FEAR AND LOATHING IN LOUISIANA: CONFINING THE SANE DANGEROUS INSANITY ACQUITTEE

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In the late summer of 1984, a seventeen year old named Terry Foucha broke into the home of an elderly couple, Andrew and Deborah Green.[1] Brandishing a .357 revolver,[2] Foucha demanded money from the Greens and then chased them out of their house.[3] The Greens called the police, who arrived as Foucha was fleeing the scene.[4] Foucha fired on the police, but was captured.[5]

The state charged Foucha with aggravated burglary and illegal discharge of a weapon.[6] The case went to trial, and Foucha was found not guilty by reason of insanity.[7] Pursuant to Louisiana law, the state then held a hearing at which Foucha could win his freedom if he proved that he could be released without danger to himself or others.[8] He failed to do so, and was committed to the East Feliciana Forensic Facility.[9]

Four years after his commitment, the superintendent of Feliciana determined that Foucha had recovered his sanity, and initiated proceedings for his release.[10] At the required hearing, court-appointed psychiatrists testified that in their opinion Foucha was no longer mentally ill, but that they "would not 'feel comfortable in certifying that [he] would not be a danger to himself or to other people.'"[11] The psychiatrists noted that Foucha had several altercations with other patients while at Feliciana.[12] On this basis the court ordered him back to

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1. *High Court to Hear Appeal From Asylum*, THE TIMES-PICAYUNE (New Orleans), Nov. 4, 1991, at B3; Ruth Marcus, *Justices Weigh Louisiana's Criminal Sanity Law*, THE WASHINGTON POST, Feb. 24, 1992 at A3.
2. Foucha v. Louisiana, 112 S. Ct. 1780, 1791 (1992).
3. Marcus, *supra* note 1.
4. 112 S. Ct. at 1791.
5. *Id.*
6. Louisiana v. Foucha, 563 So. 2d 1138, 1138–39 (La. 1990) *rev'd*, 112 S. Ct 1780 (1992).
7. *Id.*
8. LA. CODE CRIM. PROC. ANN. art. 654 (West Supp. 1993) provides in relevant part:
   When a defendant is found not guilty by reason of insanity in any [non-capital] felony case, the court shall remand him to the parish jail or to a private mental institution approved by the court and shall promptly hold a contradictory hearing at which the defendant shall have the burden of proof, to determine whether the defendant can be discharged or can be released on probation, without danger to others or to himself.

Id.
9. 563 So. 2d at 1139.
10. Foucha v. Louisiana, 112 S. Ct. 1780, 1782 (1992).
11. *Id.* at 1783.
12. *Id.* at 1782–83. Foucha also reportedly stabbed a guard with a ball-point pen. Bruce

Feliciana.[13]

Foucha challenged the denial of his release, contending in effect that, by acquitting him, the state forswore its interest in criminally punishing him, and further that since he was no longer mentally ill, the state could not continue to hold him for treatment either.[14] He claimed that in the absence of these justifications, his continued confinement was a denial of due process and equal protection of law.[15] Foucha unsuccessfully sought relief in both a Louisiana trial court and that state's supreme court.[16] He then applied to the United States Supreme Court for a writ of certiorari, which was granted.[17]

On appeal, a five justice majority agreed that the Louisiana scheme violated Foucha's right to due process.[18] The Court held that precedent establishing the constitutional limits of a state's power to civilly commit its citizens, most prominent among them *Jones v. United States*,[19] mandated a reversal of the Louisiana Supreme Court's decision[20]

At first blush, the *Foucha* decision is unsatisfactory. After all, Terry Foucha clearly demonstrated his capacity to do harm to society, as evidenced by his behavior on both sides of the hospital walls.[21] Is society not justified in confining people in Foucha's condition for its own protection? Must we inquire into the mental health of an insanity acquittee who we know is dangerous in order to legitimately confine him? Isn't a state entitled to hold people like Foucha by virtue of the facts that they have committed a transgression in the past and, according to medical prognosis, continue to pose a danger to the public?

Foucha's confinement presents complex questions of individual liberty, behavioral control and societal protection. Under what circumstances may a state confine its citizens? What proof of these circumstances is required? Foremost among these questions is whether the government can preventively detain a sane person on the sole basis of fear of that person's future behavior. This Note examines the relationship between criminal and civil confinements, as well as some of the legal problems in confining insanity acquittees who have regained their sanity.

Intended as a primer of legal confinement, Part I discusses traditional legal tactics for dealing with problem behavior, and the rationales attributed to

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Alpert, *Court: Free Mental Patient*, THE TIMES-PICAYUNE (New Orleans), May 19, 1992, at A1, A8.

13. 112 S. Ct. at 1783.

