prison physician to be mentally ill. He was automatically transferred to a mental hospital under authority of a Nebraska statute. The Court held that the transfer of a prisoner to a mental hospital without an adequate hearing violates the Fourteenth Amendment. The United States Supreme Court affirmed the district court’s finding that

the interest of the State in segregating and treating mentally ill patients is strong. The interest of the prisoner in not being arbitrarily classified as mentally ill and subjected to unwelcome treatment is also powerful, however . . . the risk of error in making the determinations required by § 83-180 is substantial enough to warrant appropriate procedural safeguards against error.

Id. at 495; see also *Addington v. Texas*, 441 U.S. 418, 425-26 (1979) (finding that commitment to a mental hospital has “adverse social consequences” not engendered by convicted criminals).

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

40. *Jones v. United States*, 463 U.S. 354, 365 n.14 (1983). In *Jones*, the Court was concerned with an individual’s suicidal tendencies. However, “dangerous” includes any perceived danger to oneself or to others. *Id.*

recognized as a mental illness, it is certainly an abnormal emotional condition that manifested itself by way of violent and aggressive behavior.⁴¹ The record indicates that less than two months prior to his release hearing, Foucha had been sent to a maximum security section of the mental hospital because of altercations with other mental patients.⁴² Medical experts at the hospital attribute his aggressive behavior to the antisocial personality disorder.⁴³

In a dissenting opinion, Justice Thomas criticized the majority's emphasis on the fact that Foucha's condition was not a medically recognized mental illness as the basis justifying his release.⁴⁴ However, the majority emphasized that medical experts have historically been relied upon in making commitment determinations in civil proceedings and in commitment and release proceedings for insanity acquittees.⁴⁵

The important differences between civil commitment and commitment pursuant to an insanity defense justify a reliance on more than medical evidence in determining confinement. In the former, the only evidence to present is that of the individual's mental condition as diagnosed by medical experts. However, in the latter instance, the individual must also display dangerousness in the form of a criminal act, and that dangerous propensity should be used to support the expert's testimony.⁴⁶

In *Foucha*, the defendant's dangerous and violent behavior, coupled with the doctors' diagnoses of his antisocial condition, should have adequately substantiated the need for continued confinement. That his dangerous condition is not technically recognized as a mental illness should not overshadow the obvious need to protect others from its harmful effects.⁴⁷

The *Foucha* Court also found that the confinement of a sane individual in a mental facility is an infringement on his liberty interest.⁴⁸ The

41. *Foucha v. Louisiana*, 112 S. Ct. 1780, 1782-83 (1992).

42. *Id.* at 1797 (Kennedy, J., dissenting).

43. *Id.* at 1782-83.

44. *Id.* at 1801 (quoting *Ake v. Oklahoma*, 470 U.S. 68, 81 (1985)).

45. *Id.* at 1783 n.3.

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

47. See *O'Connor v. Donaldson*, 422 U.S. 563, 582 (1975) ("[T]he idea that States may not confine the mentally ill except for the purpose of providing them with treatment is of very recent origin, and there is no historical basis for imposing such a limitation on state power. . . . There can be little doubt that in the exercise of its police power a State may confine individuals solely to protect society from the dangers of significant antisocial acts or communicable disease."); see also *Hickey v. Morris*, 722 F.2d 543, 548 (9th Cir. 1983) ("The state has a substantial interest in avoiding premature release of insanity acquittees, who have committed acts constituting felonies and have been declared dangerous to society.").

48. *Foucha*, 112 S. Ct. at 1784-85.

Court relied on *Vitek v. Jones* in stating that detention in a mental hospital is qualitatively different from penal detention, and involuntary commitment of a person to a mental hospital may have "adverse social consequences" on an individual that is not justified by his criminal acts.⁴⁹ The *Vitek* Court recognized that an individual's liberty interest involves more than his freedom from confinement. A defendant also has a legitimate interest in not wanting to be labeled as insane and confined as such, so as to avoid the stigma that society still places on mental illness. However, *Vitek* is distinguishable in that the Nebraska statute allowed for the automatic and involuntary transfer of a convicted criminal to a mental facility upon the finding that he suffered from a mental disease or defect.⁵⁰ The defendant in *Vitek*, who did not claim to be insane and did not want to be confined as such, was not allowed the adequate procedural protections to protest the decision.⁵¹

