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Cover Page Footnote

The author wishes to thank Professor Kate Stith Cabranes of Yale University Law School for all of her help on the article

THE JURISDICTIONAL IMPLICATIONS OF A *MENS REA* APPROACH TO INSANITY: PLUGGING THE "DETAINMENT GAP" AFTER *FOUCHA v. LOUISIANA*

*Amy Baker Benjamin**

I. INTRODUCTION

When the state seeks to restrain a citizen, it must have either of two justifications.[1] First, the state may refer to a past act of the citizen which violated official rules of behavior, that is, conduct which violated the criminal law. This first justification is backward-looking, is based on a prior illegal act, and is the rationale of the criminal law. The state, as drafter and enforcer of the criminal law, may base compulsory confinement of a citizen solely on a past act committed in breach of the state's penal laws. The nature of that past act, rather than the dangerous nature of the citizen *per se*, determines the applicable penalty.

The state may also justify restraint of a citizen by pointing toward the possibility that the citizen will perpetrate antisocial, possibly dangerous acts in the future if he[2] is released from the state's custody. This second justification for compulsory restraint by the state is forward-looking. Forward-looking restraint can be based on a prior illegal act, as in the case of indeterminate sentencing, or even on the suspicion of a prior illegal act, as in the case of pretrial detainees.[3] Yet, historically, forward-looking restraint has been rooted in the need to treat the citizen for a mental disorder which may lead to harmful acts in the future. The state confines the citizen not for some past criminal act, but for an illness that carries the risk of destructive behavior in the future. Con-

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1. *See* Warren J. Ingber, *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, 286-87 (1982). "At an abstract level, our society has just two approaches to minimizing incidents of harmful acts perpetrated by one individual against another: the punishment-deterrence and prediction-prevention strategies." *Id.*

2. The generic reference to the male gender is used throughout this Article to refer to both the female and male genders for simplicity and stylistic purposes only.

3. *See, e.g.*, United States v. Salerno, 481 U.S. 739 (1987) (state may detain, prior to trial, arrestees who present an identified and grave threat to an individual or to a community, so long as it affords certain procedural protection in the determination of dangerousness).

finement for the purposes of treatment and protective restraint until the treatment proves effective is the rationale of civil commitment.[4]

Criminal confinement and civil commitment are not as easily delineated from each other as might be expected. Within the realm of criminal confinement lies a grey area in which the state deems citizens who committed criminal acts to be "not guilty by reason of insanity."[5] Further, some states regard such citizens as "guilty but mentally ill."[6] The citizens in these two categories find themselves confined by the state, but they do not fall squarely within the domain of either the criminal or civil jurisdiction of the judicial systems that confine them. This "lack of fit," as it were, inevitably produces the question: When can these citizens go free? Society's response has been to allow a "detainment gap" to open up in the protective operation of the law by letting the "bad and mad" citizen go free as soon as he is no longer "mad."

The United States Supreme Court recently decided *Foucha v. Louisiana*,[7] a case in which a citizen questioned the constitutionality of a state statute designed to plug the detainment gap.[8] The Louisiana statute conditioned release of a citizen, confined in an institution for the mentally ill following an insanity acquittal, on the dangerousness of the citizen rather than on his mental condition.[9] The Court reversed

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4. *See generally* Ingber, *supra* note 1.

> It is important to notice that prior antisocial conduct plays a different role in each . . . strateg[y]. In a punishment-deterrence (*i.e.*, criminal) proceeding, there is no need to look forward in time; the factfinder need only determine whether the act in question was in fact done in a way that justifies punitive treatment. In contrast, the factfinder in a prediction-prevention (*i.e.*, commitment) hearing is charged with determining whether the probability and gravity of future antisocial behavior are sufficiently high to warrant confinement of the individual. In a prediction-prevention setting, prior antisocial acts may be weighed as factors, but they are not a direct predicate for confinement.

Id. at 287; *see also* Norval Morris, *The Criminal Responsibility of the Mentally Ill*, 33 SYRACUSE L. REV. 477 (1982).

> Progress in medicine having set aside quarantine as rare, brief, and hence inconsequential, there remain only two legal powers supporting compulsory incarceration by the State: imprisonment under the criminal law and commitment to a mental hospital under the mental health law. . . . Leaving aside the nuances, imprisonment requires that a person be convicted of a crime and that his imprisonment be both deserved and socially desirable. Commitment to a mental hospital requires that the person be mentally ill or retarded and a danger to others or to himself, or that he be incapable of caring for himself.

Morris, *supra* at 477-78.

5. For a discussion of "not guilty by reason of insanity" statutes, see *infra* notes 170-79 and accompanying text.

6. For a discussion of "guilty but mentally ill" statutes, see *infra* notes 163-79 and accompanying text.

7. 112 S. Ct. 1780 (interim ed. 1992).

8. *Id.*

9. *Id.* at 1781.

the holding of the Supreme Court of Louisiana and found the statute to be unconstitutional.[10]

This Article examines the detainment gap and the states' attempts to close it. Section II examines how the detainment gap developed.[11] Section III discusses the recent United States Supreme Court ruling which apparently requires, as a matter of constitutional law, that the detainment gap be preserved.[12] Section IV scrutinizes the Court's decision in light of the *mens rea* approach to criminal acquittals based upon mental illness and in light of a citizen's constitutional rights when being prosecuted by the state.[13] Section V concludes that Louisiana's response to the detainment gap does not violate the detained citizen's constitutional rights when the citizen is held beyond the time that he ceases to be mentally ill.[14]

II. BACKGROUND

A. A Perfect World

One can imagine a world in which the end of the domain of criminal confinement precisely marks the beginning of the domain of civil commitment.[15] If the state could not establish *either* a prior criminal act *or* the existence of a mental illness that makes an individual dangerous, it could not confine the individual, regardless of how dangerous he appeared to be. The norm in such an imaginary world would be that innocent and mentally sound individuals go free. It is a norm that minimizes the chance that the state will deprive persons of their liberty merely on the basis of their perceived potential for dangerous conduct. It minimizes, in short, the likelihood of preventive detention — a

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10. *Id.* at 1788.

11. *See infra* notes 15-38 and accompanying text.

12. *See infra* notes 39-72 and accompanying text.

13. *See infra* notes 73-209 and accompanying text.

14. *See infra* Section V.

15. The state would gain criminal jurisdiction over an individual in every instance where it could establish the fact of a prior criminal act. While a criminally liable person might also be mentally ill, his illness would not deprive the state of criminal jurisdiction over him; at most the illness would trigger a right to certain minimally acceptable conditions of confinement. *See* Estelle v. Gamble, 429 U.S. 97, 106 (1976) ("deliberate indifference to serious medical needs" of prisoners would violate the Eighth Amendment); *see also id.* at 116-17 (Stevens, J., dissenting).

If, however, the state neither found the individual guilty of a prior criminal act nor obliged him to wait in the antechamber of the state's criminal jurisdiction because of an indictment, *see* United States v. Salerno, 481 U.S. 739 (1987), the state could gain jurisdiction over him only by establishing the existence of a mental illness that makes him dangerous. In O'Connor v. Donaldson, 422 U.S. 563 (1975), the United States Supreme Court held that, as a matter of due process, the state could not commit a mentally ill person unless that person posed a danger either to himself or to society, or was unable to care for himself. *Id.* at 576. In Addington v. Texas, 441 U.S. 418 (1979), the Court required the State to prove these grounds for commitment by clear and convincing evidence. *Id.* at 433.

means of preventing harm that is wrong from both an administrative and philosophical standpoint.

From an administrative standpoint, one wonders how the state can fairly gauge a person's potential for dangerous conduct. Should police subject Italian-Americans to greater scrutiny or detention than other Americans given their reputation for volatile tempers? Should a dangerous "look" automatically indicate a dangerous propensity? What type of "look" is relevant and probative? Long hair? Worn jeans? Black skin? Even in what is perhaps the easiest case — that of recidivists, who have already repeatedly demonstrated their capacity to engage in criminal conduct — a general rule of preventive detention cannot begin to separate those recidivists who ultimately emerge from jail rehabilitated from those who do not. Indeed, the two groups can only be separated when one group goes on to commit further crimes and well-grounded suspicion becomes hard reality.

Philosophically, preventive detention does not comport with the traditional English and American legal principal that persons should not be confined for fear of their yet uncommitted acts. Justice Robert Jackson once observed that the "jailing of persons by the courts because of anticipated but as yet uncommitted crimes" could not be reconciled with "traditional American law."[16] The principle against preventative detention can be deemed to be rooted in either (1) the optimistic belief that all persons have the potential to draw back from criminal conduct at the last moment and the state should give them a chance to do so, or (2) the pessimistic reluctance of the libertarian to allow the state any more control over individuals than it already possesses through backward-looking criminal sanctions. Whatever its foundation, the principle against preventive detention need not boast some sort of "natural law" status to be regarded as a relevant and nontrivial feature of both American criminal jurisprudence and Americans' cultural and political ideals in general. While the claim sounds arbitrary,

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16. Williamson v. United States, 184 F.2d 280, 282 (2d Cir. 1950). Lord Justice Denning observed about British law that "[i]t would be contrary to all principle for a man to be punished, not for what he has already done but for what he may hereafter do." Everett v. Ribbands, 2 Q.B. 198, 206 (C.A. 1952). Francis Wharton, a criminal law scholar, stated:

> If the [preventive] theory be correct, and be logically pursued, then punishment should precede, and not follow, crime. The State must explore for guilty tendencies, and make a trial to consist in the psychological investigation of such tendencies. *This contradicts one of the fundamental maxims of English common law, by which not a tendency to crime, but simply crime itself, can be made the subject of a criminal issue.*

FRANCIS WHARTON, CRIMINAL LAW § 2, at 3 (12th ed. 1932) (footnote omitted) (emphasis added); *see also In re* Torsney, 394 N.E.2d 262, 271 (N.Y. 1979) (plurality opinion) ("Whatever its label, confinement on a showing of mere propensity amounts to nothing more than preventive detention, a concept foreign to our constitutional order."), *overruled by* People v. Escobar, 462 N.E.2d 1171 (N.Y. 1984).

it is nonetheless true that preventive detention is improper because Americans and English have traditionally believed such detention to be unacceptable.

B. Insanity and Guilty-But-Mentally-Ill Defenses

This Article addresses the fact that we do not live in such a perfect world with a clear boundary between the guilty and the ill. Those acquitted of criminal charges by reason of insanity[17] are principally responsible for muddying the boundary line between criminal confinement for punitive purposes[18] and civil commitment for therapeutic ones by being both "bad" and "mad." On the one hand, an acquittal by reason of insanity in most jurisdictions rests on a finding beyond a reasonable doubt that the acquittee committed the crimes for which he is prosecuted with the appropriate *mens rea*.[19] On the other hand, an insanity verdict signifies that the acquittee suffered from a mental disease or illness at the time of the criminal act which impaired his cognitive functions or self-control so substantially that he cannot be held criminally responsible for the commission of the act.[20] The acquittee has

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17. For convenience, such persons shall hereinafter be referred to as "insanity acquittees" or simply as "acquittees." In certain instances acquittees will be compared to those who are civilly committed for mental treatment and care, hereinafter referred to as "committees."

18. "Punitive purposes" includes the oft-named and oft-conflicting purposes of criminal punishment: prevention, deterrence, retribution, rehabilitation, education, and restraint. What these purposes have in common, no matter how constructive rather than reprobative they might be, is that they are premised on an earlier criminal offense. The state does not — may not — deter, rehabilitate, educate, restrain, or visit retribution upon just anyone. Indeed, each punitive purpose must first find authorization in the existence of a prior criminal act.

19. MODEL PENAL CODE § 4.08 cmt. 2 (1985).

20. *See id.* § 4.01(1) (the acquittee must be unable to appreciate criminality of act or to conform conduct to legal requirements). Some courts mistakenly believe the insanity defense is coextensive with the concept of *mens rea*, such that any defendant who has a valid insanity defense necessarily is not guilty for lack of *mens rea*. *See, e.g.*, State v. Krol, 344 A.2d 289, 295 (N.J. 1975). The *Krol* court premised its holding that insanity acquittees are entitled to the same standards of commitment as civil committees on the fact that "[c]ommitment following acquittal by reason of insanity is not intended to be punitive, for, although such a verdict implies a finding that defendant has committed the *actus reus*, it also constitutes a finding that he did so without a criminal state of mind. There is, in effect, no crime to punish." *Id.* (citations omitted). But the *Krol* view is not always the case. *See* WAYNE R. LAFAVE AND AUSTIN W. SCOTT, JR., CRIMINAL LAW § 4.1, at 305-06 (2d ed. 1986).

Moreover, the *Krol* approach is arguably unconstitutional. A defendant who suffers from a mental disease that prevented him from forming the mental state of the crime charged deserves a verdict of "not guilty," rather than a verdict of "not guilty by reason of insanity," which will in all likelihood subject him to commitment in a mental institution until he recovers his sanity. Admittedly, the circumstances which give rise to a defense of insanity sometimes also warrant the conclusion that the defendant did not commit the acts with the requisite mental state. However, this overlap does not obliterate the differences between the two types of verdicts, nor between the legal consequences of a mental disease that prevents the formation of *mens rea* and the legal consequences of a mental disease that allows the formation of *mens rea* but nonetheless excuses the crime.

performed an act for which he would otherwise be held criminally responsible had he not been mentally ill at the time of the act.

In some instances, this hybrid nature of an insanity acquittal poses no threat to the state's interest in retaining custody of a dangerous, yet legally innocent, insanity acquittee. If the acquittee continues to be mentally ill at the time of conviction, the state can assert its therapeutic jurisdiction over him and commit him through civil proceedings to a secure mental facility for the amount of time necessary either to cure his illness or render him nondangerous to the public. From the point of view of a state anxious to contain those it believes to be dangerous, therapeutic jurisdiction essentially has the same effect as criminal confinement.

Prior to the 1960s, the state's therapeutic jurisdiction usually did have the effect of criminal confinement.[21] Most insanity acquittees were presumed by the courts to suffer from chronic mental illnesses.[22] The presumption was justified, given the relatively narrow nature of the insanity defense then employed by most jurisdictions[23] — the *M'Naghten* test,[24] sometimes coupled with the "irresistible impulse" test[25] — and the lack of effective medical treatment for mental illnesses.