14. Brief for the Petitioner at *17, Foucha v. Louisiana, 112 S. Ct. 1780 (1992) (No. 90-5884), 1991 WL 527591.

15. *Id.*

16. Louisiana v. Foucha, 563 So. 2d 1138, 1140 (1990), *rev'd*, 112 S. Ct. 1780 (1992).

17. Foucha v. Louisiana, 111 S. Ct. 1412 (1991).

18. 112 S. Ct. at 1781. Justice O'Connor wrote separately "to emphasize that the Court's opinion addresses only the specific statutory scheme before us." *Id.* at 1789.

19. 463 U.S. 354 (1983). The *Jones* case held that as civil and criminal commitments are imposed for different purposes, a state may constitutionally confine an insanity acquittee for a period longer than that to which he may have been sentenced if found guilty. *Id.*; *see infra* notes 136–54 and accompanying text.

20. 112 S. Ct. at 1786.

21. *See supra* note 12 and accompanying text.

these tactics.[22] Part I argues for limiting confinements to those which are based on past behavior.[23] Part II discusses the *Foucha* case in the light of its relevant precedent.[24] Finally, Part III discusses a proposed solution to the problem of legitimating the confinement of people in Foucha's condition—the "guilty but mentally ill verdict."[25] This Note concludes that *Foucha* is indeed a good decision, and that the alternative confinement rationale suggested in Justice O'Connor's concurrence—the guilty but mentally ill verdict—is ill advised.

I. THE HOWS AND WHYS OF CONFINEMENT

It is elemental that human beings, individually and as a society, fear harmful human behavior.[26] This fear provides the impetus for confining people who are for one reason or another identified as "dangerous".[27] A primary goal of the law is the protection of its subjects from unjustified injury by others.[28] For this purpose, two means for effecting the confinement of dangerous individuals have evolved: the criminal and civil commitment systems. The important distinctions between the two derive from the purposes they serve and the sources of state power which authorize them. As will be seen, because there is some overlap in purpose, it is sometimes unclear which of the two types of commitment is appropriate to achieve a particular confinement.

A. Criminal Confinement

The state's authority to criminally confine citizens derives from its police power to protect the health, safety and morals of its citizens.[29] The reasons assigned for the exercise of this power, while not uncontroversial,[30] are fairly straightforward. States confine criminal convicts to serve the purposes of deterrence, incapacitation, rehabilitation and retribution.[31]

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22. *See infra* notes 26–86 and accompanying text.
23. *Id.*
24. *See infra* notes 87–222 and accompanying text.
25. *See infra* notes 232–40 and accompanying text. It appears that this solution is still open to states seeking to confine individuals who commit crimes while mentally ill.

In her concurrence, Justice O'Connor emphasized that the Court's holding "casts no doubt on laws providing for prison terms after verdicts of 'guilty but mentally ill.'" Foucha v. Louisiana, 112 S. Ct. 1780, 1790 (1992).

26. *See, e.g.*, Gregory B. Leong et al., *Dangerous Mentally Disordered Criminals: Unresolvable Societal Fear?*, 36 J. FORENSIC SCI. 210 (1991). Jean Hampton's definition of harm will serve for the purposes of this Note: "A harm or loss is a disruption of or interference in a person's well-being, including damage to that person's body, psychological state, capacities to function, life plans, or resources over which we take this person to have an entitlement." Jean Hampton, *Correcting Harms Versus Righting Wrongs: The Goal of Retribution*, 39 UCLA L. REV. 1659, 1662 (1992).

27. John Monahan & Saleem A. Shah, *Dangerousness and Commitment of the Mentally Disordered in the United States*, 15 SCHIZOPHRENIA BULL. 541 (1989). Predictions of offender dangerousness are made throughout the criminal justice system. Marc Miller & Norval Morris, *Predictions of Dangerousness: Ethical Concerns and Proposed Limits*, 2 J. L. ETHICS & PUB. POL'Y 393 (1986). Preventing harm is the unique function of confinement as a criminal penalty. Franklin E. Zimring & Gordon Hawkins, *Dangerousness and Criminal Justice*, 85 MICH. L. REV. 481 (1986).

28. Monahan & Shah, *supra* note 27, at 541; Leonard V. Kaplan, *Unhappy Pierre: Foucault's Parricide and Human Responsibility*, 83 NW. U. L. REV. 321 (1989).

29. Foucha v. Louisiana, 112 S. Ct. 1780, 1785 (1992).

30. *See generally* WAYNE R. LAFAVE & AUSTIN W. SCOTT JR., CRIMINAL LAW § 1.5 (2d ed. 1986).