In contrast, however, Foucha's confinement in a mental institution was not involuntary. As in the case of all insanity acquittees, he affirmatively plead insanity, and his confinement was based upon insanity. He chose to plead and prove insanity in order to avoid punishment for his crimes. It is not reasonable to now conclude that he will suffer adverse social consequences as a result of being confined in an institution for the insane. As the dissent stated, "[a] criminal defendant who successfully raises the insanity defense necessarily is stigmatized by the verdict itself, and thus the commitment causes little additional harm in this respect."⁵²

B. *Due Process Requires Adequate Proceedings Prior to Confinement*

Secondly, the Court held that Foucha was denied constitutionally adequate procedures to determine the basis of his confinement. Since Foucha is no longer insane, the Court held that he can no longer be confined as an insanity acquittee in a mental hospital. Therefore, due process entitles him to additional proceedings to determine the purpose of any continued confinement.⁵³

Relying on *Jackson v. Indiana*⁵⁴ the Court found that Foucha was

49. *Vitek v. Jones*, 445 U.S. 480, 492 (1980).

50. *Id.* at 483-84.

51. *Id.* at 484-85.

52. *Foucha*, 112 S. Ct. at 1803 (Thomas, J., dissenting) (quoting *Jones v. United States*, 463 U.S. 354, 367 n.16 (1983)).

53. *Foucha*, 112 S. Ct. at 1785; see also *Jackson v. Indiana*, 406 U.S. 715 (1972); and *Baxstrom v. Herold*, 383 U.S. 107 (1966).

54. 406 U.S. 715 (1972).

entitled to civil commitment proceedings or additional criminal proceedings prior to his continued detention.⁵⁵ However, *Jackson* is easily distinguished in that it involved the pretrial detention of an incurable mentally ill person. The *Jackson* Court ruled that a state cannot indefinitely commit a person charged with a criminal offense solely on the basis of his incompetence to stand trial, particularly where there is little likelihood that he will attain competence.⁵⁶ He is entitled to constitutionally adequate procedures to determine the basis for his confinement.⁵⁷

Unlike *Jackson*, *Foucha* was given his "day in court." He was adequately represented by counsel and affirmatively plead his defense.⁵⁸ His confinement is the result of his proceedings, not in anticipation of it. *Jones* relates "the [g]overnment's strong interest in avoiding the need to conduct a *de novo* commitment hearing following every insanity acquittal—a hearing at which a jury trial may be demanded . . . and at which the Government bears the burden of proof by clear and convincing evidence."⁵⁹

In civil commitment proceedings, the State has the burden of establishing by clear and convincing proof an individual's insanity and dangerousness acts as a safeguard against arbitrary confinements. In contrast, the fear of arbitrary confinement is not as great in criminal commitments since the defendant himself claims to be insane, thereby eliminating the need for the State to provide the proof. However, if *Foucha* is in fact no longer insane, civil commitment proceedings would only be a waste of the state's resources. The state clearly would not be able to confine a sane person through civil commitment proceedings, no matter how dangerous he may be.⁶⁰ Since the state can no longer confine *Foucha* based on the criminal proceedings, the Court has left it with no choice but to release a dangerous criminal back into society.

C. *Arbitrary Restraint Violates Due Process*

The third due process right found by the Court to be violated by the Louisiana statutory scheme was substantive in nature. The state cannot

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

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

57. *Id.* (noting that since due process requires the nature and duration of confinement to bear a reasonable relationship to the purpose for confinement, the State must hold civil commitment proceedings or release a defendant who is unlikely to ever be found competent to stand trial).

58. But see LA. CODE CRIM. PROC. art. 558.1 (West Supp. 1993), whereby the defendant may be committed without a trial.

59. *Jones v. United States*, 463 U.S. 354, 366 (1983).

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

restrain individuals arbitrarily.⁶¹ While convicted criminals may be imprisoned for reasons of deterrence and retribution,⁶² the Constitution limits the state's right to punish certain conduct.⁶³ A state must justify the confinement of individuals who lack criminal culpability.⁶⁴ Since Foucha was not found "guilty" of his crimes and cannot be punished, the State must establish the grounds for his confinement.⁶⁵

In insanity acquittals, the necessary grounds for confinement are mental illness and dangerousness, but certain circumstances may warrant other grounds for confinement.⁶⁶ In *United States v. Salerno*, the Supreme Court held that the state's strong and compelling interest in preventing crime by arrestees provided a legitimate reason to detain certain dangerous persons.⁶⁷ The *Foucha* Court held that the lower court's reliance on *Salerno* was improper.⁶⁸ In *Salerno*, the Supreme Court detailed narrow circumstances in which persons who are found to pose a danger to society may be subjected to limited confinement without constitutionally adequate proceedings.⁶⁹ The *Foucha* Court distinguished *Salerno* in finding that the Louisiana statutory scheme was not narrowly tailored enough to survive due process scrutiny.⁷⁰ Unlike the limitations

61. *Id.* at 1785.