In the context of the defense of self-defense, the United States Supreme Court has acknowledged that such an overlap is constitutionally permissible as long as the defendant's evidence introduced to prove the affirmative defense of insanity is also allowed to be considered by the jury on the question of guilt, if the evidence is relevant to that question. Martin v. Ohio, 480 U.S. 228, 234 (1987) (holding that a state may place the burden on a defendant of proving self-defense, but indicating that a state's right to shift the burden does not include the right to prevent defendant from showing self-defense in an effort to prove that she did not act with the *mens rea* of "prior calculation and design"); *see also* Leland v. Oregon, 343 U.S. 790, 794 (1952) (upholding a state statute that placed upon defendant the burden of proving insanity beyond a reasonable doubt where it was clear that the jury was allowed to consider the evidence going to insanity on the issue of guilt); *cf.* United States v. Twine, 853 F.2d 676, 678-79 (9th Cir. 1988) (interpreting the Insanity Defense Reform Act of 1984 to restrict a defendant's ability to excuse guilt with mental defect evidence, but not to limit defendant's right to introduce such evidence for the purpose of disproving guilt); United States v. Pohlot, 827 F.2d 889, 903 (3d Cir. 1987) (interpreting the Insanity Defense Reform Act of 1984 to allow the admission of evidence of mental abnormality on the issue of *mens rea*), *cert. denied*, 484 U.S. 1011 (1988).

21. Scott Leigh Sherman, *Guilty But Mentally Ill: A Retreat from the Insanity Defenses*, 7 AM. J.L. & MED. 237, 242 (1981).

22. *Id.*

23. WAYNE R. LAFAVE AND AUSTIN W. SCOTT, JR., CRIMINAL LAW §§ 37-38, at 274, 287, 292, 294 n.78 (1st ed. 1972).

24. M'Naghten's Case, 8 Eng. Rep. 718 (H.L. 1843). The *M'Naghten* test centers on the degree to which mental illness impaired the cognitive faculties of a perpetrator at the time of his act. This test provides that a defense on the ground of insanity lies if:

> 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 was wrong.

Over the last two decades, however, the escape net of the state's therapeutic jurisdiction has slowly deteriorated. Courts became willing to entertain more expansive notions of criminal insanity, as exemplified first by the embrace of the *Durham* test for insanity by the District of Columbia Court of Appeals,[26] and then by the widespread adoption of the American Law Institute's (A.L.I.) test for the insanity defense.[27] The consequence of a more forgiving test of insanity is not the acquittal of persons who suffer from traditional "organic" mental illnesses,[28] but rather the acquittal of those who occupy the more nebulous areas of pathology, sociopathology, and "personality disorders," and who suffer from mental defects that are not readily amenable to medical treatment. Their illnesses are both less grave and less treatable, and the state's therapeutic mission concerning such patients is correspondingly problematic.[29] Additionally, the development of modern

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25. LAFAVE & SCOTT, *supra* note 20, § 4.2(d). "Broadly stated, [the irresistible impulse test] requires a verdict of not guilty by reason of insanity if it is found that the defendant had a mental disease which kept him from controlling his conduct." *Id.*

26. Durham v. United States, 214 F.2d 862 (D.C. Cir. 1954), *overruled by* United States v. Brawner, 471 F.2d 969 (D.C. Cir. 1972). Under the *Durham* rule, "an accused [is] not criminally responsible if his unlawful act was the product of mental disease or mental defect." LAFAVE & SCOTT, *supra* note 20, § 4.3. At the time of its promulgation, the *Durham* rule was touted as providing a broader test of criminal irresponsibility than either the *M'Naghten* test or the "irresistible impulse" test. LAFAVE & SCOTT, *supra* note 20, § 4.3(a).

27. Under the A.L.I. test, "[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 [wrongfulness] of his conduct or to conform his conduct to the requirements of law." LAFAVE & SCOTT, *supra* note 20, § 4.3 (footnote omitted). Whereas the *M'Naghten* and irresistible impulse tests were generally construed to require a complete impairment of cognitive capacity and capacity for self-control, the A.L.I. test requires only a lack of "substantial capacity" to conform one's conduct to the requirements of law. *Id.* See *supra* notes 24-25 for a description of the *M'Naghten* and irresistible impulse tests. The language of the A.L.I. test that sets forth the causal link between disease and crime (*i.e.*, "if . . . as a result of mental disease or defect . . ."), LAFAVE & SCOTT, *supra* note 20, § 4.3(d), also reproduces the ambiguity, and the potential leniency, of the language of the *Durham* rule (*i.e.*, "if his unlawful act was the product of mental disease or mental defect"), *id.* § 4.3. See *supra* note 26 and accompanying test for a discussion of the *Durham* rule.

28. An example of a traditional, "organic" mental illness is schizophrenic psychosis.

29. *See* ABRAHAM S. GOLDSTEIN, THE INSANITY DEFENSE 155, 159 (1967).

> The problem [of indefinite commitment of insanity acquittees] is raised in its starkest form by the person who cannot be "treated" in the present state of knowledge and resources. . . . This will occur because he will not be able to satisfy the existing criteria of release. Where sanity is the key, it will be difficult to say it has been restored, or that the offender has been cured. . . . The problem will become even more acute if the insanity defense is applied to include psychopaths, alcoholics, and narcotics addicts. Though they will seem more capable of functioning in society than many psychotics, they may be less curable and more dangerous. . . . [T]he psychiatric literature . . . has contented itself with urging the expansion of the insanity defense, so that more offenders might be brought into mental hospitals, and has neglected almost entirely the gnawing question of what should be done with those who cannot be treated successfully.

Id. (footnote omitted).

psychopharmacological techniques has made successful treatment of mental illness possible within a very short period, sometimes months or weeks.[30]

The spectacle created by these developments is a severe one: the insanity acquittee is relieved of responsibility by the criminal law authorities for an act that would otherwise have constituted a crime but for his mental illness. Soon thereafter, the acquittee is either (a) pronounced by mental health authorities to be insufficiently amenable to medical treatment so as not to require it, or (b) rather quickly cured of his mental illness and then pronounced fit for release.[31] In both situations, the state pays dearly for its time-honored principle that insanity excuses criminal responsibility and deprives the state of a rationale for punishment. The state finds itself absolving dangerous persons whom it then cannot legitimately detain on a therapeutic basis.[32]

> [T]o hold a patient solely for potential dangerousness would snap the thin line between detention for therapy and detention for retribution. Though the likelihood is not great that many cases will pose this issue, the possibility of it arising has increased under the *Durham* rule. The meaning of mental illness for the insanity defense has been construed under *Durham* to include "psychopathic and sociopathic personalities," even though insanity for civil-commitment purposes excludes, except for the "sexual psychopath," such personality disorders.

Joseph Goldstein & Jay Katz, *Dangerousness and Mental Illness: Some Observations on the Decision to Release Persons Acquitted By Reason of Insanity*, 70 YALE L.J. 225, 238 (1960) (footnotes omitted).

30. Peter Marguiles, *The "Pandemonium Between The Mad And The Bad:" Procedures For The Commitment And Release Of Insanity Acquittees After* Jones v. United States, 36 RUTGERS L. REV. 793, 798-802 (1984).

31. In the 1970s, the combination of forgiving legal standards of insanity and rather narrow medical conceptions of mental illness requiring commitment resulted in the early release of some insanity acquittees. The Nixon Administration apparently sensed a gap in the protective, and possibly the retributive, functions of the law caused by this combination, and reacted thusly:

> The Nixon reform [movement to narrow the insanity defense to a "defense" of lack of *mens rea*] was unconcerned that those found not guilty by reason of insanity were detained for long periods of time in mental hospitals. Nixon instead focused on not guilty by reason of insanity "patients" who were quickly released by psychiatric staff members who determined that those committed were not insane, and that their hospitalizations had resulted from fabricated defenses and overly credulous juries. The staff considered the "patient" cured his first day in the hospital. In a climate in which courts were constantly telling psychiatrists that they were depriving patients of the liberty they deserved by not paying sufficient attention to commitment criteria, the psychiatric staff discharged patients — even those who had committed extremely dangerous acts — because they had no diagnosable mental illness and did not meet the [civil] criteria for further detention.

Jonas Robitscher & Andrew Ky Haynes, *In Defense Of The Insanity Defense*, 31 EMORY L.J. 9, 38 (1982).

32. One case in which a court comes to grips with this "detainment gap" and its possibly dangerous consequences is *In re* Torsney, 394 N.E.2d 262 (N.Y. 1979) (plurality opinion), *overruled by* People v. Escobar, 462 N.E.2d 1171 (N.Y. 1984). Police Officer Robert Torsney was acquitted by reason of insanity of the killing of a teenage boy. *Id.* at 263. His mental defect was one of psychomotor epilepsy: when he felt attacked and threatened, the aggressive impulses already latent in his personality because of his "explosive personality disorder" erupted in explosive

It is not hard to see how this scheme of rationales for confinement opens a gap in the protective operation of the law.[33] "Under this construction and with current standards of civil commitment, psychopaths, absolved of criminal responsibility under *Durham*, could not be detained in either prisons or hospitals."[34] Some no doubt think this detainment gap defensible. Given the principles at stake — that the insanity defense acquits a criminal defendant of his crime,[35] that the acquittee may not require medical treatment, and that "the fundamental function of the criminal law [is] to safeguard every individual from the imposition of sanctions solely for his potential dangerousness"[36] — the state, in its capacity as enforcer of the criminal law, must on this view pay the price of that gap and let the mentally sound insanity acquittee go free. Otherwise, the state's continued detention of the acquittee/patient solely for potential dangerousness "would snap the thin line between detention for therapy and detention for retribution."[37] Such detention would transform the state's confinement of an acquittee for purposes of treatment and protection into the incarceration of an indi-

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impulses. *Id.* at 268. Although this defect did not amount to a classical form of psychosis, the jury judged from Torsney's symptomatology that he had not been able to appreciate the consequences of his conduct at the time of the crime and acquitted him for insanity on that basis. *Id.* Upon his acquittal, Torsney was committed to a mental institution. *Id.* The medical authorities responsible for his release reported eight months after his commitment that Torsney exhibited no signs of psychosis, psychopathic disorder, or organic damage. *Id.* at 269. Because Torsney also did not exhibit signs of dangerousness, the medical authorities recommended to the court that he be released. *Id.* The New York Court of Appeals upheld the lower court's release order on the grounds that an insanity acquittee such as Torsney can be held only for as long as he suffers from a mental illness that makes him dangerous to himself and others; dangerous propensities by themselves do not justify further commitment. *Id.* at 270-71. Judge Wachtler filed a dissent in which he argued that Torsney's psychological condition had not changed from the time of the killing to the time of his release hearing. *Id.* at 273 (Wachtler, J., dissenting). During the entire time span, Torsney suffered (and might well continue to suffer) from a personality disorder that rendered him dangerous. *Id.* Judge Wachtler argued that the jury may well have acquitted Torsney on the basis of the symptomatology of this disorder even though it knew that Torsney's mental condition did not easily fit into any particular psychiatric category. *Id.* at 275. It was, therefore, "a frightful paradox" for the court to release Torsney on the grounds that he "merely" manifested the symptoms of a mental defect that could not be labeled in psychiatric terms. *Id.* The plurality conceded the force of Judge Wachtler's point when it noted that

> [t]he friction between the operation of a perhaps theoretically subjective rule permitting acquittals on something less than uniform notions of mental disease or defect and the cry of due process for objective criteria upon which to predicate continued institutionalization is amply illustrated in the case at bar. Perhaps resolution of this conflict lies in reevaluation of the scope and applicability of the insanity defense.

Id. at 271 (footnote omitted). The court, in other words, was calling on the legislature to plug the detainment gap.

33. Goldstein & Katz, *supra* note 29, at 239 n.50.
34. Goldstein & Katz, *supra* note 29, at 239 n.50.
35. *See, e.g.*, Sherman, *supra* note 21, at 245.
36. Goldstein & Katz, *supra* note 29, at 237 (footnote omitted).
37. Goldstein & Katz, *supra* note 29, at 238.

vidual who has never been convicted of a crime. By turning the acquittee into a "criminal-patient," the state would make him "suffer the worst of both worlds — imprisonment for what he did [in the past] with duration of the imprisonment limited only by predictions of his continuing dangerousness."[38]

This argument is certainly one response to the detainment gap created in the protective and punitive operations of the law by the phenomenon of the sane or recovered insanity acquittee. The question is whether this argument is the only permissible response. Must the state choose between (a) rejecting the exculpatory nature of mental illness, or (b) surrendering all jurisdiction over acquittees who have been proven beyond a reasonable doubt to have committed crimes? Does the Constitution even allow this choice, or does the Constitution compel the state to honor the exculpatory nature of mental illness and correspondingly set the insanity acquittee free upon his medical recovery? These are the questions that this Article will explore.

III. *FOUCHA V. LOUISIANA*

In *Foucha v. Louisiana*,[39] the United States Supreme Court confronted a Louisiana statute that allowed the state to commit a person acquitted by reason of insanity to a psychiatric hospital until such time as he proved that he could be released without posing a threat of danger to himself or to others.[40] The statute conditioned the continued confinement of insanity acquittees on the sole factor of their dangerousness.[41] The statute ignored the factor of mental illness, in spite of the fact that, under the *O'Connor/Addington* standards of civil commitment,[42] Louisiana could not constitutionally continue to detain civil committees once they ceased to be mentally ill. The statute attempted, in other words, to plug the detainment gap: to maintain the state's jurisdiction over persons whom it had spared from criminal sanctions but

38. Morris, *supra* note 4, at 479.

39. 112 S. Ct. 1780 (interim ed. 1992).

40. *Id.* at 1781.