31. *Id.*

The deterrence rationale is based on the theory that by tying legal penalties to selected harmful behaviors, people will avoid engaging in those behaviors.[32] This approach necessarily involves the assumption that citizens will behave rationally; that they will weigh the possible outcomes of those behaviors, and find them unprofitable.[33]

The incapacitation rationale is also straightforward. By segregating criminals from the rest of society, the state prevents criminals from inflicting further harm for the duration of their confinement. This, of course, involves the assumption that the individuals so held present a significant danger of reoffense.[34]

Next, by providing incarcerated offenders with educational and other rehabilitative opportunities, the rehabilitation rationale seeks to restore the offender to productive, functioning members of society.[35] This rationale depends upon several behavioral assumptions: that the offender is by virtue of his or her criminal behavior in some way medically or psychologically deficient; that the offender is capable of being rehabilitated; and perhaps the most precarious assumption of all—that there are treatments which in fact effect a 'cure' for criminal propensities.[36]

Finally, the retributive rationale seeks to inflict punishment on the criminal for committing an immoral act. This retributive function is a method for restoring the moral balance between the criminal and society.[37] By committing a serious crime, a criminal denies others rights which he himself has enjoyed.[38] He thus offends community norms and upsets the moral balance between society and himself. Acting through law, society vindicates whatever interest was maligned by the crime and thus restores the moral balance.[39] The retributive rationale also has the benefit of diffusing public passion toward revenge against the offender.[40]

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32. Ernest Van den Haag, *The Neoclassical Theory of Crime Control*, 1 CRIM. JUST. POL'Y REV. 91 (1986).

33. *Id.*

34. There is indication that the deterrence rationale is not worth the increased cost of imprisoning criminals who would not otherwise be incarcerated, *see* Christy A. Visher, *Incapacitation and Crime Control: Does a "Lock 'em Up" Strategy Reduce Crime?*, 4 JUST. Q. 513 (1987) (high-rate serious offenders are difficult to identify accurately with information currently available in official criminal history records). Alfred Blumstien, *Selective Incapacitation as a Means of Crime Control*, 27 AM. BEHAVIORAL SCIENTIST 87 (1983).

35. In his recent book, Professor La Fond traces the history of confinement politics, and comes to the conclusion that the public has become disillusioned by the "rehabilitative ideal" and that this goal is no longer a focus of criminal confinement. JOHN Q. LA FOND & MARY L. DURHAM, BACK TO THE ASYLUM (1992); *see also* Robert A. Pugsley, *Retributivism: A Just Basis for Criminal Sentences*, 7 HOFSTRA L. REV. 379, 383 (1979).

36. Pugsley, *supra* note 35, at 379.

37. Herbert Morris, *Persons and Punishment*, *in* PUNISHMENT AND REHABILITATION 40, 43 (J. Murphy ed., 1973).

38. *Id.*

39. Pugsley, *supra* note 35, at 398; HERBERT MORRIS, ON GUILT AND INNOCENCE 34 (1976).

40. Oliver Wendell Holmes observed:

> [I]t may be said, not only that the law does, but that it ought to, make the gratification of revenge an object .... The first requirement of a sound body of law is, that it should correspond with the actual feelings and demands of the community, whether right or wrong. If people would gratify the passion of revenge outside of the law, if the law did not help them, the law has no choice but to satisfy the craving itself, and thus avoid the greater evil of private retribution.

As stated above, there is much controversy surrounding which of these rationales should predominate in decision-making regarding whether and for what duration the government should impose a given criminal confinement. This Note argues that the retributive rationale is best for two reasons: the retributive rationale relies only on past events, which are reasonably susceptible of proof, and it offers an otherwise lacking moral justification for the state's intrusion into the liberty interest of individuals.

Each of the rationales for criminal confinement, with the exception of retribution, are forward-looking. The aim of deterrence is toward prevention of *future* crime. The threat of aversive consequences for those found guilty of a crime is supposed to deter the public generally from committing offenses in the future.[41] Further, the actual confinement imposed on individual offenders is supposed to deter the offenders themselves from committing future criminal acts.[42] So too is the incapacitation rationale forward-looking. Incapacitation proposes that by segregating criminals from the rest of society, they will be unable to commit further crimes.[43] However, this proposition depends upon the notion that the criminal would in fact have committed another crime but for his incarceration. Finally, rehabilitation, as it is based on a medical model, supposes that the criminal suffers from some mental infirmity, which if treated will subside, resulting in a safer future society.

Because these considerations all aim at preventing future harms, their benefits are necessarily speculative. Because their focus is exclusively on the interests of society, they run the risk of trampling individual rights.[44] In its zeal to protect itself, society might easily confine individuals unnecessarily. From the point of view of the collective, the confinement of a few individuals who would not in fact have committed a harmful act is a small price to pay for the harm prevented by the confinements of those who would. The collective would thus be subordinating the right of the individual to be free from coercion to its interest in self protection.