62. See Mickenberg, *supra* note 3, at 958.

63. *Foucha*, 112 S. Ct. at 1785 (1992); see, e.g., *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (holding that an Ohio statute that imposes criminal sanctions for advocating violence against minorities is a violation of the First and Fourteenth Amendments); *Robinson v. California*, 370 U.S. 660 (1962) (determining that a California statute that criminalizes the addiction to the use of narcotics is a violation of the Eighth and Fourteenth Amendments).

64. *O'Connor v. Donaldson*, 422 U.S. 563, 574-75 (1975).

65. *Foucha*, 112 S. Ct. at 1785; see also *Jones v. United States*, 463 U.S. 354 (1983); *United States v. Salerno*, 481 U.S. 739 (1987).

66. *Salerno*, 481 U.S. at 749-50. The defendant in *Salerno* was the head of the Genovese crime family, and the government had evidence that he had, among other things, participated in two murder conspiracies. The government wished to detain the defendant under the Bail Reform Act based on the seriousness of the charges and the danger that release would present. *Salerno* contended that the Act violated the Eighth Amendment in that it allowed for detention on the ground that the arrestee is likely to commit a crime. *Id.* at 742-44. The Court held that where the government's only interest is in preventing flight, the Court must set bail in an attempt to accomplish that goal but cannot go beyond that. However, where, as here, the Government has a compelling interest in the safety of the community, dangerous felons could be detained. *Id.* at 754-55.

67. See *infra* note 70 for limitations of ruling.

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

69. *Salerno*, 481 U.S. at 750. *Salerno* involved the constitutionality of the Bail Reform Act of 1984, which requires courts to detain certain dangerous pretrial arrestees who have been proven by clear and convincing evidence at a hearing to present "an identified and articulable threat to an individual or the community." *Id.* at 751. The Act covers only persons who are accused of the most serious of crimes and who pose a particularly acute problem for society if released. In order to confine the individual while awaiting trial, the government is required to convince a neutral decision-maker by clear and convincing proof of the compelling need to confine the individual. Furthermore, once the government meets the burden, the defendant must be housed separately from those found guilty and serving sentences. *Id.* at 747-48.

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

for confinement in *Salerno*, the Louisiana statute did not entitle Foucha to a hearing.⁷¹ Moreover, the State was not required to shoulder the burden of proof, and his period of detention was unlimited in duration.⁷² The only evidence presented to justify Foucha's continued confinement at Feliciana was the report given by the defendant's examining physicians, including their refusal to certify that he would not pose a danger to himself or others.⁷³ The United States Supreme Court found problematic the state's failure to either hold civil commitment proceedings or further criminal proceedings in response to the defendant's violent behavior while at Feliciana.⁷⁴

However, the statute at issue in *Salerno* regulated the detention of pretrial arrestees, and therefore was justifiably narrow in scope.⁷⁵ The Louisiana statute in contrast regulates the release of criminals who have been confined as a result of constitutionally adequate proceedings.⁷⁶ The United States Supreme Court appears to have overlooked this critical distinction between the two statutes. Furthermore, the *Salerno* Court was resolute in holding that "the Government's regulatory interest in community safety can, in appropriate circumstances, outweigh an individual's liberty interest."⁷⁷ Where an individual poses a clear threat to society, the government has a compelling interest in safety of the community; thus, dangerous felons may be detained.⁷⁸

In comparison the state had legitimate and compelling reasons for confining Foucha. His dangerousness has been established: he entered another's home while armed with a loaded .357 revolver; he discharged the gun; two medical experts diagnosed him as being in remission from a mental illness but stated that the illness may reappear; they refused to certify that he would not be a danger to others if released; he has been involved in altercations while at Feliciana, thus requiring his solitary confinement.⁷⁹ Based on the foregoing facts, it is reasonable to conclude that the state's continued confinement of Foucha was not arbitrary.