41. *Id.*

42. Together, the holdings of O'Connor v. Donaldson, 422 U.S. 563 (1975), and Addington v. Texas, 441 U.S. 418 (1979), require the state to prove by clear and convincing evidence that the person it seeks civilly to commit is both mentally ill and dangerous. *See supra* note 15. Moreover, even if the state initially meets the *O'Connor/Addington* standard of civil commitment, civil commitment may not constitutionally continue after that initial basis for commitment no longer exists. *Foucha*, 112 S. Ct. at 1784 (quoting *O'Connor*, 422 U.S. at 575). Thus, if Terry Foucha had been civilly committed rather than committed by reason of an acquittal for insanity, he would become entitled to release if he recovered his mental health.

who subsequently "escaped" the state's therapeutic "sanction" of commitment by regaining sanity.[43]

The question presented to the Court was whether it is constitutionally permissible for dangerousness to be the sole test for the continued detention of a person found not guilty by reason of insanity.[44] Relying on its prior decision in *Jones v. United States*[45] for guidance, the Court answered in the negative. According to the Court, the continued incarceration of Terry Foucha under the Louisiana statute violated constitutionally mandated due process[46] and equal protection.[47]

In *Jones*, the issue had been whether an insanity acquittal alone is a constitutionally adequate basis for the state to commit and then to hospitalize an acquittee for a period longer than he might have served in prison had he been convicted.[48] The *Jones* Court concluded that an insanity acquittal was no less adequate a basis for indefinite commitment than satisfaction of the *Addington* burden of proof in the case of civil commitment.[49] Once satisfied with the evidentiary weight of an insanity acquittal, and with the commensurability of the acquittal with

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43. In Terry Foucha's case, the "escape" came in the form of recovery from the temporary, drug-induced psychosis from which he was adjudged to have suffered at the time of his criminal acts (aggravated burglary and illegal discharge of a firearm). *See Foucha*, 112 S. Ct. at 1782. Needless to say, with his short-lived mental illness, inducible by a difficult-to-treat drug dependency, Terry Foucha was apt to fall right through the detainment gap. Hospital psychiatrists certified four years after his initial commitment that Foucha was in remission from the psychosis, and that there had been no evidence of mental illness since his admission to the hospital. *Id.* The psychiatrists recommended that Foucha be conditionally discharged. *Id.* At the subsequent court hearing on the issue of dangerousness, a two-member sanity commission confirmed that Foucha no longer suffered from psychosis, but concluded that he continued to be an antisocial personality — an untreatable condition which is not a mental disease — and that he was not certifiably "nondangerous" for purposes of release. *See id.* at 1782-83. The court denied Foucha's plea for release on the basis of the commission's appraisal of his dangerousness. *Id.* at 1783.

44. *See id.* at 1784.

45. 463 U.S. 354 (1983).

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

47. *Id.* at 1783-84, 1788.

48. *Jones*, 463 U.S. at 356. The *Jones* Court focused on the evidentiary weight of an insanity acquittal that results when a defendant proves by a preponderance of the evidence that he was insane at the time of the offense charged. *Id.* at 363-66.

49. *Id.* at 367-68. The Court based its conclusion upon two factors. *See id.* at 366-67. First, a determination of mental illness at the time of the crime gives rise to a reasonable presumption of continuing mental illness at the time of trial and commitment. *See id.* at 366. Writing for the Court, Justice Powell endorsed Congress' view that:

> Where [the] accused has pleaded insanity as a defense to a crime, and the jury has found that the defendant was, in fact, insane at the time the crime was committed, it is just and reasonable . . . that the insanity, once established, should be presumed to continue and that the accused should automatically be confined for treatment until it can be shown that he has recovered.

Id. (citing S. REP. No. 1170, 84th Cong., 1st Sess., 13 (1955)).

Second, a preponderance of the evidence standard for commitment does not entail a greater risk of error than the clear and convincing standard of the civil context because the acquittee

the *Addington* civil-commitment standard, the Court then found no reason to accept Jones' argument that he was entitled either to release at the end of the period for which he could have been incarcerated or to recommitment pursuant to the *Addington* standard.[50] Given that the insanity acquittal satisfied the evidentiary standard for commitment, *and* that the purposes of commitment following an insanity acquittal were the same as those of civil commitment, the state had no reason to then diverge from the principle that governed civil confinement, namely, that the state may continue to confine the patient "until such time as he has regained his sanity or is no longer a danger to himself or society."[51]

In *Foucha*, a battle raged over whether the *Jones* Court meant the disjunctive "or" in this last sentence[52] to have constitutional import, or whether the Court used "or" as a nonbinding statutory interpretation of the law at issue.[53] The *Jones* Court had insisted that the purposes of the commitment of insanity acquittees and civil committees are the same.[54] It was reasonably clear, therefore, that the Court regarded the disjunctive standard to be constitutionally required.[55] The Court's language bears quoting:

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himself advanced his mental illness as a defense and because he was proven to have committed a criminal act as a result of that mental illness. *Id.* at 367.

50. *Id.* at 368-69.

51. *Id.* at 370.

52. *See id.* ("until such time as he has regained his sanity *or* is no longer a danger to himself or society.") (emphasis added).

53. Foucha v. Louisiana, 112 S. Ct. 1780, 1784-85 n.5 (interim ed. 1992).

> Justice Thomas, dissenting, suggests that there was no issue of the standards for release before us in *Jones*. The issue in that case, however, was whether an insanity acquittee "must be released because he has been hospitalized for a period longer than he might have served in prison had he been convicted" . . . and in the course of deciding that issue in the negative, we said that the detainee could be held until he was no longer mentally ill or no longer dangerous, regardless of how long a prison sentence might have been. . . . The Justice would "wish" away this aspect of *Jones*, but that case merely reflected the essence of our prior decisions.

Id. (citations omitted).

54. *See Jones*, 463 U.S. at 362-63. Jones himself did not insist upon such a complete convergence of the two types of commitment. He conceded that the District of Columbia could continue his confinement solely on the insufficient evidentiary basis of an insanity acquittal for a period equal to the maximum prison sentence he could have received had he been convicted. *Id.* at 362. He admitted that a valid justification for such automatic commitment would be to ensure that insanity acquittees do not "escape" confinement entirely. *Id.* at 362-63. Once conceding this punitive interest, however, Jones did insist on a quid pro quo: if he were to get stung by the state's punitive interest, he was entitled to have that punitive interest end at the time it ends for all who are criminally convicted, that is, at the end of the period of the relevant criminal sentence. *Id.* In response to Jones' concession, the Court effectively said: "Wrong — don't be so generous." *Cf. id.* at 368-69.

55. *Id.*

> In light of the congressional purposes underlying commitment of insanity acquittees, we think [Jones] clearly errs in contending that an acquittee's hypothetical maximum sentence provides the constitutional limit for his commitment. A particular sentence of incarceration is chosen to reflect society's view of the proper response to commission of a particular criminal offense, based on a variety of considerations such as retribution, deterrence, and rehabilitation. The State may punish a person convicted of a crime even if satisfied that he is unlikely to commit further crimes.
>
> Different considerations underlie commitment of an insanity acquittee. *As he was not convicted, he may not be punished.* His confinement rests on his continuing illness and dangerousness. Thus, under the District of Columbia statute, no matter how serious the act committed by the acquittee, he may be released within 50 days of his acquittal if he has recovered. In contrast, one who committed a less serious act may be confined for a longer period if he remains ill and dangerous. There simply is no necessary correlation between severity of the offense and length of time necessary for recovery. The length of the acquittee's hypothetical criminal sentence therefore is irrelevant to the purposes of his commitment.[56]

The Court, therefore, declined to base the length of commitment upon any potential underlying criminal sentence because it viewed the criminal and mental health systems as distinguishable.[57]

Terry Foucha asked the Court to pass on the constitutionality of a statute that explicitly affronted the conception of criminal commitment which the Court had assumed in *Jones*.[58] The *Foucha* Court affirmed the constitutional ruling implicit in *Jones*.[59] The Court began by citing *Jones* for the proposition that insanity acquittees are constitutionally entitled to the same substantive standards of release as civil committees under *Addington* and *O'Connor*.[60] The standards apply even if, as

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56. *Id.* (emphasis added) (citations omitted) (footnotes omitted).

57. What is remarkable about the *Jones* opinion is the Court's insistence that there is no difference in the *purposes* of criminal and civil commitment; indeed, that there are not two types of commitment at all, only two routes — the criminal and the civil — by which to achieve the one and only type of commitment — civil. The Court stipulates to and accepts the possible consequences of its approach, which is that a violent murderer might go free fifty days after his initial commitment, while a check forger or attempted shoplifter remains confined to a hospital ward for fifty years. *Id.* The *Jones* Court ratified a completely exculpatory conception of the insanity defense, a conception that holds a person's perpetration of a crime to be an unconstitutional basis for imposing upon him harsher standards of release from commitment. The Court's conception essentially is one in which the state's excusing or pardoning of a crime completely effaces the crime in time, space, and, *a fortiori*, in all of its practical legal consequences. The conception, moreover, does nothing less than ratify the detainment gap as the constitutionally necessary outcome. If the Court assumed this outcome rather than directly decide it, the Court made this assumption because the propositions appeared so clear.

58. Foucha v. Louisiana, 112 S. Ct. 1780, 1785 (interim ed. 1992).

59. *Id.*

60. *Id.* at 1783.

Jones held, acquittees may initially be confined without the state's compliance with procedures applicable to civil committees.[61] In other words, the *Foucha* Court cited *Jones* for the proposition that the disjunctive "or" in the release formula for civil committees[62] is constitutionally required for insanity acquittees. Because Louisiana did not contend that Foucha was mentally ill at the time of his release hearing, but only that he was continuing to show signs of an antisocial personality, the basis of Louisiana's therapeutic jurisdiction no longer existed.[63] Once the State's therapeutic jurisdiction failed, ample problems existed with Louisiana's continued detention of Foucha.

First, by keeping Foucha confined in a mental facility when he was no longer mentally ill, Louisiana violated the due process principle that the nature of commitment bear some reasonable relation to the purpose for which the individual is committed.[64] Second, tenets of substantive due process prohibited the state from "punishing" Foucha by holding him at all.[65] Here, the Court invoked *Jones*' admonition that "as he was not convicted, [the insanity acquittee] may not be punished. . . . [Society] may not excuse a defendant's criminal behavior because of his insanity and at the same time punish him for invoking an insanity defense."[66] Third, an insanity acquittee who recovers his mental health is no more subject to the state's criminal jurisdiction than are convicted criminals who have completed their prison terms[67] or mental incompetents who cannot stand trial but who also cannot become competent through treatment.[68] The insanity acquittal has the same effect of re-

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61. *Id.* at 1783 & n.4.

62. *See supra* notes 51-57 and accompanying text.

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

64. *Id.* This principle was enunciated in Jackson v. Indiana, 406 U.S. 715 (1972), where the Court held that when a state finds a person incompetent to stand trial and commits him to a mental facility for purposes of treatment and recovery of competence, it must either release him once a reasonable period of observation establishes the unlikelihood of recovery or proceed to commit him via civil proceedings. *Id.* at 729; *cf.* Vitek v. Jones, 445 U.S. 480 (1980). In *Vitek*, the Court held that because an incarcerated prisoner has a liberty interest in not being erroneously stigmatized or subjected to medical treatment, due process requires the state to afford the prisoner a hearing at which to contest the issue of his mental illness before transferring him from prison to a mental facility. 445 U.S. at 494.

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

66. Jones v. United States, 463 U.S. 354, 369 & n.18 (1983) (quoting Jones v. United States, 432 A.2d 364, 369 (D.C. 1981), *aff'd*, 463 U.S. 354 (1983)).

67. *See Foucha*, 112 S. Ct. at 1788; Baxtrom v. Herold, 383 U.S. 107 (1966) (convicted criminal who allegedly became mentally ill while in prison was entitled on equal protection grounds to release at the end of his prison term unless the state committed him via civil proceedings). "For purposes of granting judicial review before a jury of the question whether a person is mentally ill and in need of institutionalization, there is no conceivable basis for distinguishing the commitment of a person who is nearing the end of a penal term from all other civil commitments." *Baxtrom*, 383 U.S. at 111.

68. *See Jackson*, 406 U.S. at 738.

storing an acquittee to civil status (and thus to the situation of being subject only to the state's civil jurisdiction) as does a completed prison term or a frustrated indictment.[69] If Louisiana continued to hold Foucha, the State would have to bring civil commitment proceedings against him.[70] Yet, civil proceedings clearly would fail given Foucha's recovered mental health.[71]

The three grounds upon which the *Foucha* Court relied in finding the Louisiana statute unconstitutional are substantive due process regarding the nature of confinement, substantive due process regarding the permissible bases of punishment, and equal protection.[72] Each of these three grounds of the *Foucha* decision will presently be examined in greater detail.

IV. *Foucha* Under Scrutiny

A. The Nature of the Confinement

The *Foucha* Court began its criticism of the Louisiana statute by focusing on what was arguably the statute's weakest aspect: the law sanctioned the continued confinement of a nonmentally ill acquittee in a mental facility.[73] Even assuming that Foucha's continued detention was *per se* constitutionally permissible, the Court found that Louisiana had violated the due process principle of commensurability between the nature and purpose of confinement.[74] The principle here is that hospitals are not prisons, and that healthy individuals should not be subjected to unnecessary treatment or to the stigma of being confined as "sick."[75]

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69. *See Foucha*, 112 S. Ct. at 1783-84, 1788.

70. *Id.* at 1785.

71. The Court apparently assumed that dangerousness and an antisocial personality do not constitute a mental disease. *Id.* at 1783; *see, e.g., infra* notes 165-69 and accompanying text.

72. *Foucha*, 112 S. Ct. at 1787-89.

73. *Id.* at 1784.

74. *Id.*

75. Justice O'Connor reiterated this point in her *Foucha* concurrence when she stated:

> It might therefore be permissible for Louisiana to confine an insanity acquittee who has regained sanity if, unlike the situation in this case, the nature and duration of detention were tailored to reflect pressing public safety concerns related to the acquittee's continuing dangerousness. Although the dissenters apparently disagree, I think it clear that acquittees could not be confined as mental patients absent some medical justification for doing so; in such a case the necessary connection between the nature and purposes of confinement would be absent.