By contrast, the retributive rationale looks only to past behavior as providing a basis for confinement. Proof of the commission of a crime in the past is sufficient for a retributive confinement.[45] Retributive confinements are not based on the speculation that confining the criminal will have the effect of inducing or preventing him or anyone else from committing future crimes, either during the period of confinement or afterwards. Merely having committed a crime in the past is sufficient to justify confinement under the retributive rationale.

A practical reason for limiting criminal confinements to those based on past acts is the simple fact that the future behavior of human beings, at least in regard to harmful behavior, is too unpredictable.[46] Implicit in any confinement aimed at preventing future harms is the prediction that without that

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OLIVER WENDELL HOLMES, THE COMMON LAW 41–42 (1881).

41. Morris, *supra* note 37, at 49.

42. *See, e.g.*, Commonwealth v. Ritter, 13 Pa. D. & C. 285, 291 (Dist. Ct. 1930).

43. *See* LAFAVE & SCOTT, *supra* note 30, at 24. This is of course dubious, since there are few crimes which are wholly impossible to commit in prison. *Id.* at n.17.

44. Pugsley, *supra* note 35, at 384.

45. *Id.* at 399.

46. *See* sources cited *infra* note 60; *cf.* Laurence H. Tribe, *An Ounce of Detention: Preventive Justice in the World of John Mitchell*, 56 VA. L. REV. 371, 375 (1970).

confinement, more harms would in fact occur. Such predicates are by no means easily established in individual cases. By contrast, past events, such as the defendant having recently fired a gun, having been in another city at the time of the crime, etc., *are* reasonably susceptible of proof.[47] The profound deprivation of liberty entailed in any confinement warrants the firmest possible foundation.[48]

A further reason for adopting the retributive rationale for criminal confinements is that it supplies a needed premise to the practice of punishing criminals for their actions—justification for the state's use of force in confining individuals.[49] If we are to abide by the Kantian moral imperative to treat all people as "ends in themselves" rather than means to some other purpose, the forcible confinement of an individual must be justified in a way that appeals to societal benefit alone will never accomplish.[50] By tying punishment to moral blame, the retributive rationale for punishment legitimates this use of force. Because criminal acts consist of intentional conduct which denigrates the worth of legally protected interests, criminals are morally culpable for such acts and so *deserve* to be punished.[51]

B. Civil Confinement

Civil commitment has two basic purposes. The first is to secure needed treatment for those whose mental illness renders them incapable of seeking it out on their own.[52] In this sense, civil commitment is a humane intervention by

47. Professors Miller and Morris argue that a person's membership in a class of dangerous persons (based on actuarial data) can be proven to any specified degree. Miller & Morris, *supra* note 27, at 423. However, they agree that, because individual predictions of dangerousness are unreliable, they should not be used to authorize confinement beyond that which would be deserved as punishment. They argue that predictions of dangerousness should inform the allocation of limited correctional resources (i.e., prison space). *Id.* at 431.

48. *Cf. id.* at 431–32 (predictions of dangerousness should not be used to extend confinement beyond limit of deserved punishment). Indeed, given that confinement decisions implicate a fundamental right for due process purposes, Greenholtz v. Nebraska Penal Inmates, 442 U.S. 1 (1979) (Powell, J., concurring in part and dissenting in part), it would certainly stand to reason that requiring a confinee to bear the risk of error inherent in predictions of dangerousness is *per se* a violation of due process. However, this argument was made and rejected in Barefoot v. Estelle, 463 U.S. 880 (1983) (argument that admission of unreliable psychiatric testimony as to future dangerousness in death penalty case was a violation of due process "is somewhat like asking us to disinvent the wheel"). The facts of that case seem particularly egregious in that 1) the liberty interest involved was life, 2) the psychiatrist who testified as to Barefoot's dangerousness had not personally examined him, and yet 3) the psychiatrist testified that he was "100% certain" that someone possessed of Barefoot's psychological makeup would commit some future act of violence. *Id.* at 905. Barefoot was executed in 1984. Miller & Morris, *supra* note 27, at n.81.

49. Peter Arenella, *Convicting the Morally Blameless: Reassessing the Relationship Between Legal and Moral Accountability*, 39 UCLA L. REV. 1511, 1534 (1992).

50. Pugsley, *supra* note 35, at 399–400.

51. Samuel H. Pillsbury, *The Meaning of Deserved Punishment: An Essay on Choice, Character, and Responsibility*, 67 IND. L.J. 719 (1992). Conversely, actors who commit harmful acts but are *not* morally blameworthy (such as actors who because of mental disorder do not appreciate the moral quality of their acts) should *not* be punished. This is the reasoning behind the insanity defense. Richard J. Bonnie, *The Moral Basis of the Insanity Defense*, 69 A.B.A. J. 194 (1983). This argument does not apply to crimes which are mere "malum prohibitum"—not morally wrong in themselves, but criminalized as an expedient to regulating society (e.g. parking ordinances). For those crimes, because the liberty interests involved are usually not profound (e.g., paying a small fine) the concern that they must be legitimated is attenuated.