Since due process is a flexible concept which allows the state to accommodate the interests of the individual and society, the Supreme

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.* (pointing out that the State could have charged the defendant with assault on the other inmates and incarcerated him in a penal institution if found guilty).

75. *United States v. Salerno*, 481 U.S. 739, 751-52.

76. LA. CODE CRIM. PROC. ANN. art. 657 (West Supp. 1992).

77. *Salerno*, 481 U.S. at 748.

78. *Id.* at 750-51.

79. *State v. Foucha*, 563 So. 2d 1138, 1138-41 (La. 1990), *rev'd*, 112 S. Ct. 1780 (1992).

Court should not interfere with a state's reasonable decision on favoring the protection of society.⁸⁰ Although Foucha is not legally culpable for his prior crimes, he nevertheless committed the crimes. A verdict of not guilty by reason of insanity is not equivalent to a verdict of not guilty.⁸¹ All of the elements of his crimes have been established; if any elements of the crimes could not have been proven, he would have been acquitted and would not need the defense.⁸² This distinction supports the desire of the state to further its interest in protecting the public from dangerous insanity acquittees, though they may no longer be insane.

D. *Arbitrary Restraint Violates Equal Protection*

In addition to due process, Foucha's equal protection rights were also found to have been violated.⁸³ While insanity acquittees as a class may be treated differently than civil committees, the State no longer contended that Foucha was mentally ill. Therefore, the Court held that treating him differently was unconstitutional.⁸⁴ The *Foucha* Court was concerned that the statutory language would eventually lead to the state's detention of convicted felons after the expiration of their penal term solely on the basis of dangerousness.⁸⁵ The Court stated that it is likely that many convicted prisoners serving their sentences also suffer from an antisocial personality, but they are not subjected to additional confinement based on a finding of dangerousness.⁸⁶

Reality, however, undercuts the Court's argument because dangerousness is indeed a critical factor in determining whether to release a criminal from prison. A prisoner serving his term must prove that he would not present a threat to society prior to a grant of his parole.⁸⁷ In addition, an inmate involved in altercations in which he assaults other inmates may receive additional sentences.⁸⁸ The federal government's interest in incapacitating dangerous criminals in order to protect the public is consistent with the state's interest in protecting the public from the

80. *O'Connor v. Donaldson*, 422 U.S. 563, 585-86 (1975); see, e.g., *Morrissey v. Brewer*, 408 U.S. 471, 483-84 (1972).

81. *Foucha*, 112 S. Ct. at 1797 (Thomas, J., dissenting); see also Mickenberg, *supra* note 3, at 952-53.

82. *Foucha*, 112 S. Ct. at 1797-98 (Thomas, J., dissenting).

83. *Id.* at 1788.

84. *Id.* (relying on *Jones v. United States*, 463 U.S. 354, 367 (1983)).

85. *Id.* at 1787 n.6.

86. *Id.*

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

88. Donald J. Tyrell, *Prediction of Dangerousness*, 34 MED. TRIAL TECH. Q. 24 (1988).

dangerously insane. Where the state has a compelling interest in the protection of the public, an offender's potential for dangerous actions is a relevant factor whether the release contemplated is from a prison or a mental hospital.

Furthermore, equal protection does not require identical treatment. Rather, it requires only that an individual's treatment rationally corresponds to the purpose of his classification.⁸⁹ The United States Supreme Court has held that "[t]he constitution permits qualitative differences in meting out punishment."⁹⁰ In determining the appropriate punishment, the "life and habits" of an offender should be considered by the judge prior to sentencing.⁹¹

Insanity acquittees are justifiably treated differently than civil committees and convicted prisoners. They are not merely insane; they have raised and proven insanity by a preponderance of the evidence as a defense against a criminal act they have committed. They are not ordinary criminals; they are persons whose criminal act was the result of a mental illness. It is the combination of these two factors which properly distinguishes them as a unique class and justifies unique treatment unlike that given to criminal convicts or civil committees.

Moreover, when an individual is convicted of a crime and serves his sentence, the purpose for his confinement (retribution and deterrence) has ended. But in cases where an individual has been acquitted by reason of insanity, the purpose of the commitment is treatment and protection of the public.⁹² Since the time necessary to recover from a mental illness is impossible to predict, Congress has elected to establish an indeterminate commitment period for both civilly committed persons and insanity acquittees. Periodic review of the patient's progress toward recovery provides the method for release, rather than a foreordained term of confinement.⁹³

The United States Supreme Court has denied the State of Louisiana the right to determine the suitability of a criminal offender's release. It has held that an insanity acquittee's continued confinement is improper,

89. *Baxstrom v. Herold*, 383 U.S. 107, 111 (1966) (citing *Walters v. St. Louis*, 347 U.S. 231, 237 (1954)).