Id. at 1789-90 (O'Connor, J., concurring) (citations omitted). *See* Jackson v. Foti, 670 F.2d 516 (5th Cir. 1982) (an insanity acquittee's dangerousness alone is an insufficient basis for confining him to a mental institution). "The propensity for danger is not enough. Mental institutions exist for the benefit of those who can be helped by care and treatment or who require custodial attention. They are not substitutes for prisons." *Id.* at 522. Another court noted that the state should not be allowed to "transform the hospital into a penitentiary where one could be held indefi-

The force of this first criticism of the statute is weakened considerably by the fact that Foucha was in no danger of being medically treated for a nonexistent illness while at the East Feliciana Forensic Facility.[76] Louisiana appears to have been content to hold him in custody at the facility without attempting to treat him for his "antisocial personality."[77] Absent an attempt by Louisiana to subject Foucha to unnecessary medical treatment, or to expose him to mentally ill patients, it is not clear that either of the Court's opinions in *Jackson v. Indiana*[78] or *Vitek v. Jones*,[79] both cited by the *Foucha* Court,[80] apply to Foucha.

In *Jackson*, the Court found that the State arbitrarily deprived a deaf mute of his liberty by continuing his pretrial commitment after the point when commitment could not serve the statutory purpose, that is, the recovery of competence for the purpose of standing trial.[81] In Foucha's case, Louisiana renounced the purpose of treatment and apparently embraced the purpose of preventive detention, punitive confinement, or both.[82] Because the State did not hold Foucha in order to cure or to treat him, its purpose in holding him, that is, to keep him away from others, was not out of line with his confinement. Thus, the rationale of *Jackson* does not support the theory that Louisiana's choice of a mental facility as the confinement center was arbitrary and violative of due process. The record merely demonstrated to the *Foucha*

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nitely . . . ." *In re* Torsney, 394 N.E.2d 262, 267 (N.Y. 1979) (plurality opinion), *overruled by* People v. Escobar, 462 N.E.2d 1171 (N.Y. 1984).

76. *See Foucha*, 112 S. Ct. at 1782.

77. *See id.* at 1784; Brief of the American Orthopsychiatric Ass'n, the National Mental Health Ass'n, the American Ass'n on Mental Retardation, the National Ass'n of Protection and Advocacy Systems, the American Civil Liberties Union, and the ACLU of Louisiana as Amici Curiae in Support of Petitioner at 15 & n.10, Foucha v. Louisiana, 112 S. Ct. 1780 (interim ed. 1992) (No. 90-5844), *available in* LEXIS, Genfed Library, Briefs File. "Louisiana claims the power to incarcerate Petitioner to prevent the possibility of unspecified future acts of dangerousness." *Id.* at 15. "The term 'hospitalize' would certainly be inappropriate in these circumstances, since Petitioner has no 'illness' and the state concedes that it cannot and will not provide him 'treatment.' " *Id.* at 15 n.10.

78. 406 U.S. 715 (1972).

79. 445 U.S. 480 (1980).

80. *Foucha*, 112 S. Ct. at 1781.

81. *Jackson*, 406 U.S. at 738. The Court stated:

> Jackson was not afforded any 'formal commitment proceedings' addressed . . . to the State's ability to aid him in attaining competency through custodial care or compulsory treatment, the ostensible purpose of the commitment. . . . We hold, consequently, that a person charged by a State with a criminal offense who is committed solely on account of his incapacity to proceed to trial cannot be held more than the reasonable period of time necessary to determine whether there is a substantial probability that he will attain that capacity in the foreseeable future.

Id.

82. *See Foucha*, 112 S. Ct. at 1785.

Court that Louisiana persisted in confining Foucha in a building carrying the sign "East Feliciana Forensic Facility" when he was no longer mentally ill.[83] Nothing in the record, apart from the proper name of the confinement center, suggested that the mode of Foucha's commitment was unrelated to its purpose.[84]

Nor is it clear that the due process protection against stigmatization applies here, as it did in *Vitek v. Jones*,[85] because Foucha was an insanity acquittee who himself raised the issue of his sanity at trial and who advanced it as the sole ground on which to avoid conviction.[86] In *Jones v. United States*,[87] the Court explicitly subscribed to the view that stigma attaches to an insanity acquittee by virtue of the acquittal itself, that commitment causes little additional harm in this regard, and that, consequently, the harm of an erroneous commitment is less in the case of an acquittee than in the case of a civil committee.[88]

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83. *See id.* at 1784.

84. In his dissent in *Foucha*, Justice Thomas adopts this narrower concept of the due process principle of commensurability between the nature and purpose of confinement.

> *In particular circumstances*, of course, it may be unconstitutional for a State to confine in a mental institution a person who is no longer insane. This would be a different case had Foucha challenged specific conditions of confinement — for instance, being forced to share a cell with an insane person, or being involuntarily treated after recovering his sanity. But Foucha has alleged nothing of the sort — all we know is that the State continues to confine him in a place called the Feliciana Forensic Facility. It is by no means clear that such confinement is *invariably* worse than, for example, confinement in a jail or other detention center — for all we know, an institution may provide a quieter, less violent atmosphere. I do not mean to suggest that is the case — my point is only that the issue cannot be resolved in the abstract.

Id. at 1809 n.18 (Thomas, J., dissenting). Justice Thomas goes on to ask:

> I have no idea what facilities the Court . . . believe[s] the Due Process Clause mandates for the confinement of sane-but-dangerous insanity acquittees. Presumably prisons will not do . . . . May a State designate a wing of a mental institution or prison for sane insanity acquittees? May a State mix them with other detainees? Neither the Constitution nor our society's traditions provides any answer to these questions.

Id. at 1809.

85. 445 U.S. 480 (1980).

86. *See* LA. CODE CRIM. PROC. ANN. art. 558.1 (West Supp. 1993). This is assuming, *arguendo*, that confinement in a mental facility does in fact stigmatize the confinee, even though, as discussed *infra* at text accompanying notes 100-57, the confinement might not amount to a violation of due process.

87. 463 U.S. 354 (1983).

88. *Id.*

> Internal aspects of . . . litigation do not provide a basis for distinguishing *Addington's* standard for civil commitment in post-insanity acquittal hearings. There is only one relevant difference between the hearings from an internal point of view. Given that acquittees have already been acquitted of violent offenses by reason of insanity, the additional stigmatization threatened by commitment is minimal in comparison to that which threatens civil commitment candidates.

Ingber, *supra* note 1, at 305.

While the Court is free to ignore or reject aspects of its prior opinions, the *Foucha* Court did not explain why stigmatization was irrelevant to the issue of procedural protections in *Jones v. United States* but relevant to the issue of standards of release in *Foucha*.[89] An explanation would have been helpful, if only because American criminal procedure in a number of contexts invests the fact of a defendant's choice, or lack thereof, with legal significance. For example, the state may commit an insanity acquittee automatically upon acquittal if he has affirmatively relied on the defense, but may not so commit an acquittee who has maintained that he was mentally responsible at the time of the alleged offense.[90] Another example is where a defendant who elects to take the witness stand on his own behalf forfeits his constitutional right not to answer incriminating questions.[91] Additionally, a defendant who successfully appeals his original conviction, on any ground other than insufficiency of the evidence supporting the verdict,[92] forfeits his right not to be retried.[93]

American criminal procedure recognizes, in short, a doctrine of forfeiture, whereby a criminal defendant is held to relinquish the constitutional right to do or to be X (such as the right not to be falsely stigmatized by the state) once he chooses to exercise a legal right to do Y.[94] The proviso for relinquishment of the constitutional right is that, by the exercise of his legal right to do Y, the defendant "has placed the state in such a position that its interests now outweigh his countervailing interests in 'X'. If the state's interests do not outweigh the defendant's [interests,] the condition is unconstitutional and the forfeiture is invalid."[95]

The question thus becomes whether a defendant, by the exercise of his legal right to plead the insanity defense, places the state in a position which justifies it in exacting the forfeiture of the constitutional right against erroneous or gratuitous stigmatization by the state. It is a question regarding the nature of confinement which, as the *Foucha* ma-

89. *See Foucha*, 112 S. Ct. at 1784-85.

90. *See* Lynch v. Overholser, 369 U.S. 705, 712-15 (1962).

91. *See* Jenkins v. Anderson, 447 U.S. 231, 237 (1980) (citing Brown v. United States, 356 U.S. 148, 156 (1958)).

92. *See* Burks v. United States, 437 U.S. 1 (1978) (once a reviewing court finds insufficient evidence for a guilty verdict, the Fifth Amendment precludes a second trial).

93. *See* United States v. Ball, 163 U.S. 662 (1896) (a criminal defendant who has a verdict and judgment against him set aside by reviewing court may be retried for the same offense of which he was convicted).

94. *See* Peter Westen, *The Three Faces of Double Jeopardy: Reflections on Government Appeals of Criminal Sentences*, 78 Mich. L. Rev. 1001, 1056-58 (1980).

95. Westen, *supra* note 94, at 1058 & n.201.

jority seemed to acknowledge,[96] only comes into play if we assume that continued confinement *per se* is not unconstitutional. The answer to this question will be found in this threshold requirement of the continuing legitimacy of confinement *per se* of an insanity acquittee and in the state's meeting this threshold requirement.

The question as to stigmatization and the nature of confinement goes to the very heart of the meaning and legal import of the insanity defense and its jurisdictional consequences. Just as students of double jeopardy jurisprudence must ask difficult questions about the relative weights of a defendant's finality interests, on the one hand, and the state's interest in prosecuting the guilty, on the other,[97] so too must students of the insanity defense determine what a successful insanity plea actually means before they settle upon what relinquishment the state may constitutionally require of those who plead the defense.

While the *Foucha* Court had a fairly definite conception of a successful insanity defense,[98] it neither asked nor answered the question as to exactly how the defense accomplishes what it does. The Court failed to offer any analysis for its position that an acquittee may not be punished because he has not been convicted.[99] In failing to address and analyze this question, the Court failed to shed light on the rights and immunities of insanity acquittees as well as on the prerogatives of the state in dealing with them. The next two subsections of this Article address these issues. The Article then returns to the issue of stigmatization, as illuminated by the discussion that now follows.

B. Confinement Of Any Variety

The central, if somewhat muted, premise underlying the *Foucha* majority opinion is that Louisiana has no legitimate punitive interest in an insanity acquittee such as Terry Foucha.[100] A state, the Court says:

> pursuant to its police power, may of course imprison convicted criminals for the purposes of deterrence and retribution. But there are constitutional limitations on the conduct that a State may criminalize. Here, the State has no such punitive interest. As Foucha was not convicted, he may not be punished. Here, Louisiana has by reason of his acquittal ex-

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96. "[E]ven if his continued confinement were constitutionally permissible, keeping Foucha against his will in a mental institution is improper absent a determination in civil commitment proceedings of current mental illness and dangerousness." Foucha v. Louisiana, 112 S. Ct. 1780, 1784 (interim ed. 1992).

97. *See* Westen, *supra* note 94, at 1033-44.

98. A successful insanity defense exculpates the defendant and exempts him from punishment. *See Foucha*, 112 S. Ct. at 1785.

99. *Id.*

100. *Id.*

> empted Foucha from criminal responsibility as [Louisiana law] requires.[101]

This portion of the opinion is the key to the Court's finding that Louisiana's continued detention of a nonmentally ill insanity acquittee — in any type of building bearing any sign above its door and under any circumstances of confinement — violates substantive due process.[102] The vision of the jurisdictional bases of state power that the Court posits is a compelling one. The Court put forward the same vision of a clear delimitation of the state's punishment power in *Jones*.[103] If the *Jones* Court used the "as he was not convicted, he may not be punished" rule to tell Mr. Jones why the length of his hypothetical sentence was irrelevant to the permissible length of his commitment, the *Foucha* Court used the rule to tell Louisiana that it cannot continue to have a punitive interest in Terry Foucha once, under its own law, it has exempted him from responsibility for his criminal act.[104]

As central as the *Foucha* passage quoted above may be, however, it is also ambiguous. The statement, on its face, can be taken to mean that Louisiana cannot exercise its criminal or punitive jurisdiction over an insanity acquittee because the Constitution, through its own force, forbids such exercise.[105] The statement may also be taken to mean that Louisiana cannot exercise its criminal jurisdiction because its own state law provides that satisfaction of a version of the *M'Naghten* test of insanity exempts an accused from criminal responsibility.[106] The proponents of this approach would argue that because an "exemption" can mean just one thing — outright immunity from the punitive reach of the state — an attempt by Louisiana to revoke its reprieve by keeping Foucha after he regained his mental health would deprive him of his liberty without due process of law. The State would thus punish Foucha where Louisiana law itself says there will be no punishment.[107]

This latter argument against the Louisiana statute — if it was, in fact, the argument the Court was making — is essentially a procedural due process argument. Once having guaranteed a substantive right, that is, full acquittal upon a finding of insanity, Louisiana may not

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101. *Id.* (citations omitted).

102. *See id.* at 1785, 1787.

103. *See supra* notes 54-57 and accompanying text.

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

105. *See id.* at 1784.

106. *See* LA. REV. STAT. ANN. § 14:14 (West 1986). The Louisiana statute provides that "[i]f the circumstances indicate that because of a mental disease or mental defect the offender was incapable of distinguishing between right and wrong with reference to the conduct in question, the offender shall be exempt from criminal responsibility." *Id.*

107. *See id.*

constitutionally hedge or diminish that guarantee through procedural mechanisms designed to burden an acquittee's chance for release.[108] It is clear, however, that this procedural due process argument does not fit the facts of the statute at issue in *Foucha*.

Louisiana did not broadly proclaim a substantive right of complete immunity from its criminal jurisdiction upon an acquittal for insanity and then try to curtail that right through scanty procedural mechanisms.[109] Rather, Louisiana may have imposed a stricter *substantive* standard of release on insanity acquittees precisely because the State intended the exemption granted by its statute to be something less than complete immunity. A stricter standard of release constitutes part of the meaning of "exemption," not a procedural curtailment of release. To be exempt from criminal responsibility under the Louisiana statute means entitlement to freedom only when one ceases to be mentally ill *and* proves one's nondangerousness.[110]

To be sure, the phrase "exempt from criminal responsibility,"[111] in the absence of mental illness, more likely makes people anticipate complete freedom rather than conditioned freedom. This difference in interpretation creates an expectation problem between Louisiana and its citizens. But an expectation problem does not, without more, amount to a procedural due process violation. If the deflation of expectations regarding the effect of an "acquittal" or an "exemption" violates the Constitution in this case, it does so because the deflation itself is inherently wrong rather than the procedural manner in which it has been produced.