52. John Q. La Fond, *An Examination of the Purposes of Involuntary Civil*

the state in the lives of the mentally ill. Under this theory, the individual is deemed unable to act in his or her own best interests, and so the state, acting according to its *parens patriae* power,[53] steps in to preserve those interests. The rubric under which these sorts of civil confinements are pursued is "grave disability". The great majority of states authorize the involuntary civil commitment of the "gravely disabled",[54] which they usually define as those who are unable to provide for their own needs for food, shelter or clothing.[55] In these cases, the State is principally concerned with the harm that the committee may inflict on himself.

The other rationale for civil commitment, also frequently expressed in authorizing statutes, is the preventive detention of the "dangerous" mentally ill.[56] States most frequently express this concern by requiring that prospective committees be "dangerous to self or others".[57] As in criminal commitments, the state is here invoking its *police* power to prevent harm to the community.[58] The determination of whether a given person is dangerous is generally left to psychiatric experts in civil commitment hearings, and is usually based on the clinical judgment of the experts.[59] This is so despite the fact that these clinicians are notoriously bad at making such predictions.[60] This was the commitment scheme under which Louisiana initially confined Terry Foucha.[61]

Because physical confinement is the result of both civil and criminal commitments, the deprivation of liberty involved is in many respects equivalent. Accordingly, ensuring a proper factual basis for a civil confinement

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Commitment, 30 BUFF. L. REV. 499, 504 (1981).

53. *Id. Parens patriae* is the state power to act as guardian of persons under legal disability; *see also* Note, *The Nascent Right to Treatment*, 53 VA. L. REV. 1134, 1138 (1967).

54. *See, e.g.*, ARIZ. REV. STAT. ANN. § 36–533 (1993) (requiring petition for court-ordered treatment to allege that the patient is "gravely" disabled).

55. *See, e.g.*, ARIZ. REV. STAT. ANN. § 36–501 (1993) "'Gravely disabled' means a condition evidenced by behavior in which a person, as a result of a mental disorder, is likely to come to serious physical harm or serious illness because he is unable to provide for his basic physical needs." *Id.*

56. *See, e.g.*, DEL. CODE ANN. tit. 16 § 5003 (Michie 1983). "No person shall be involuntarily admitted to the hospital as a patient except pursuant to the written certification of a psychiatrist that ... such person is likely to commit or suffer serious harm to himself or others ... if not given immediate hospital care or treatment." *Id.*

57. *Id.*

58. Donaldson v. O'Connor, 493 F.2d 507, 521 (5th Cir. 1974), *aff'd in part*, 422 U.S. 563 (1975); La Fond, *supra* note 52, at 501.

59. Bruce J. Ennis & Thomas R. Litwack, *Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom*, 62 CAL. L. REV. 693 (1974). This practice has been sharply criticized as an abdication of the judicial fact-finding role in such hearings. *Id.* at 696.

60. JOHN MONAHAN, THE CLINICAL PREDICTION OF VIOLENT BEHAVIOR 60 (1981) (prediction of violence accurate in at best one third of all cases); *see also* Charles W. Lidz et al., *The Accuracy of Predictions of Violence to Others*, 269 JAMA 1007 (1993) (Episodes of violent behavior occurred among 53% of the patients classified as likely to be violent, compared with 36% of the patients classified as not likely to be violent); Deidre Klassen & William A. O'Connor, *A Prospective Study of Predictors of Violence in Adult Male Mental Health Admissions*, 12 LAW & HUM. BEHAV. 143 (1988) (Fifty-nine percent of patients predicted as violent were actually violent, compared to 6% of those who were predicted to be non-violent).

61. The trial court found that Foucha

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

Louisiana v. Foucha, 563 So. 2d 1138, 1139 (La. 1990) (quoting trial court) (emphasis added).

should be just as important as it is in the criminal context. There is no inherent difficulty in making the finding of present mental illness, at least so far as the signs and symptoms of recognized mental disorders are concerned.[62] However, the same difficulty regarding predictions of dangerousness that is of concern in the criminal context exists in the civil context as well. Moreover, there is no corresponding notion of desert to legitimate the severe deprivation of liberty inherent in civil commitment. Thus, it appears that the danger of unwarranted confinement is greater in the civil context.

Some jurisdictions have sought to mitigate the danger of unnecessary civil confinements by requiring the finding of a recent overt act of dangerousness to authorize civil commitment.[63] However, states have recently moved toward broadening criteria for civil commitment, and so this is a minority rule.[64] Unfortunately, a combination of unwarranted confidence in clinical predictions and the legitimate need for a system of civil commitment[65] have served to preclude any serious challenge to the practice of using bare predictions of dangerousness as a predicate for civil confinements.