90. *Williams v. Illinois*, 399 U.S. 235, 243 (1970) ("The mere fact that an indigent in a particular case may be imprisoned for a longer time than a non-indigent convicted of the same offense does not . . . give rise to a violation of the Equal Protection Clause.").

91. *Id.* (citing *Williams v. New York*, 337 U.S. 241, 247 (1949)).

92. *Jones*, 463 U.S. 354 (1983); *O'Connor*, 422 U.S. 563 (1975); *Salerno*, 481 U.S. 739 (1987).

93. *Jones*, 463 U.S. at 368.

even though one of the two reasons for his commitment, namely, dangerousness, still exists, and the other reason is arguably missing.⁹⁴ In doing so, the *Foucha* majority limits the states' power to assert a "legitimate and traditional" interest, upheld by a constitutionally adequate procedure, as a basis for the defendant's incarceration.⁹⁵

V. PROBLEMS AND SUGGESTED SOLUTIONS

The problems associated with the *Foucha* decision are: (1) the premature release of dangerous criminals into society; and (2) the potential abolition of the Not Guilty By Reason of Insanity (NGRI) verdict in many jurisdictions. A feasible solution to both problems is the adoption of the guilty but mentally ill (GBMI) verdict as an alternative to NGRI. Also, clarification of the terms "dangerousness" and "insanity" and consistent application of tests to determine the existence of these two factors may aid states in satisfying their duties to both society and mentally ill citizens.

A. *The Premature Release of Dangerous Criminals*

One of the weaknesses of the *Foucha* decision is that it will allow insanity acquittees to be released once they can prove that they are no longer afflicted with a mental illness. This is true regardless of the apparent dangerousness of the individual or the nature of the act committed. This ruling apparently leaves the doors of justice wide open for culpable defendants to plead insanity and, if successful, escape liability altogether. As Justice Kennedy points out in his dissent, this very case appears to be one in which the "petitioner's initial claim of insanity may have been feigned."⁹⁶

Furthermore, in cases such as this one, persons who were insane as a result of a drug-induced psychosis at the time of the offense should have no difficulty proving their sanity once they are no longer under the influences of the mind-altering drug.⁹⁷ This, in effect, creates a complete defense to crimes committed by persons on drugs, provided they can prove that the drug resulted in their inability to distinguish between right and wrong.⁹⁸ Historically, the assertion of drug intoxication in an attempt to

94. See *supra* text accompanying notes 23-25 and 41-45 for discussion of antisocial personality as an abnormal emotional condition.

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

96. *Id.* at 1797.

97. See *supra* text accompanying note 18.

98. The defendant's burden will vary depending on which insanity test is used in the relevant jurisdiction.

prove the lack of *mens rea* has only been used to mitigate the defendant's liability, not to exculpate the defendant completely.⁹⁹ However, the result of *Foucha* may be that defendants who commit crimes while on drugs may claim to have suffered from a drug-induced psychosis rather than mere intoxication in an attempt to escape punishment. This is particularly disturbing given the significant correlation between drug use and criminal activity.¹⁰⁰

B. *NGRI Verdict May Face Abolition*

Another problem with the *Foucha* decision is that it may result in a breakdown of the NGRI verdict. Since the Court did not make a distinction with regard to the variance in defendants' conditions of dangerousness, states may be compelled to release extremely dangerous defendants upon a showing of sanity. As those individuals inevitably commit further violent acts, public outrage could very likely result in legislation restricting the NGRI verdict, if not eliminating it altogether as some jurisdictions have already done.¹⁰¹

C. *Guilty But Mentally Ill As a Practical Solution*

The intermediate verdict of GBMI has proven to be a viable alternative to the insanity defense in twelve states.¹⁰² Michigan, the first state to

99. MODEL PENAL CODE § 2.08 (1962), reprinted in WAYNE R. LAFAVE, MODERN CRIMINAL LAW, CASES COMMENTS AND QUESTIONS (1988), provides:

(1) Except as provided in Subsection (4) of this section, intoxication of the actor is not a defense unless it negates an element of the offense. . . (4) Intoxication which (a) is not self-induced or (b) is pathological is an affirmative defense if by reason of such intoxication the actor at the time of his conduct lacks substantial capacity either to appreciate its criminality [wrongfulness] or to conform his conduct to the requirements of law.