The second possible interpretation of the *Foucha* passage quoted above[112] is that the Constitution, through its own force, prohibits the state from exercising any and all criminal jurisdiction over an insanity acquittee such as Terry Foucha. If this substantive due process argument is the one the Court meant to make, then the Court failed to explain its reasoning. The direct effect of such a holding is the creation of a constitutionally mandated interpretation of the terms "insanity acquittal" and "exemption from criminal responsibility." These terms could now mean nothing less than the complete termination of the

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108. *See* Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985).

109. Compare this proposition regarding *Foucha* with *Cleveland Bd. of Educ.*, 470 U.S. 532 (holding substantive rights and procedural protections to be distinct, with the latter being a matter of federal law and federal judicial protection; while the state may define the substance of property rights, it may not do so through procedural mechanisms).

110. See Foucha v. Louisiana, 112 S. Ct. 1780, 1781 (interim ed. 1992).

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

112. *See supra* text accompanying note 101.

state's punitive interest in an acquittee and the acquittee's return to civil status.

Until now, however, the Court has never held the availability of the insanity defense to be constitutionally required.[113] The Court thus seems to require the states to invest their insanity defenses with one constitutionally required effect before the Court has ruled that the state may not abolish the insanity defense altogether. In addition, the Court has never before explicitly held that the state may not refuse to allow the admission of evidence of mental illness on the question of guilt.[114] This, indeed, is an odd outcome.

If the state may legitimately abolish the insanity defense, then it is unclear why the state may not structure the legal effect of any allowable insanity defense as it wishes. With the issue of procedural due process put to one side, there is no reason why a greater power to define substantive law should not determine the scope of a lesser power to define substantive law. It is possible, of course, that the *Foucha* Court was really covertly tipping its hand to more issues than were actually before it to decide. However, if the Court did not intend to range so widely — as it probably did not — then it needed to explain how its ruling fit in with these other areas of the law.

The confusion as to the extent of the Court's ruling in *Foucha* deepens when one considers that the Court had already positively decided that the meaning and legal import of the insanity defense is a matter for state discretion.[115] While Justice Brennan in his *Jones* dissent forcefully warned that the state is required by the Constitution to invest an insanity acquittal with a completely exculpatory effect, he

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113. Ingber, *supra* note 1, at 285.

114. With respect to evidentiary rules regarding the admissibility of evidence of mental illness on the issue of guilt, Fisher v. United States, 328 U.S. 463 (1946), stands for the proposition that each jurisdiction can decide for itself whether to admit mental defect evidence for the purpose of negating *mens rea*. *See id.* at 476. Although the Court has never explicitly overruled *Fisher*, it has arguably done so by implication in the line of cases beginning with *In re* Winship, 397 U.S. 358 (1970), and ending with Martin v. Ohio, 480 U.S. 228 (1987). The Court in *In re Winship* declared that the Due Process Clause "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." 397 U.S. at 364. In *Martin*, the Court, in dicta, confirmed that the "beyond a reasonable doubt" burden of proof would be unconstitutionally allocated to the defendant if the jury were barred from considering evidence offered as part of an affirmative defense on the issue of *mens rea*. 480 U.S. at 233-34 (affirmative defense at issue was self-defense); *see also supra* note 20. *Martin*, therefore, seems to implicitly overrule *Fisher*, which also dealt with an affirmative defense, albeit insanity.

115. *See* Donald H.J. Hermann & Yvonne S. Sor, *Convicting or Confining? Alternative Directions in Insanity Law Reform: Guilty but Mentally Ill versus New Rules for Release of Insanity Acquittees*, 1983 B.Y.U. L. REV. 499, 539 (1983); Ingber, *supra* note 1, at 285.

also admitted that "insanity and *mens rea* stand in a close relationship, *which this Court has never fully plumbed*."[116]

Indeed, insanity and *mens rea* stand in a relationship which the Court explicitly and deferentially left to the states to define in *Powell v. Texas*.[117] In *Powell*, the Court held that a statute imposing a fine for public intoxication did not violate the Eighth Amendment, even if alcoholism were a disease, because it punished an act rather than the status of being an alcoholic.[118] As for Powell's claim that alcoholism was a disease that exempted him from responsibility for his act of appearing in public while drunk and immunized him from punishment, the Court sounded a skeptical tone.[119] Without denying the possible constitutional dimension of the requirement of a *mens rea* in order for an act to be criminal, the Court pointedly declined to specify those mental states that prevented the formation of a *mens rea* and thus precluded punishment by the states.[120] The Court's refusal to define a constitutional doctrine of *mens rea* was rooted in principles of federalism, traditional common-law concepts of personal accountability,[121] and in the indepen-

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116. Jones v. United States, 463 U.S. 354, 373 n.4 (1983) (Brennan, J., dissenting) (emphasis added).

> Punishing someone acquitted by reason of insanity would undoubtedly implicate important constitutional concerns. It is questionable that confinement to a mental hospital would pass constitutional muster as appropriate punishment for any crime. The insanity defense has traditionally been viewed as premised on the notion that society has no interest in punishing insanity acquittees, because they are neither blameworthy nor the appropriate objects of deterrence.

Id.

117. 392 U.S. 514 (1968).

118. *Id.* at 532.

119. *See id.* at 534-36.

120. *Id.* Specifically, the Court stated:

> Ultimately . . . the most troubling aspects of this case . . . would be the scope and content of what could only be a constitutional doctrine of criminal responsibility. . . . If Leroy Powell cannot be convicted of public intoxication, it is difficult to see how a State can convict an individual for murder, if that individual . . . suffers from a 'compulsion' to kill, which is an 'exceedingly strong influence,' but 'not completely overpowering'. . . . Traditional common-law concepts of personal accountability and essential considerations of federalism lead us to disagree with [such an outcome]. We are unable to conclude, on the state of this record or on the current state of medical knowledge, that chronic alcoholics in general . . . suffer from such irresistible compulsion to drink and to get drunk in public that they are utterly unable to control their performance of either or both of these acts and thus cannot be deterred at all from public intoxication. And in any event this Court has never articulated a general constitutional doctrine of *mens rea*.
>
> . . . . The doctrines of *actus reus, mens rea*, insanity, mistake, justification, and duress have historically provided the tools for a constantly shifting adjustment of the tension between the evolving aims of the criminal law and changing religious, moral, philosophical, and medical views of the nature of man. This process of adjustment has always been thought to be the province of the States.

Id. (footnotes omitted).

121. *Id.* at 535.

dence of the legal realm from the categories, definitions, and findings of medical science.[122] The *Powell* Court's refusal effectively invests the states with the authority to determine to what extent mental illness in the form of insanity excuses a proven crime.[123]

A line of cases relating to the placement of the burden of proof of specific defenses furnishes analytical support for *Powell's* deference to the states in the determination of the exculpatory extent of mental illness. The upshot of these cases, beginning in 1975 with *Mullaney v. Wilbur*,[124] proceeding somewhat confusedly through *Patterson v. New York*,[125] and ending with *Martin v. Ohio*,[126] is that the state may impose upon a defendant the burden of proving a defense — in other words, the state may make a defense an affirmative one — as long as that defense does not necessarily relate to a specific element of a crime.[127] If a defense relates to a specific element of the crime charged, it is not for the defendant to prove, but for the prosecution to disprove beyond a reasonable doubt.[128]

Applied to the context of the insanity defense, the import of these principles is that, assuming *mens rea* is defined as denoting the specific mental states which must accompany an *actus reus*, then insanity is properly viewed as an affirmative defense where a mental illness does not necessarily preclude the requisite mental state.[129] Where a legally

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122. *See id.* at 530, 536.

123. In declining to dictate the substantive terms of criminal responsibility to the states, the *Powell* Court was following the precedent of Leland v. Oregon, 343 U.S. 790 (1952). In *Leland*, the Court found no violation of the Due Process Clause in Oregon's preference of one insanity defense (the "right and wrong" test of *M'Naghten*) over another insanity defense (the "irresistible impulse" test). *Id.* at 800-01. The Court commented:

> [T]he progress of science has not reached a point where its learning would compel us to require the states to eliminate the right and wrong test from their criminal law. Moreover, choice of a test of legal sanity involves not only scientific knowledge but questions of basic policy as to the extent to which that knowledge should determine criminal responsibility.

Id. at 801.

124. 421 U.S. 684 (1975).

125. 432 U.S. 197 (1977).

126. 480 U.S. 228 (1987).

127. The "not necessarily" language in this sentence refers to the Supreme Court's decision in Martin v. Ohio, 480 U.S. 228 (1987). *Martin* qualified the rule of *In re* Winship, 397 U.S. 358 (1970), *see supra* note 114, with what might be called the "overlap exception." In cases where evidence going to prove an affirmative defense may also be probative on the issue of *mens rea*, the state may place the burden of proving the affirmative defense on the defendant as long as it allows the jury to consider the affirmative defense evidence when deciding the issue of guilt. *Martin*, 480 U.S. at 234. Unless a piece of evidence can be said only to speak to the issue of *mens rea*, *Martin* seems to allow the state to place the burden of proof as to this evidence on the defendant. *See Martin*, 480 U.S. at 233-34.

128. *In re* Winship, 397 U.S. 358 (1970).

129. Mullaney v. Wilbur, 421 U.S. 684, 705-06 (1975) (Rehnquist, J., concurring). In *Mullaney*, Justice Rehnquist opined that:

insane mind can entertain the *mens rea* required by the definition of the offense charged, the state's requirement that the defendant assume the burden of proof on insanity does not work an unconstitutional shift in the burden.[130] However, where legal insanity bears a necessary relationship to the existence of *mens rea*, as in the case where the defendant suffers from an abnormal ideation,[131] placing the burden of proof of insanity on the defendant arguably works an unconstitutional shift in the burden of proof. Placing the burden on the insane defendant relieves the state of its burden under *In re Winship*[132] of proving the mental elements of the crime beyond a reasonable doubt.[133]

If one accepts the foregoing, then the key question is whether, in those instances where the state can constitutionally shift the burden of proof of insanity to the defendant, it also may retain criminal jurisdiction over the defendant should he defeat the charges against him by

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> Although . . . evidence relevant to insanity as defined by state law may also be relevant to whether the required *mens rea* was present, the existence or nonexistence of legal insanity bears no necessary relationship to the existence or nonexistence of the required mental elements of the crime. For this reason, Oregon's placement of the burden of proof of insanity on Leland . . . did not effect an unconstitutional shift in the state's traditional burden of proof beyond a reasonable doubt of all necessary elements of the offense.

Id.; *see* Leland v. Oregon, 343 U.S. 790, 794-95 (1952) (upholding an Oregon statute that placed the burden of proving insanity beyond a reasonable doubt on the defendant because, although a plea of insanity was made, the prosecution was still required to prove every element of the crime charged); *see also* Comment, *Mens Rea And Insanity*, 28 ME. L. REV. 500 (1976) (contending that the question as to whether a legally insane person can possess the requisite criminal *mens rea* — *i.e.*, whether *mens rea* and legal insanity are compatible or contradictory — depends upon the type of mental disease or defect at issue) [hereinafter Comment, *Mens Rea And Insanity*].

130. Some scholars of the insanity defense doubt that legal insanity can ever coexist with *mens rea*. *See, e.g.*, Note, *Insanity — Guilty But Mentally Ill — Diminished Capacity: An Aggregate Approach To Madness*, 12 J. MARSHALL J. PRAC. & PROC. 351, 351-52 (1979) [hereinafter Note, *An Aggregate Approach*]. "A person found to be insane during the commission of the act is held to be incapable of entertaining the requisite mental state. Therefore, the insane person cannot be held criminally responsible or punished, even though a sane person committing the same act would be punished." *Id.* This Article assumes, without establishing, that legal insanity and *mens rea* are, in certain instances, compatible, and then asks what consequences for the state's criminal jurisdiction flow from this compatibility.

131. An "abnormal ideation" generally means some sort of cognitive disability that prevents a person from knowing, and therefore from intending, the nature and quality of his act. The conventional illustration of a person suffering from an abnormal ideation is the man who strangles his wife believing her to be a lemon. In his case, the same evidence which would establish his incapacity to entertain any of the degrees of *mens rea* (*i.e.*, intent or purpose, knowledge, recklessness, or negligence) would also tend to prove him insane (he could not know the nature and quality of his act or that it was wrong (*M'Naghten*)). Comment, *Mens Rea and Insanity, supra* note 129, at 521-22. On the other hand, a defendant might know the nature of his act but yet (1) not know that the act is wrong or (2) not be able to desist from the act. Although he would have an insanity defense under at least the latter half of the *M'Naghten* test and the irresistible impulse test, in most situations it could not be said that the defendant did not act with intent, knowledge, or recklessness. *See* LAFAVE & SCOTT, *supra* note 20, at 306.

132. 397 U.S. 358 (1970).

133. *See supra* note 114 and accompanying text.

way of the affirmative defense. Once a state complies with the requirements of *In re Winship* and the jury finds that all the elements of the crime charged exist beyond a reasonable doubt, may the state incarcerate "on any reasonable basis," or is its criminal jurisdiction extinguished by the successful affirmative defense? When a defendant is excused of a crime, is he also immunized from the state's criminal jurisdiction?[134] If the state's criminal jurisdiction is extinguished by a successful affirmative defense, should the state's jurisdiction be equally extinguished with regard to all of the various affirmative defenses, including self-defense, necessity, defense of property, intoxication, immaturity, as well as insanity? Even if the state's criminal jurisdiction is extinguished with respect to noninsanity defendants, should it be preserved with respect to insanity defendants on policy grounds, such as the state's legitimate goal of discouraging false insanity pleas?[135]

All of these questions, to be sure, were not before the Court in *Foucha*, with the exception of whether a state's compliance with the demands of *In re Winship* preserves its criminal jurisdiction over a defendant who has won acquittal by means of an affirmative defense of insanity.[136] If the answer to that question is "yes," then Terry Foucha's mental health was irrelevant to the legitimacy of his post acquittal detention. If the answer is "no," then one wonders whether it is just or ultimately consistent with *In re Winship* to allow the state to put the burden of proof on the defendant of a fact that has such "talismanic significance"[137] and such complete exculpatory effect. One also wonders about the justice of requiring the disposition following a non-*mens rea*

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134. Could the state, for example, excuse from blame one who kills in self-defense, but continue to detain him for the period he might have served had he been convicted because the state regards him as dangerous? Could the state stipulate that a successful affirmative defense only extinguishes the state's retributive interest in punishment, but leaves its interest in incapacitative punishment intact and sufficient to support its criminal jurisdiction over the acquittee? While there may appear to be no need to confine a person who kills in self-defense because he is unlikely to kill again, does the state nonetheless have the jurisdictional authority to do so? Can this authority be based perhaps on the ground that the self-defender is a person of "dangerous propensities?"