C. Maintaining the Bounds.

As observed, criminal and civil commitment laws share the common purpose of preventing dangerous behavior. It is through the "dangerousness" criterion that the domain of civil commitment encroaches on that of the criminal law. Because the two types of commitment share the police power interest of protecting the public from harm, the line of demarcation between the two has blurred. At best, this blurry line leads to confusion of the functions of the respective systems. At worst, it leads to abuse of process.[66]

Clearly, the public desires protection from those who appear dangerous.[67] From the public's point of view, ascertaining whether the confinees are "mad or bad" is less important than effecting that confinement. The fact that a state may often achieve a given confinement using either the criminal or the civil law, makes it sorely tempting to take the path of least resistance and divert candidates for confinement from the criminal to the civil system.[68] In this way, the state may circumvent the stringent procedural protections available to criminal defendants and confine individuals more easily. This would of course lead to constitutional violations.[69]

Washington state's "Sexually Violent Predator" law[70] is an excellent

62. However, there may be considerable difficulty in determining exactly what constitutes a mental illness. *See* sources cited *infra* note 76.

63. *See, e.g.*, Lessard v. Schmidt, 349 F. Supp. 1078 (E.D. Wis. 1972); Caswell v. Harrell, 534 So. 2d 317 (Ala. Civ. App. 1988).

64. Mary L. Durham & John Q. La Fond, *The Empirical Consequences and Policy Implications of Broadening the Statutory Criteria for Civil Commitment*, 3 YALE L. & POL'Y REV. 395 (1985).

65. Andrew Scull, *Deinstitutionalization: Cycles of Despair*, 11 J. MIND & BEHAV. 301, 306–07, n.1 (1990).

66. *See, e.g.*, John Q. La Fond, *Washington's Sexually Violent Predator Law: A Deliberate Misuse of the Therapeutic State for Social Control*, 15 U. PUGET SOUND L. REV. 655 (1992).

67. Monahan & Shah, *supra* note 27, at 541.

68. *Cf.* Tribe, *supra* note 46, at 374.

69. *See, e.g., infra* note 85 and accompanying text.

70. WASH. REV. CODE ANN. § 71.09.060(1) (West 1992).

illustration of this potential for abuse. Under this statute's provisions, people charged with any of a number of listed offenses become candidates for civil commitment if they "suffer from a *mental abnormality* or personality disorder which makes [them] likely to engage in predatory acts of sexual violence."[71] This liability attaches *regardless* of whether the person was convicted and sentenced for the incident which forms the basis of the civil commitment petition.[72] Indeed, the predator scheme appears to be primarily addressed to convicted offenders.[73] The scheme then authorizes the state to hold committees indefinitely, until a court finds that they are safe to be at large.[74] In this way, the state may extend the confinement of sex offense convicts beyond the term of their criminal sentences.

As numerous commentators have pointed out, several problems exist with this scheme.[75] The principal problem is that the standards for commitment do not identify people who are mentally ill.[76] The statute uses the standard of "mental abnormality", however, this term is scientifically meaningless.[77] It might embrace anything from a full-blown psychosis[78] to insomnia.[79] The alternative standard, that the committee suffer from a "personality disorder", while psychiatrically recognized, is hard to conceive of as a legally significant "mental illness".[80] The reason for this is that the concept of personality disorder is fundamentally tautological.[81] The term indicates only that the person has behaved in specified maladaptive ways in the past, not that any psychological

71. *Id.*, § 71.09.020(1) (emphasis added). The enumerated crimes include murder, assault, and burglary, if the crime "has been determined beyond a reasonable doubt to have been sexually motivated." *Id.*, § (4)(c).

72. *Id.*, § 71.09.020(1).

73. *Id.*, § 71.09.030(1).

74. *Id.*, § 71.09.060(1).

75. *See, e.g.*, La Fond, *supra* note 66; Brian G. Bodine, Comment, *Washington's New Violent Sexual Predator Commitment System: An Unconstitutional Law and an Unwise Policy Choice*, 14 U. PUGET SOUND L. REV. 105 (1990); Lisa T. Greenlees, Note, *Washington State's Sexually Violent Predators Act: Model or Mistake?*, 29 AM. CRIM. L. REV. 107 (1991). *But see* Gary Gleb, Comment, *Washington's Sexually Violent Predator Law: The Need to Bar Unreliable Psychiatric Predictions of Dangerousness from Civil Commitment Proceedings*, 39 UCLA L. REV. 213 (1991); Marie A. Bochnewich, Comment, *Prediction of Dangerousness and Washington's Sexually Violent Predator Statute*, 29 CAL. W. L. REV. 277 (1992) (both arguing scheme is at least constitutional).