Id.

100. See Deborah W. Denno, *Human Biology and Criminal Responsibility: Free Will or Free Ride?*, 137 U. PA. L. REV. 615, 631 n.99 (1988) (citing H. HARWOOD, ET AL., ECONOMIC COSTS TO SOCIETY OF ALCOHOL AND DRUG ABUSE AND MENTAL ILLNESS: 1980 (1984) (concluding that an estimated 10% of homicides in the United States result from drug abuse)); GOLDSTEIN ET AL., *Drug Dependence and Abuse*, in CLOSING THE GAP: THE BURDEN OF UNNECESSARY ILLNESS 89, 90, 95-96 (1987) (estimating that over 2,000 homicides in the United States in 1980 were drug-related and resulted in the total loss of approximately 70,000 years of life, assuming an average life span of 65 years).

101. See Mickenberg, *supra* note 3, at 943-44 (discussing this process as it has already been documented in response to highly publicized trials such as the John Hinckley trial); see also McGinley, *supra* note 2, at 206-07 (noting that although the insanity defense is still possible in 48 states, a number of jurisdictions are contemplating altering or abolishing their insanity statutes in response to the insanity acquittal of John Hinckley in 1982).

102. See ALASKA STAT. §§ 12.47.020(c), 12.47.030, 12.47.050 (1989); DEL. CODE ANN. tit. 11, §§ 401(b), 408, 409, 3905 (1987); GA. CODE ANN. § 17-7-131 (Michie Supp. 1989); ILL. ANN. STAT. Ch. 38, Para. 115-3 (Smith-Hurd 1990); IND. CODE ANN. §§ 35-36-1-1 to 35-36-2-5 (Burns 1985 & Supp.); KY. REV. STAT. ANN. §§ 504.120 to 504.130 (Michie/Bobbs-Merrill 1985); Pouncey v. State, 465 A.2d 475 (Md. 1983); MICH. COMP. LAWS ANN. § 768.36 (West 1982); N.M. STAT. ANN.

adopt the verdict, still retains the NGRI verdict as a defense where appropriate.¹⁰³ However, GBMI has been added as an alternative for juries to consider whenever a defendant pleads insanity. Once a defendant is found GBMI, a hearing is held to determine the level of mental illness and the appropriate sentencing.¹⁰⁴ If the defendant is no longer mentally ill at the time he committed the crime, but his illness did not meet the test of insanity, as was the case in *Foucha*, he may be incarcerated in a penal institution.¹⁰⁵ If the defendant is mentally ill, he will receive the appropriate psychiatric treatment which may or may not involve inpatient treatment.¹⁰⁶ Once successfully treated, he will then either be placed on probation or sent to a prison for the remainder of his sentence depending on the crime committed and the sentence remaining.¹⁰⁷

Opponents of the GBMI verdict claim that it violates an insane person's right to due process and equal protection, as well as Eighth Amendment rights prohibiting cruel and unusual punishment.¹⁰⁸ Primarily, they assert that since insanity has no technical legal definition, the GBMI verdict will result in the punishment of persons who are truly insane.¹⁰⁹ However, states that have adopted the alternate verdict have found the opposite to be true. Michigan reports that since its adoption of GBMI, the percentage of defendants who successfully plead insanity as a defense has remained unchanged.¹¹⁰ Therefore, since the verdict is only possible after the State has proven guilt beyond a reasonable doubt, defendants in that jurisdiction who have received the GBMI verdict would otherwise have received a guilty verdict if GBMI had not been available.

Critics of the GBMI verdict further argue that the possibility exists for an insane defendant to receive a GBMI verdict. However, as evidenced by the *Foucha* decision, the reverse is true as well. Persons who should justifiably be incapacitated for the good of society sometimes "slip through the cracks." Nevertheless, a verdict which has the potential of denying individuals their constitutional rights—in particular, the Eighth

§§ 31-9-3, 31-9-4 (Michie 1984); 18 PA. CONS. STAT. ANN. § 314 (1983); S.D. CODIFIED LAWS ANN. §§ 23A-7-2, 23A-7-16, 23A-26-14, 23A-27-38 (1988); UTAH CODE ANN. § 77-13-1 (1990).