Apart from how one answers the foregoing questions, it is curious that, although the purposes of criminal punishment are various, and certainly include the prevention of future criminal behavior, see *supra* note 18, when it comes to the state's attempt to retain criminal jurisdiction over defendants acquitted on one affirmative defense — insanity — all punishment seems to become retributive and blame-apportioning rather than preventive.

135. *Cf.* Lynch v. Overholser, 369 U.S. 705, 715 (1962) (upholding mandatory, automatic commitment for defendants who affirmatively rely on a claim of mental irresponsibility on the ground, *inter alia*, that "Congress might have considered it appropriate to provide compulsory commitment for those who successfully invoke an insanity defense in order to discourage false pleas of insanity.").

136. *See* Foucha v. Louisiana, 112 S. Ct. 1780, 1791-93 (interim ed. 1992) (Kennedy, J., dissenting).

137. *See id.* at 1805 n.13 (Thomas, J., dissenting).

insanity acquittal to be complete freedom while the disposition following a *mens rea* insanity acquittal is in many instances automatic and lengthy commitment.

Neither the *Foucha* majority, nor Justice O'Connor in concurrence, adequately addressed the legal import of an affirmative defense of insanity, which is a defense that is not even passed on by the jury until it finds the elements of the crime charged (including *mens rea*) beyond a reasonable doubt. These Justices, rather, insisted simply that an insanity acquittal acquits, thoroughly and mercifully, leaving behind no residue of culpability or blameworthiness that could justify a further criminal-law interest on the state's part. The dissenters, however, saw the issue differently.

Justice Kennedy adamantly reminded the Court of several points. Louisiana had fulfilled its burden of proving beyond a reasonable doubt every element of the crimes charged to Foucha.[138] Because of this compliance, Foucha's acquittal by reason of insanity was "neither equivalent nor comparable to a verdict of not guilty standing alone."[139] Louisiana could therefore choose to excuse Foucha and yet derive authority from his past criminal acts to further detain him.[140] In short, compliance with *In re Winship* enabled Louisiana to "incarcerate on any reasonable basis."[141] These points were especially true because of the particular test of insanity employed in Louisiana: a truncated version of the *M'Naghten* test that excludes its abnormal ideation component ("nature and quality of the act") and retains only its moral cognition component ("right and wrong").[142]

Justice Kennedy concluded from the nature of this test that Foucha's acquittal established only that Foucha was unable to distinguish between right and wrong at the time of his crime, not that his criminal conduct was the product of a mental disease.[143] This, in effect, was another way of saying that Foucha's adjudicated insanity under the second half of the *M'Naghten* test had a less negativing effect on his capacity for criminal intent than it might have had under a different test, such as, according to Justice Kennedy, the *Durham* test.[144] As to the degree of "lesser effect," Justice Kennedy's dissent is not clear. At the very least, however, Justice Kennedy applied a *mens rea* ap-

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

139. *Id.* at 1793.

140. *See id.* at 1795.

141. *Id.* at 1792.

142. *Id.* at 1785 (majority opinion). For a discussion of "abnormal ideation," see *supra* note 131.

143. *Foucha*, 112 S. Ct. at 1793 (Kennedy, J., dissenting).

144. For a discussion of the *Durham* test, see *supra* note 26.

proach to the problem of the state's criminal jurisdiction over sane acquittees.[145] He linked the fact that Foucha's insanity had not established the absence of *mens rea* at the time of his crime to the conclusion that Louisiana could legitimately exercise a backward-looking, act-dependent, criminal jurisdiction over Terry Foucha.[146]

Strong, if not completely identical, echoes of Justice Kennedy's approach have sounded in lower court opinions for some time. Sensing that the degree of an acquittee's mental illness at the time of the crime is relevant to the state's jurisdiction over him, courts have upheld procedural differences in commitment and release proceedings as between insanity acquittees and civil committees.[147] They have held that the state legitimately may place greater burdens and standards of proof on insanity acquittees who try to avoid continued commitment than it places on civil committees because (1) the trier of fact has found be-

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145. *See Foucha*, 112 S. Ct. at 1794-95 (Kennedy, J., dissenting).

146. *Id.* Justice Kennedy observed:

> Present sanity would have relevance if petitioner had been committed as a consequence of civil proceedings, in which dangerous conduct in the past was used to predict similar conduct in the future. It has no relevance here, however. Petitioner has not been confined based on predictions about future behavior but rather for past criminal conduct. Unlike civil commitment proceedings, which attempt to divine the future from the past, in a criminal trial whose outcome turns on *M'Naghten*, findings of past insanity and past criminal conduct possess intrinsic and ultimate significance. . . . The establishment of a criminal act and of insanity under the *M'Naghten* regime provides a legitimate basis for confinement. *Although Louisiana has chosen not to punish insanity acquittees*, the State has not surrendered its interest in incapacitative incarceration.

Id. (emphasis added). Neither the majority nor Justice O'Connor in concurrence discussed the type of insanity defense used in Louisiana nor the relevance of the nature of the defense to the legitimacy of Foucha's continued detention. *See id.* at 1781-89 (majority opinion); *id.* at 1789-90 (O'Connor, J., concurring).

147. *See* Warren v. Harvey, 632 F.2d 925 (2d Cir.) (finding no equal protection violation where the state must meet only "preponderance of the evidence" standard to continue commitment of acquittees, whereas continued commitment of committees rests on *Addington* standard of "clear and convincing evidence"), *cert. denied*, 449 U.S. 902 (1980); Waite v. Jacobs, 475 F.2d 392, 396 (D.C. Cir. 1973); Dixon v. Jacobs, 427 F.2d 589, 603-04 (D.C. Cir. 1970) (Leventhal, J., concurring).

The *Waite* court subscribed to the view that differences between acquittees and committees entitle the state to place the burden of proof as to readiness for release on insanity acquittees until the time of expiration of their hypothetical maximum sentence. The court quoted Judge Leventhal in *Dixon* and added that:

> "meaningful elements of responsibility" may exist even in those cases in which the jury is certain that the defendant was not "sufficiently responsible." The insanity defense is not black and white — there is not a precise psychological line separating absolute free will from absolute uncontrollability. . . . Even those defendants who are "legally insane" to a "certainty," in other words, may have some control over their behavior, and therefore may possess some "meaningful elements of responsibility for the offense."

Waite, 475 F.2d at 396 (quoting *Dixon*, 427 F.2d at 603-04 (Leventhal, J., concurring)); *see also* United States v. Brown, 478 F.2d 606 (D.C. Cir. 1973) (standard of proof for confinement of acquittees may be lower than for confinement of committees); Jones v. United States, 411 A.2d 624 (D.C. 1980), *aff'd*, 463 U.S. 354 (1983); Alter v. Morris, 536 P.2d 630 (Wash. 1975).

yond a reasonable doubt that the acquittee has committed the charged offense, and (2) a person acquitted by reason of insanity may nonetheless have "meaningful elements of responsibility for the offense, even though there is enough doubt to obviate a verdict of guilty."[148]

In the view of these courts and their decisions, acquittees are not merely presumed to be more dangerous than committees. Such a presumption is evidentiary in nature and was ratified by the Court in *Jones v. United States*.[149] The difference between acquittees and committees, rather, centers on the fact that the issue of mental irresponsibility for a proven criminal act is always doubtful in the case of acquittees. There exists not only the danger of calculated abuse of the insanity defense, but also the possibility "that the condition involved may be one which is less clearly defined and understood by the medical profession, [and] that there is more doubt as to the existence of an illness, its connection with a past offense, and any future prognosis and forecast of danger."[150]

Although the state may have well-founded security concerns about committees as well as acquittees, it is the potentially soft foundation of acquittees' acquittals, rendered even softer by the hard, undeniable fact of the state's compliance with *In re Winship*, that justifies these courts in upholding greater hurdles to release against acquittees.[151] The courts have allowed the state to insinuate its criminal-law interest through the side door of commitment and release procedures, and have done so because of doubts as to the exculpatory nature of successful insanity defenses.

The foregoing discussion is not meant to resolve long-standing debates about burdens of proof or the question of the import of particular tests of insanity for the jurisdictional authority of the state. Its goal, however, is to point out that the *Foucha* Court should have found these

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148. *Dixon*, 427 F.2d at 603-04 (Leventhal, J., concurring); *see also supra* note 147 and the cases cited therein.

149. 463 U.S. 354 (1983).

150. *Dixon*, 427 F.2d at 603 (Leventhal, J., concurring); *see also Brown*, 478 F.2d at 611.

151. Some courts phrase the justification for greater procedural hurdles in terms of who bears what degree of risk of error from an erroneous commitment decision. *See Brown*, 478 F.2d at 611.

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

Id.

issues highly relevant to the issue of the legitimate meaning of the Louisiana statute's phrase "exempt from criminal responsibility."[152] What can "exempt from criminal responsibility" constitutionally mean where the state has established beyond a reasonable doubt all necessary elements of an offense and where a successful assertion of its insanity defense by a defendant does not negate *mens rea*? If the evidence going to prove insanity also casts a reasonable doubt on the defendant's *mens rea*, the prosecution will have had to rebut and overcome that doubt in order to comply with *In re Winship*. The burden of proof lies with the prosecution even where the defendant has produced particular exculpatory evidence at trial.[153] Because the insanity defense will not even be reached or considered unless the prosecution has carried its *In re Winship* burden, it is clear that a successful insanity defense can do no more than justify or excuse a crime, not disprove it. Since a successful insanity defense does not disprove a crime, only excuses it, one rightly asks the *Foucha* Court why a state may not legitimately choose the extent to which it excuses a crime?

Burden-of-proof jurisprudence is based on the concept that matters not related to the act and mental state of a crime are ancillary matters properly left to a state's legislative discretion to regulate. This concept should also inform the issue of the state's criminal jurisdiction over insanity acquittees. If the burden-of-proof concept *did* inform the jurisdictional issue, then the state's jurisdiction over insanity acquittees would simply depend upon whether the state discharged its burden under *In re Winship*.[154] If the state fails to satisfy the *In re Winship* standard, then a defendant is entitled to a verdict of "not guilty." This is so even if he also had a successful defense on the grounds of insanity. At the dispositional stage, the state constitutionally would be required to acknowledge the acquittal to vest wholly and absolutely, such that any further state jurisdiction over the defendant could be merely therapeutic and based on civil commitment proceedings.

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

153. In *Martin v. Ohio*, the Court had this to say about the permissibility of requiring a defendant to carry the burden of proof on an issue that falls within the prosecution's own burden:

> We are thus not moved by assertions that the elements of aggravated murder and self-defense overlap in the sense that evidence to prove the latter will often tend to negate the former. . . . In those cases, evidence offered to support the defense may negate a purposeful killing by prior calculation and design, but Ohio does not shift to the defendant the burden of disproving any element of the state's case. When the prosecution has made out a prima facie case and survives a motion to acquit, the jury may nevertheless not convict if the evidence offered by the defendant raises any reasonable doubt about the existence of any fact necessary for the finding of guilt.

480 U.S. 228, 234 (1987).

154. *See supra* notes 152-53 and accompanying text.

On the other hand, if the state satisfies the *In re Winship* standard but the defendant is acquitted on grounds of insanity, then at the dispositional stage, the state would have several options. First, the state could not only forgive the blameworthiness of the defendant but also relinquish its criminal-law interest in him. As a second option, the state could forgive the blameworthiness of the defendant, but find enough concern about his prospects for good behavior once free to hold that the maximum sentence of the acquittee's crime will establish the maximum limit of his confinement, with the *actual* duration of confinement to depend on either predictive considerations of dangerousness or on the rehabilitative/reformative potential exhibited by the acquittee while incarcerated.[155] Finally, the state could, in the words of Justice Kennedy, simply proceed to incarcerate the acquittee "on any reasonable basis" for the amount of time he would have served had he been convicted.[156] In other words, once the state's compliance with *In re Winship* secures the state's criminal jurisdiction over the defendant, the state can regulate the exculpatory effect of his acquittal in accordance with what it perceives to be his blameworthiness or potential for reform.

Lack of blameworthiness or culpability, while regarded by some to be the essence of innocence and thus incompatible with *mens rea* and the state's criminal jurisdiction,[157] would mitigate in a subsidiary way, without extinguishing, the state's criminal jurisdiction. Compliance with *In re Winship* would mean that the state's criminal jurisdiction would not depend on the blameworthiness of the defendant, but that it could be calibrated to it. While it might be morally obtuse for the state to exercise its criminal jurisdiction over one who is not culpable or blameworthy, such jurisdiction would not be regarded as unconstitutional.

Now one can see why the *Foucha* Court's equal protection argument, because of its indiscriminancy, is as potentially unsound as its due process argument. The *Foucha* Court found that Louisiana law did not provide for the detention of persons, other than insanity acquittees, who have committed criminal acts and who cannot later prove that they will not be dangerous.[158] "Criminals who have completed their prison terms, or are about to do so," the Court stated, harkening back

155. *See* Alan M. Dershowitz, *Preventive Confinement: A Suggested Framework For Constitutional Analysis*, 51 TEX. L. REV. 1277, 1282 (1973).

156. *See* Foucha v. Louisiana, 112 S. Ct. 1780, 1792 (interim ed. 1992) (Kennedy, J., dissenting).

157. *See, e.g.*, Sinclair v. State, 132 So. 581 (Miss. 1931); Hermann & Sor, *supra* note 115, at 540-41.