76. La Fond, *supra* note 66, at 686–87. On the slipperiness of the concept of "mental disorder" and a definition, see Jerome C. Wakefield, *The Concept of Mental Disorder, on the Boundary Between Biological Facts and Social Values*, 47 AM. PSYCHOLOGIST 373 (1992); Jerome C. Wakefield, *Disorder as Harmful Dysfunction: A Conceptual Critique of DSM–III–R's Definition of Mental Disorder*, 99 PSYCHOL. REV. 232 (1992).

77. La Fond, *supra* note 66, at 690.

78. THE AMERICAN PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (3d. ed. 1987) [hereinafter DSM III–R] defines psychosis as a "[g]ross impairment in reality testing and the creation of a new reality .... When a person is psychotic, he or she incorrectly evaluates the accuracy of his or her perceptions and thoughts and makes incorrect inferences about external reality, even in the face of contrary evidence." *Id.* at 404.

79. Insomnia is defined as an inability to initiate or maintain sleep, which results in significant daytime fatigue. This must occur at least three times per week for a month in order to meet diagnostic criteria for Primary Insomnia. *Id.* at 301.

80. *Cf.* John W. Parry & James C. Beck, *Revisiting the Civil Commitment/Involuntary Treatment Stalemate Using Limited Guardianship, Substituted Judgment and Different Due Process Considerations: A Work in Progress*, 14 MENTAL & PHYSICAL DISABILITY L. REP. 102 (1990).

81. La Fond, *supra* note 66, at 691.

impairment caused the behavior.[82] Personality disorders should not therefore be the basis of civil commitment, since they do not indicate that a person so diagnosed is *incapable* of acting in an adaptive fashion, only that they have not done so in the past.[83]

In his recent article, Professor La Fond argues forcefully that the sexually violent predator scheme is an illegitimate use of civil commitment to effectively extend the sentences of Washington sex crime convicts.[84] By civilly committing these offenders, the Washington legislature avoids the constitutional issues that would arise were it to simply extend the criminal sentences statutorily.[85] As such, the sexually violent predator scheme constitutes an end-run around constitutional protections which are vital for protecting the individual rights of criminal defendants from oppressive government action.[86]

II. *FOUCHA* ANALYZED

A. Decisional Antecedents

Since the public's desire to have all dangerous people confined is in tension with constitutionally protected individual freedoms, it has been necessary to draw bounds around a state's power to confine its citizens. This section explores those bounds as found in the federal Constitution. In order to fully appreciate the import of *Foucha*, as well as illustrate the foregoing analysis, it is necessary to review the relevant precedent concerning civil commitment and insanity acquittal. There are four main Supreme Court cases: *O'Connor v. Donaldson*,[87] *Baxstrom v. Herold*,[88] *Vitek v. Jones*,[89] and *Jones v. United States*.[90] Each case serves to illuminate a point along the interface between criminal and civil commitments. *O'Connor* establishes the criteria for valid civil confinements,[91] and *Baxstrom* indicates that these criteria will not be relaxed for prisoners nearing the end of their sentences.[92] *Vitek* holds that the conditions of confinement in prisons are sufficiently different from those in mental hospitals as to implicate constitutionally protected liberty interests.[93] Finally, *Jones* establishes that not only are findings of dangerousness and mental

82. Brief Of Amicus Curiae Washington State Psychiatric Ass'n in Support of Petitioners at 8, *In re* Detention of Young, 857 P.2d 989 (1993) (57837-1); La Fond, *supra* note 66, at 691.

83. *Cf.* Emily Campbell, Comment, *The Psychopath and the Definition of "Mental Disease or Defect" Under the Model Penal Code Test of Insanity: A Question of Psychology or a Question of Law?*, 69 NEB. L. REV. 190 (1990).

84. La Fond, *supra* note 66.

85. These constitutional issues would include violation of the prohibition against ex post facto laws, because the convicts would become subject to an increased criminal penalty after the offense was committed. U.S. CONST. art. I, §§ 9, cl. 3, 10, cl. 1.; Miller v. Florida, 482 U.S. 423, 429 (1987); Collins v. Youngblood, 497 U.S. 37 (1990).

86. And yet the Washington Supreme Court found the scheme constitutional. *In re* Detention of Young, 857 P.2d 989 (Wash. 1993). At the time of this writing, Young was considering federal appeal. Ellis E. Conklin, *Battle Against Sexual Predator Law Not Done Yet*, SEATTLE POST-INTELLIGENCER, Aug. 11, 1993 at B1.

87. 422 U.S. 563 (1975).

88. 383 U.S. 107 (1966).

89. 445 U.S. 480 (1980).

90. 463 U.S. 354 (1983).

91. *See infra* notes 95–107 and accompanying text.

92. *See infra* notes 108–22 and accompanying text.