103. Mickenberg, *supra* note 3, at 987.

104. Mickenberg, *supra* note 3, at 988 (citing MICH. COMP. LAWS ANN. § 768.36.3 (West 1948)).

105. Mickenberg, *supra* note 3, at 949-50.

106. Mickenberg, *supra* note 3, at 949-50.

107. Mickenberg, *supra* note 3, at 949-50.

108. Judith A. Northrup, Comment, *Guilty But Mentally Ill: Broadening the Scope of Criminal Responsibility*, 44 OHIO ST. L.J. 797, 811, 814 (1983).

109. Christopher Slobogin, Comment, *The Guilty But Mentally Ill Verdict: An Idea Whose Time Should Not Have Come*, 53 GEO. WASH. L. REV. 494, 509 (1985).

110. Mickenberg, *supra* note 3, at 992. A defendant can only receive this verdict if he is found guilty and insane. *Id.* at 987-88.

Amendment protection against cruel and unusual punishment—should be closely examined.

Perhaps a different set of guidelines than those presently used for the verdict may be necessary. For example, jurisdictions may want to consider reserving the option of applying the GBMI verdict for only particularly violent felony cases,¹¹¹ such as murder, rape, armed robbery, assault with a deadly weapon, etc. This would further the state's interest in the incarceration of criminal defendants who have proven themselves to be a danger to society, rather than imprisoning a person who, for example, may have criminal tendencies as a result of mental illness but has never harmed or threatened anyone.¹¹² Even though in the jurisdictions that now recognize the verdict, it only becomes an issue once all the elements of the crime have been satisfied and the defendant pleads insanity.¹¹³ This extra precaution would alleviate the risk of an insane individual serving a prison term for only a minor or nonviolent offense.

D. Redefining "Insanity" and "Dangerousness"

As another solution, perhaps the time has come for a clearer, more consistent definition of "insanity" for states to follow. Jurisdictions are split as to the definition of insanity and the proper test for determining a defendant's state of sanity at the time of a crime.¹¹⁴ Some degree of inconsistency originates from the application of the relevant insanity test to

111. See Blum, *supra* note 1, at 9, finding that fifty percent of defendants pleading insanity are accused of violent or potentially violent crimes.

112. See *Jones v. United States*, 463 U.S. 354, 359-60 (1983).

113. In the alternative, states might consider making this a verdict that certain defendants may plead to escape indefinite commitment to a mental institution. For example, in *Jones* a defendant who committed petit larceny was indefinitely committed as a result of a finding that paranoid schizophrenia caused him to commit the act. A defendant such as Jones may prefer to plead GBMI and receive treatment and a possible prison sentence as opposed to indefinite confinement. However, this should only be available to non-dangerous defendants. In such cases parole could also be conditioned on continued treatment.

114. Donald J. Tyrell, *Insanity: A Crazy Defense*, 35 MED. TRIAL TECH. Q. 48, 54-57 (1989). Several tests are currently used to determine insanity. The author outlines various tests. (1) *M'Naghten* test—The defendant is presumed to be sane unless he proves that "he was suffering from a mental defect or disease which caused a defect in his ability to reason and that as a result, he did not understand the 'nature and quality' of his act or he did not know that his act was wrong." *Id.* at 55. (2) Irresistible Impulse test—Under this test, which was "an offshoot and elaboration of the *M'Naghten* rule . . . the defendant would be considered insane 'if by reason of the duress of such mental disease, he had so far lost the power to choose between the right and wrong, and to avoid doing the act in question, as that his free agency was at the time destroyed.'" *Id.* (3) *Durham* test—The defendant must prove that "his unlawful act was the product of mental disease or defect.'" This test expanded the *M'Naghten* test in that it provided for the testimony of psychiatric experts as witnesses. The *Durham* test led to the present reliance on the testimony of psychiatrists in insanity proceedings. *Id.* at 55-56. (4) The *Model Penal Code*—The American Law Institutes test states:

(1) A person is not responsible for criminal conduct if at the time of such conduct as a

varying circumstances on a case-by-case basis. However, jury confusion and margin for error may be reduced if a specific test is consistently applied.

Finally, the dangerousness of the individual should be considered when applying the verdict. The *Foucha* decision heightened the need for the GBMI verdict in certain cases since it eliminated the consideration of dangerousness from insanity acquittee proceedings. While the state of a defendant's mental health is critical in making a determination of NGRI or GBMI, the element of dangerousness deserves tantamount consideration.