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

to *Baxtrom v. Herold*,[159] "are an obvious and large category of such persons. Many of them will likely suffer from the same sort of personality disorder that Foucha exhibits. However, state law does not allow for their continuing confinement based merely on dangerousness."[160] This is surely true. All of these criminals, however, will also have completed their sentences and will have thus exhausted the state's first — and until a subsequent indictment — sole bite at the punitive apple.

An insanity acquittee, whom a court has found to have possessed the *mens rea* of the crime charged, has not exhausted the state's punitive interest and may legitimately be required to serve time in prison or even a hospital. An acquittee who was judged *not* to have had the *mens rea* of the crime charged returns to civil status, just as the convicted prisoner in *Baxtrom*.[161] The state cannot touch him except through its therapeutic jurisdiction. In this case, the equal protection argument makes complete sense.[162]

C. *An Isle of Certitude in a Sea of Ambiguity*

While a *mens rea* approach rooted in the requirements of *In re Winship* offers the cleanest and most sensible way to deal with the issue of state criminal jurisdiction over sane acquittees, it is important to note that some states have attempted a different approach. In the form of "guilty but mentally ill" statutes, some states seek to comply with *In re Winship* by predicating the state's criminal jurisdiction on the various gradations of mental illness.[163] Although they vary in their details,

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159. 383 U.S. 107 (1966).

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

161. *See* discussion of *Baxtrom v. Herold supra* note 67.

162. It is, perhaps, no coincidence that a court that accepted the possibility that, under modern standards of the insanity defense, persons may be acquitted who have "meaningful elements of responsibility," also had this to say about *Baxtrom v. Herold*:

> *Baxtrom v. Herold* does not cut across our analysis [upholding a lesser burden of proof of mental illness for the commitment of acquittees than for civil committees]. It involved a New York statute law providing that a state prisoner, at the end of his sentence, could be civilly committed without the jury trial and hearing generally required prior to civil commitment. . . . [I]nsofar as [the *Baxtrom* principle] may govern burden and standard of proof, it is limited to persons at the end of the penal term. Whatever protection can be available to society from detention of offenders has been achieved, and whatever additional protection is now needed because of present danger from mental illness must be sought from ex-convicts on the same basis as from non-convicts who are dangerous by reason of mental illness. In contrast, the insanity-acquitted present different considerations on the issue of burden of proof on detention.

United States v. Brown, 478 F.2d 606, 611-12 (D.C. Cir. 1973) (footnote omitted).

163. The following states have "guilty but mentally ill" statutes: Alaska (ALASKA STAT. § 12.47.030 (1992)), Delaware (DEL. CODE ANN. tit. 11, § 401(b) (1987)), Georgia (GA. CODE ANN. § 17-7-131(b)(1)(D) (Supp. 1993)), Illinois (ILL. COMP. STAT. ANN. ch. 720 para. 5/6-2(c) (Smith-Hurd 1993)), Indiana (IND. CODE ANN. § 35-35-1-1 (West 1986)), Kentucky (KY. REV. STAT. ANN. § 504.130 (Baldwin 1988)), Michigan (MICH. COMP. LAWS ANN. § 768.38 (West

"guilty but mentally ill" (GBMI) statutes all provide a statutory formula that specifies the type of mental illness that will preserve the state's criminal jurisdiction, and, by implication, the type that justifies a verdict of "not guilty by reason of insanity" (NGRI) and extinguishes the state's criminal jurisdiction.[164]

Michigan's GBMI statute is perhaps archetypical. The law provides that the trier of fact is to return a GBMI verdict if it finds that the defendant committed the alleged criminal act with the requisite mental state but that he was suffering from a mental disease or defect, not amounting to legal insanity, at the time of the act.[165] The type of mental illness that is consistent with *mens rea* is one that is "a substantial disorder of thought or mood which significantly impairs judgment, behavior, capacity to recognize reality, or ability to cope with the ordinary demands of life."[166] The defendant found GBMI remains under the criminal jurisdiction of the state, and may be sentenced as if he had been convicted of the offense charged.[167] Based upon an evaluation of his mental condition, Michigan provides psychiatric treatment to the prisoner either in the correctional facility or in a facility of the Department of Mental Health.[168] After discharge from a mental institution, the defendant is returned to the custody of the Department of Correction to complete his sentence.[169]

A NGRI verdict triggers different directives. If the trier of fact finds the defendant's mental illness deprived him of "substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law,"[170] he is committed to the Center for Forensic Psychiatry for a period not to exceed sixty days, for the purpose of assessing his present mental condition to determine whether he is "a person requiring treatment."[171] A "person requiring treatment" is one who is civilly committable because, as a result of mental illness, he is presently dangerous or unable to provide for himself.[172]

1982)), New Mexico (N.M. STAT. ANN. § 31-9-3(A) (Michie 1984)), Pennsylvania (PA. STAT. ANN. tit. 18, § 314 (1983)), South Carolina (S.C. CODE ANN. § 17-24-20 (Law Co-op. Supp. 1992)), South Dakota (S.D. CODIFIED LAWS ANN. § 23A-26-14 (1988)), and Utah (UTAH CODE ANN. § 77-13-1 (1990) ("guilty and mentally ill")).

164. *See infra* notes 165-79 and accompanying text.
165. MICH. COMP. LAWS ANN., § 768.36 (West 1982).
166. *Id.* § 330.1400a.
167. *Id.* § 768.36(3).
168. *Id.*
169. *Id.*
170. *Id.* § 768.21a(1).
171. *Id.* § 330.2050(1).
172. *Id.* § 330.1401.

Together, the GBMI and NGRI components of Michigan's scheme reflect the legislature's attempt to recognize "the grey area of those who cannot be classified as insane but who are clearly suffering from some mental illness or defect at the time of the offense."[173] Admittedly, the Michigan scheme does not correlate legal insanity with an absence of *mens rea*. As noted above, a person may be unable to distinguish between right and wrong, yet still know the nature and quality of his act, and thus act with intention, knowledge, or recklessness.[174]

Other states' GBMI/NGRI statutes do correlate legal insanity with an absence of *mens rea*. Utah's NGRI category covers those who, "[a]s a result of mental illness, lacked the mental state required as an element of the offense charged."[175] Alaska's NGRI category covers those who were "unable, as a result of mental disease or defect, to appreciate the nature and quality of the criminal conduct,"[176] and consigns to the GBMI realm those who "lacked substantial capacity either to appreciate the wrongfulness of the conduct or to conform [their] conduct to the requirements of law."[177] The important point, however, is not that the GBMI/NGRI demarcation infallibly reflects the line separating *mens rea* and non-*mens rea*, but that GBMI statutes are efforts to link the nature of the defendant's mental illness at the time of the crime to the scope of the state's legitimate jurisdiction over the defendant post trial.[178] Furthermore, the reason for the effort at calibration is concern about the detainment gap: while the gap may be constitutionally required in the case of persons whose mental illness prevents the formation of *mens rea* at time T_1 but then abates substantially at time T_2, it is *not* constitutionally required in the case of per-

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173. Note, *An Aggregate Approach*, *supra* note 130, at 355; *see also* People v. Bailey, 370 N.W.2d 628 (Mich. Ct. App. 1985) (upholding GBMI statute against due process challenge and noting that statute, by disclosing full spectrum of criminal responsibility, may afford jurors better understanding of gradation of responsibility in law of homicide); Debra T. Landis, Annotation, *"Guilty but Mentally Ill" Statutes: Validity and Construction*, 71 A.L.R.4TH 702, 706 (1989). A GBMI "verdict is intended to provide an 'in-between' classification whereby a defendant bears the legal responsibility for criminal conduct, but is provided treatment while incarcerated for his mental illness." *Id.*

174. *See supra* notes 117-28 and accompanying text; *see also* LAFAVE & SCOTT, *supra* note 20, at 315.

175. UTAH CODE ANN. § 76-2-305(1) (1990).

176. ALASKA STAT. § 12.47.010(a) (1990).

177. *Id.* § 12.47.030.

178. *Cf.* Sherman, *supra* note 21, at 254.

> The distinction between the guilty but mentally ill verdict and the insanity verdict . . . rests on the severity of the defendant's mental illness. Psychiatric testimony that an individual is extremely mentally ill does not necessarily negate the fulfillment of the *mens rea* requirement for criminal intent. All individuals who are mentally ill are not necessarily legally insane.

Id. (footnotes omitted).

sons whose mental illness coexists with *mens rea* at T_1 and then abates substantially at T_2.[179]

To date, no appellate court has held a GBMI statute to be unconstitutional.[180] Further, Justice O'Connor, in her *Foucha* concurrence, insists that nothing in the majority opinion is meant to cast doubt on the legitimacy of these statutes, or on the "States' freedom to determine whether and to what extent mental illness should excuse criminal behavior. . . . If a State concludes that mental illness is best considered

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179. *See* Hermann & Sor, *supra* note 115, at 582 ("The rationale for the GBMI verdict stems from a legislative concern that the insanity defense is too easily proved, while the abolition of automatic commitment of insanity acquittees in some states has made civil commitment of persons found NGRI more difficult."); *see also* Daniels v. State, 538 A.2d 1104 (Del. 1988) (purpose of GBMI statute is to correct perceived deficiencies in prior statute, which presented juries with limited and difficult choice of either finding defendant guilty despite concern about need of treatment, or finding him not guilty by reason of insanity even though mentally ill defendant appeared to appreciate criminal nature of his conduct); People v. Ramsey, 375 N.W.2d 297 (Mich. 1985) (major purpose of GBMI statute is to lessen the number of persons relieved of all criminal responsibility by way of NGRI verdict); Commonwealth v. Trill, 543 A.2d 1106 (Pa. Super. Ct. 1988) (purpose of GBMI statute is to lessen the number of persons relieved of all criminal responsibility by way of NGRI verdict), *appeal denied*, 562 A.2d 826 (Pa. 1989).

Alaska's experience calibrating the state's criminal jurisdiction to the effect of the mental illness at the time of the crime is illustrative. Prior to the enactment of its GBMI statute, Alaska's insanity defense was a composite of the two-prong *M'Naghten* test and the irresistible impulse test. Alaska then desegregated this defense into two parts: 1) the "nature and quality of the act" prong continued as the insanity defense, and 2) satisfaction of the "right and wrong" or irresistible impulse tests won a defendant nothing more exculpatory than a GBMI verdict. One person convicted under the GBMI statute contended that holding someone criminally responsible who lacked "the capacity to conform his conduct to the requirements of the law" constituted cruel and unusual punishment and violated the Due Process Clause. The Alaska court of appeals responded to the constitutional challenge in this way:

> The holding in *Leland* [which the court embraces] is predicated in part on a recognition that concepts like mental illness, insanity, and criminal responsibility are legal and ethical terms, not medical terms. . . . The determination of the point at which a person's mental condition justifies exculpation is therefore an ethical question for legislators and juries, not courts. . . . The Alaska Supreme Court considered and rejected the "irresistible impulse" test and the *Durham* test . . . in part for these reasons. We therefore conclude that the state may constitutionally eliminate a separate insanity defense based on "irresistible impulse" or inability to conform one's conduct to the requirements of the law.

Hart v. State, 702 P.2d 651, 659 (Alaska Ct. App. 1985).

180. Landis, *supra* note 173, at 707. Many commentators, however, have adopted the view that GBMI statutes are unconstitutional. One of the most insistent criticisms has been that GBMI statutes cheat defendants out of the complete acquittal they deserve because (1) in the absence of GBMI statutes, defendants who possessed only some *mens rea* to commit the crime alleged would be found legally insane and would escape the state's criminal jurisdiction, *see* Sherman, *supra* note 21, at 256-57 (characterizing as illegitimate Michigan's attempt, by means of the GBMI statute, to create a broader definition of criminal responsibility under which many more persons may be convicted than under the NGRI statute); or (2) the definitions of mere mental illness and legal insanity are virtually indistinguishable, such that jurors faced with no substantive differences but with importantly different jurisdictional consequences between the two verdicts will return the GBMI verdict for persons who are really NGRI. Hermann & Sor, *supra* note 115, at 563.

in the context of criminal sentencing," she writes, "the holding of this case erects no bar to implementing that judgment."[181]

Yet it is difficult to see why this is so. The majority found as a matter of substantive due process that "there are constitutional limitations on the conduct a State may criminalize."[182] Put another way, the Constitution limits the type of conduct over which a state may exercise its criminal jurisdiction. If a completely exculpatory effect of an insanity acquittal is a matter of constitutional law, as the majority suggests, then it is hard to see how a state may circumvent that effect by siphoning off various insanity tests into the realm of GBMI, where they will not undermine the state's criminal jurisdiction.

Either the *Foucha* Court handed down a constitutional principle that can be rendered moot by a state legislature supplanting or supplementing its NGRI statute with a GBMI statute, or the Court has very tacitly suggested that GBMI statutes might not be constitutional after all. If the former explanation is correct, then the Court invested Louisiana's insanity acquittal with a constitutionally required effect simply because Louisiana used the word "acquittal" rather than "guilty but mentally ill" to describe its dispensation for insanity. But if the Court has a distaste for allowing Louisiana to do indirectly what has been done directly and openly, that is, not treating all mental illness "acquittals" alike through the use of GBMI statutes, and if the Court has construed the Constitution to compel this direction, then "we have . . . indeed entered a land of word magic, where form triumphs over substance."[183]

A third explanation for the Court's holding in *Foucha* is that, despite Justice O'Connor's assurance to the contrary,[184] the majority meant both to reject a *mens rea/In re Winship* approach to state criminal jurisdiction over acquittees, and to suggest the unconstitutionally of GBMI statutes by implication. Apart from the dent such a holding would put in federalism, it carries some costs. One of those costs is that

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181. Foucha v. Louisiana, 112 S. Ct. 1780, 1790 (interim ed. 1992) (O'Connor, J., concurring).

182. *Id.* at 1785 (majority opinion).

183. Morris, *supra* note 4, at 531. Justice Kennedy made exactly this point in his *Foucha* dissent:

> Nor should we entertain the proposition that this case differs from a conviction of guilty because petitioner has been adjudged "not guilty by reason of insanity," rather than "guilty but insane." Petitioner has suggested no grounds on which to distinguish the liberty interest involved or procedural protections afforded as a consequence of the State's ultimate choice of nomenclature. The due process implications ought not to vary under these circumstances.

112 S. Ct. at 1793 (Kennedy, J., dissenting).

184. *Id.* at 1790 (O'Connor, J., concurring).

lower courts will be tempted to find other ways to assert state therapeutic jurisdiction over insanity acquittees. Two such ways to expand the states' therapeutic jurisdiction is either by broadening the definition of mental illness, or by insisting on the possibility of treatment for non-mentally ill acquittees. Unfortunately, neither scheme is unheard of.

In order to detain persons who, for one reason or another, cannot be proven to have committed an alleged criminal act, state courts occasionally interpret the term "mentally ill" broadly in order to trigger the state's therapeutic jurisdiction.[185] In the wake of *Foucha*, a Minnesota appellate court upheld the commitment of a habitual sex offender who was conceded to be, at most, a psychopath suffering from an antisocial personality disorder.[186] The offender cited the *Foucha* decision to the court as establishing that an antisocial personality disorder is not a mental illness requiring treatment.[187] Without responding to *Foucha* as authority on this point, the court reaffirmed the constitutionality of the psychopath-commitment statute and concluded that, although there was little likelihood of effectively treating the offender, the State was constitutionally entitled to try its best.[188]

If the courts stray too far from medical conceptions of mental illness, they will open the door to wrongful, albeit good faith, acts of preventive detention on the part of the states.[189] Many American citizens are arguably dangerous, and many arguably have "antisocial personalities" in the sense that they appear to have little moral or ethical sensibility. The formula "dangerousness + antisocial personality = civilly committable," however, is in itself a dangerous and loose concept. If states begin to commit people on the ground that they pose a threat to public safety and because they appear abnormal, the states' therapeutic-jurisdictional nets suddenly become very broad.

This does not mean that the states are constitutionally prohibited from broadening the definition of the terms "mental illness" and

185. *See* Dodd v. Hughes, 398 P.2d 540, 542 (Nev. 1965). The *Dodd* court held that the phrase "mentally ill" in a state commitment statute is to be read not only with regard to conventional psychiatric categories and labels, such as "psychosis," but with regard to "a totality of circumstances" that render a person unstable and dangerous; salient among those circumstances are recidivism, repeated acts of violence, the failure to respond to conventional penal and rehabilitative measures, and public safety. *Id.*; *cf.* Hamrick v. State, 199 So. 2d 849 (Ala.) (upholding commitment under a sexual psychopath statute where sufficiency of the evidence for commitment was doubtful, but where state was unable to prove the committee's alleged crime beyond a reasonable doubt), *appeal dismissed*, 389 U.S. 10 (1967).

186. *In re* Holly, No. C9-92-1055, 1992 Minn. App. LEXIS 987 (Minn. Ct. App. September 29, 1992).

187. *Id.* at *5.

188. *Id.*

189. The courts should not, however, go so far as to allow the meaning and force of the law to be dictated by medicine and medical categories.

"mental defect" in their commitment statutes if they so choose. While the *Foucha* Court assumed that an antisocial personality did not amount to a mental illness, and that Louisiana therefore had no therapeutic jurisdiction over Foucha,[190] the Court neither held nor intimated that Louisiana could not rewrite its commitment statutes to constitutionally contain a broader definition of "mental illness."[191] The Court did not suggest that Louisiana could not use this ploy to secure its jurisdiction over future defendants like Terry Foucha. The point is, rather, that the Court could well have bought some liberty for many "irregular" and dangerous American citizens if it had held in *Foucha* that a lack of mental illness does not divest states of criminal jurisdiction over insanity acquittees. The Court could have slowed the states' urge to impose preventive detention if it were willing to draw the proper jurisdictional consequences from the fact that legal insanity is, and always has been, a broader concept than *mens rea*.

An illustration of how strong the urge toward the imposition of preventive detention can be is found in the one grand irony of the *Foucha* case: While the Court intoned that adjudicated insanity acquits absolutely and ends the state's criminal jurisdiction, Louisiana never even argued this position to the Court.[192] Louisiana did not assert that it might detain Terry Foucha beyond the point of his recovery because his drug-induced psychosis, however serious, had not negated his *mens rea*. The State did not argue that moral blamelessness for a crime can coexist with criminal jurisdiction and punishment. Rather, Louisiana argued that, even though it truly had acquitted Foucha of his crime and exempted him from criminal responsibility, it still had some residual jurisdiction, of a preventive and regulatory type, under which it could detain him.[193]

> As in [United States v.] Salerno, the purpose of detaining insanity acquittees in mental health facilities is not punitive and cannot be as the individual has not been convicted of having committed a crime. Detaining an individual under the facts of Salerno and the instant case serves the regulatory purpose of preserving the safety of the community, a purpose which has on previous occasions been held to be constitutionally legitimate.[194]

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190. *See* Foucha v. Louisiana, 112 S. Ct. 1780, 1784 (interim ed. 1992).

191. Indeed, the logic of Powell v. Texas, 392 U.S. 514 (1968), suggests that states have the constitutional authority to invest the term "mental illness" with a broad range of meanings. For a discussion of the *Powell* Court's holding, see *supra* notes 117-23 and accompanying text.

192. *See* Brief for Respondent, Foucha v. Louisiana, 112 S. Ct. 1780 (interim ed. 1992) (No. 90-5844), *available in* LEXIS, Genfed Library, Briefs File.

193. *Id.* at 4.

194. *Id.* (citing United States v. Salerno, 481 U.S. 739 (1987)).

In other words, Louisiana argued that it could continue to detain Terry Foucha, even though the State adjudged him innocent of his crime, because the State also legitimately deemed him dangerous in committing the act constituting the crime.[195] As a matter of prediction, Louisiana was probably on target about Terry Foucha; he might well be a recidivist. As a matter of its "regulatory" jurisdiction over Foucha, however, Louisiana was on weak ground. Unlike Mr. Salerno, Terry Foucha, on Louisiana's own admission, neither stood in the antechamber nor in the postchamber of the State's criminal jurisdiction. Foucha was merely a dangerous man who had "already been shown beyond a reasonable doubt to have committed at least one dangerous act . . . ."[196]

If the state's "regulatory" jurisdiction is as expansive as its predictive capabilities, then liberty is in danger. The road to safeguard liberty is not the road of "regulation," but the road of tighter separation of jurisdiction from morality. Regulation is a poor substitute for guilt. A sane, dangerous person should go free until society has the will to tell him that his mental illness at the time of his crime did not prevent him from being guilty.

Justice O'Connor, in concurrence in *Foucha*, was not willing to accept either the proposition that Louisiana might legitimately have criminal/punitive jurisdiction over insanity acquittees, *or* that Louisiana forfeits all jurisdiction over an insanity acquittee upon his recovery of mental health. She argued, rather, that even though acquittees "may not be incarcerated as criminals or penalized for asserting the insanity defense," their criminal act "sets them apart from ordinary citizens" and justifies the state's detention of them on the ground of their dangerousness.[197] Justice O'Connor thus seemed to ratify the idea that there is a "stickiness" to the fact that the acquittee committed a criminal act, and that the defendant is subject to commitment by way of the criminal process.

Justice O'Connor treated this "stickiness," however, as an evidentiary issue: the acquittee's past bad act furnishes strong evidence in support of the state's suspicions of his dangerousness, and those borne-out suspicions justify his continued detention.[198] The jury's finding beyond a reasonable doubt that Foucha committed the crimes charged did not, in Justice O'Connor's view, seem to furnish any neutral, nonbalancing jurisdictional grounds for his further detention by en-

195. *See id.* at 5.

196. *Id.* at 5-6.

197. Foucha v. Louisiana, 112 S. Ct. 1780, 1789 (interim ed. 1992) (O'Connor, J., concurring).

198. *See id.*

forcement authorities.[199] This is made clear by her insistence that the state's sole interest in Foucha is a "regulatory" interest, as in *Salerno*, such that only those past bad acts that evidenced a high quantum of dangerousness justify detention after recovery of sanity.[200]

While Justice O'Connor stated that Louisiana might legitimately draw predictions of Foucha's dangerousness from the fact that he once suffered from a mental illness and committed a crime while under its influence,[201] she did not explain, apart from allusions to Foucha's "separation from the set of ordinary citizens," *why* Louisiana is entitled to act on its predictions and further detain Foucha. Again, the state might make accurate predictions about the dangerousness of many people, without thereby gaining criminal, or "preventive detention," jurisdiction over them. Justice O'Connor invoked *Salerno* when she suggested that it might be permissible "for Louisiana to confine an insanity acquittee who has regained sanity if, unlike the situation in this case, the nature and duration of detention were tailored to reflect pressing public safety concerns related to the acquittee's continuing dangerousness."[202] Justice O'Connor, however, failed to explain why the state may have the same preventive detention interest in persons whom it has "acquitted" and who may not be "punished" for bringing about their own "acquittal," as it does in persons who stand within the antechamber of the state's criminal jurisdiction by virtue of their valid indictment. By keeping "sufficiently ambiguous the consequences of the [insanity] defense," Justice O'Connor prevented "at least conscious recognition that the prerequisites of criminal liability have been abandoned."[203]

D. The Issue of Stigmatization

We are, finally, in a position to revisit the issue of stigmatization broached earlier.[204] Terry Foucha claimed that his continued detention in a mental facility after his recovery violated his right to due process, because it unnecessarily stigmatized him as mentally ill.[205] Terry

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199. *See id.* at 1790.

200. *Id.* Justice O'Connor stated:

> Nor would it be permissible to treat all acquittees alike, without regard for their particular crimes. For example, the strong interest in liberty of a person acquitted by reason of insanity but later found sane might well outweigh the governmental interest in detention where the only evidence of dangerousness is that the acquittee committed a non-violent or relatively minor crime.

Id.

201. *Id.* at 1789.

202. *Id.*

203. Joseph Goldstein & Jay Katz, *Abolish the Insanity Defense - Why Not?*, 72 YALE L.J. 853, 870 (1963).

204. *See supra* notes 75, 85-99 and accompanying text.

205. *See Foucha*, 112 S. Ct. at 1784-85.

Foucha had claimed that the state should not be allowed to "punish" him for his successful invocation of the insanity defense.[206] Assuming Foucha's detention in the East Feliciana Forensic Facility did not entail a risk of erroneous treatment or of exposure to sick patients, this Article argued that Foucha's successful plea of insanity might have been conditioned on the forfeiture of his constitutional right not to be erroneously or gratuitously stigmatized.[207] Whether the forfeiture was valid depended on the constitutional sufficiency of the change in the state's position brought about by Foucha's successful insanity plea.

Now one can see how the change in Louisiana's position might have been of such nature to justify the State in exacting the forfeiture of Foucha's right not to be stigmatized. If Foucha's insanity defense did not go to the issue of *mens rea*, then the defense served to bring about his commitment, in lieu of conviction and imprisonment, rather than in lieu of complete acquittal. Foucha's successful plea therefore placed the state in the position of legitimately wanting both to detain him beyond his recovery and to recognize the mitigatory effect of his mental illness by convicting him of an insanity "acquittal."[208] Because Louisiana's interest in exercising its criminal jurisdiction over Foucha is preserved in this scenario, the State's interest arguably outweighs Foucha's interest in avoiding stigmatization. Detention at the East Feliciana Forensic Facility, without more, does not amount to an unconstitutional forfeiture of Foucha's rights. Had Foucha raised the insanity defense and then been acquitted by reason of lacking *mens rea*, then his acquittal would have placed the state in a position where it would no longer have a legitimate interest in detaining Foucha other than for the purpose of treatment. Upon recovery at the Feliciana Facility, Foucha's constitutional interest in not being stigmatized and also in being free would trump the State's interest and he would have the right of release.[209] His right to freedom and his right to be free of erroneous stigmatization would be perfectly coextensive.

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206. *See* Brief for Petitioner, Foucha v. Louisiana, 112 S. Ct. 1780 (interim ed. 1992) (No. 90-5844), *available in* LEXIS, Genfed Library, Briefs File.

207. *See supra* notes 75, 85-99 and accompanying text.

208. This "acquittal," see *supra* notes 105-07 and accompanying text, might amount to no more than the possibility of gaining release from all state custody before the expiration of the hypothetical prison term.

209. *Cf.* Westen, *supra* note 94, at 1058-60 (successful appeal of original conviction is legitimately conditioned on defendant's forfeiture of his right not to be retried where the conviction is overturned because of prejudicial error on the part of the state, but not where overturned because of insufficiency of evidence to convict).

V. CONCLUSION

Most people will agree that allowing a state to continue to detain a citizen found innocent of his crime because the citizen was deemed to be dangerous in committing the criminal act is an impermissible imposition of "regulatory" jurisdiction over the citizen. "Regulation" on the basis of alleged dangerousness is a poor substitute for guilt because the standard of dangerousness limits the state's ability to detain a citizen only to the extent of the state's wide-ranging predictive capabilities. Because these predictive capabilities are too easily justified on the basis of an emotional appeal to protect society from dangerous acquittees, they endanger the liberty of all citizens and cause a disingenuous expansion of criminal jurisdiction.

One way to narrowly constrain the concept of "regulatory" jurisdiction is for society to candidly assess what constitutes criminal guilt and then allow the state to act on that assessment. Society must have the will to tell a person who is presently sane and dangerous why or why not his mental illness at the time of his crime did not prevent him from being guilty. Up until the present time, society has deemed legal insanity to be a broader concept than *mens rea*. Thus, an insanity defense not going to the issue of *mens rea* should rightfully serve to bring about commitment rather than acquittal. This commitment would be within the state's criminal jurisdiction and in lieu of conviction and imprisonment.

The successful insanity plea *within* the state's criminal jurisdiction should allow the state to detain the committed acquittee beyond his recovery due to his dangerousness and yet recognize the mitigatory effect of his mental illness at the time of the crime by "convicting" him of an insanity "acquittal." Such an "acquittal" would authorize the state to detain the acquittee until the end of his hypothetical prison term as long as he remained dangerous; yet it would correspondingly allow the acquittee the possibility of gaining release from all state custody before the expiration of the term. In the end, the effect of such an "insanity acquittal" would be to plug the detainment gap without unnecessarily expanding the state's "regulatory" jurisdiction.