A problem with relying on dangerousness as a basis for confinement is that the term itself is vague and legally undefined.¹¹⁵ Historically, courts have relied on the testimony of medical experts to predict a defendant's propensity for future dangerousness. However, "dangerousness" is not a medical term. A psychiatrist's prediction of future dangerous behavior is not based upon science since dangerousness is not recognized as an identifiable personality dimension.¹¹⁶ As a result, sociologists, lawyers, judges, and clinicians have placed in doubt the ability to predict dangerousness.¹¹⁷

One solution to this problem is to clarify the term "dangerousness" legally rather than relying solely on the evidence of medical experts. Similar to the suggestion that states agree on a uniform definition of "insanity," criminal statutes could likewise define "dangerousness" in legal terms.¹¹⁸ For example, a finding of dangerousness should be based on several factors relevant to the crime committed, such as "the magnitude of the harm; whether the crime was to persons or property; whether the crime involved physical or psychological harm; and finally, dangerousness must be considered in the light of situational and social contexts."¹¹⁹

This does not suggest that the testimony of medical experts should

result of mental disease or defect he lacks substantial capacity to either appreciate the criminality of his conduct or to conform his conduct to the requirements of law. (2) As used in this article, the terms 'mental disease or defect' do not include an abnormality manifested only by repeated criminal or otherwise anti-social conduct.

Id. at 56.

115. Tyrell, *supra* note 89, at 25-27.

116. Tyrell, *supra* note 89, at 25-27.

117. Tyrell, *supra* note 89, at 34-35.

118. Murray L. Cohen et al., *The Clinical Prediction of Dangerousness*, 24 *CRIME & DELINQ.* 28, 30 (1978). The authors concluded that while many studies have found that the prediction of future violent behavior cannot be achieved with accuracy, data indicates that a clinical prediction is more accurate than statistical. They urge clinicians to take their role in predicting such behavior very seriously given the penalties placed on the defendant which is often based on their testimony. *Id.* at 28.

119. Tyrell, *supra* note 89, at 38.

be completely overlooked as a method of predicting dangerousness. For example, in one case a defendant was found NGRI of a particularly vicious assault and rape based on the psychiatrist's compelling testimony.¹²⁰ The doctor determined that the defendant's actions resulted from his inability to control a basic hatred for women and his inclination to create situations in which he was likely to act upon his feelings.¹²¹ Based on medical testimony, the court reasonably concluded that the likelihood was strong that the defendant would continue to be dangerous if not confined.¹²² The doctor's diagnosis of the defendant's mental condition was appropriate, based on his level of expertise in the field of psychiatry.¹²³ Courts should consider the expert testimony available, but determine guilt and confinement based on how the testimony comports with the legal definitions of insanity and dangerousness.

VI. CONCLUSION

The Supreme Court's decision in *Foucha v. Louisiana* was a landmark for the constitutional rights of insanity acquittees. Once acquittees have regained their sanity, the due process and equal protection clauses require that the state release them or hold adequate civil commitment proceedings to determine a basis for their confinement. The state's interest in confining mentally ill criminals is to treat their illness and to protect society. Historically, the individual's propensity for dangerous behavior has been a factor in determining the suitability of his release. However, *Foucha* appears to have overlooked that factor by holding that dangerousness is irrelevant to confinement once a defendant has regained his sanity. This decision limits the ability of the states to protect society from dangerous criminals.

States should respond by enacting legislation that would allow courts to confine dangerous offenders even after they have regained sanity. A verdict of "guilty but mentally ill" in addition to the traditional verdicts of "guilty" and "not guilty" is one possibility. GBMI, which already exists in several jurisdictions, is available to juries only when all elements of a crime have been proven by the State, and when the defendant raises the insanity defense. This verdict allows juries to commit certain individuals to a mental institution for treatment, but, once treated, it

120. Cohen, *supra* note 119, at 32.

121. Cohen, *supra* note 119, at 32.

122. Cohen, *supra* note 119, at 32.

123. Murray L. Cohen, A. Nicholas Groth, and Richard Siegel conducted this study. *Id.*

allows juries to imprison them based on a prediction of future dangerousness for the protection of society.

Further legislation should be aimed at clearly and uniformly defining "insanity" and "dangerousness" in legal terms rather than strictly relying on medical testimony. Uniform statutory language and application would help to clarify the seemingly arbitrary and subjective process of commitment proceedings. Such legislative measures would allow states to adequately deal with the criminally insane.

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