93. *See infra* notes 125–35 and accompanying text.

illness required for civil confinements, they are the sole conditions for its perpetuation.[94] As will be seen, each case serves to discriminate the features of valid civil confinements from criminal ones. The refrain in each case is that establishing an interest in one sort of confinement does not bear on establishing an interest in the other.

O'Connor v. Donaldson[95] outlines the constitutional limits of basic civil commitment. In that case an involuntary psychiatric patient, Kenneth Donaldson, sued Florida State Hospital administrators under 42 U.S.C. § 1983 for deprivation of his constitutional right to freedom.[96] The state civilly confined Donaldson to the Chattahoochee State Hospital for nearly fifteen years, despite his repeated attempts to secure release.[97]

Donaldson contended that he was no longer mentally ill and that hospital administrators were holding him against his will.[98] He further claimed that he posed a danger neither to himself nor to others,[99] and that he was capable of supporting himself.[100] The administrators' defense to Donaldson's claims against them personally was that they held him in good faith, pursuant to a valid state law, and that they were thus not personally liable to him for any violation of his civil rights.[101] At trial, a jury found that during the time of his hospitalization, Donaldson was in fact not dangerous to himself or others and that he was able to care for his own material needs.[102] On appeal, the United States Supreme Court found no reason to doubt these findings,[103] and ruled that the state did not have the power to confine mentally ill individuals who posed no threat of harm to others.[104]

In its holding, the Court emphasized that a finding of mental illness was not by itself a sufficient basis for involuntarily confining a patient who is "dangerous to no one and [who] can live safely in freedom."[105] Thus, *O'Connor* requires that a state establish more than mere mental illness in order to confine a civil committee.[106] An additional finding of either dangerousness or inability to provide for one's own material needs is required.[107] Thus, it seems clear that the States' power to civilly confine the mentally ill is limited to those who are either dangerous or incapable of caring for themselves.

The next case relevant to the *Foucha* decision, *Baxstrom v. Herold*,[108] provides instruction regarding the constitutional distinctions between civil and criminal commitments. At issue in *Baxstrom* was whether a state could civilly commit a prison inmate nearing the end of his sentence with fewer procedural

94. *See infra* notes 136–54 and accompanying text.
95. 422 U.S. 563 (1975).
96. *Id.* at 565.
97. *Id.* at 564.
98. *Id.* at 565.
99. *Id.*
100. *Id.* at 568.
101. *Id.* at 569–70.
102. *Id.* at 573–74.
103. *Id.* at 574.
104. "In short, a State cannot constitutionally confine without more a non-dangerous individual who is capable of surviving safely in freedom by himself or with the help of willing and responsible family members or friends." *Id.* at 576.
105. *Id.* at 575.
106. *Id.*
107. *Id.*
108. 383 U.S. 107 (1966).

protections than those afforded non-inmates.[109]

The petitioner, Johnnie K. Baxstrom, had been convicted of assault and sentenced to a prison term of two and one-half to three years.[110] Two years into this term, a prison psychiatrist determined that Baxstrom was mentally ill, and moved him from the prison to the Dannemora State Hospital—a mental hospital run by the Department of Correction.[111] Four months after this transfer, and one month before the end of his prison sentence, the director of the hospital had Baxstrom civilly committed pursuant to section 384 of the New York Correction Law.[112] This law made special provision for the civil commitment of prisoners, and was distinct from that governing all other civil commitments in the state of New York.[113]

Pursuant to section 384, the state civilly committed Baxstrom *without* the de novo review of his current mental state required in all other civil commitment proceedings, and *without* the right to a jury determination of that mental state.[114] The Court found that both of these differences constituted violations of the equal protection clause of the federal Constitution.[115]

In addition to these impermissible differences in procedure, once a prisoner was found to fall within the criteria of section 384,[116] the decision whether to place him in a civil mental hospital, or keep him at Dannemora was left entirely to administrative discretion.[117] By contrast, there was a definite, articulated standard for the placement of non-prisoners at Dannemora—they had to be "so dangerously mentally ill that [their] presence in a civil hospital is dangerous to the safety of other patients or employees, or to the community."[118] This disparity in the standards for determining the site of the civil confinement of prisoners and non-prisoners was also a violation of equal protection, according to the *Baxstrom* Court.[119] The mere fact that a prospective civil committee was currently serving a prison term was an insufficient basis for the denial of an objective standard of decision as to the site of commitment.[120]

Thus, the Court focused on two variables: the committee and the place of

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109. *Id.*
110. *Id.* at 108.
111. *Id.*
112. *Id.*
113. *Id.* at 110–11.
114. *Id.* (citing N.Y. MENTAL HYGIENE LAW §§ 70, 72 (McKinney 1951)); N.Y. CORRECTION LAW § 384 (McKinney 1961).
115. 383 U.S. at 110.
116. This criterion was whether the court is "satisfied that [the prisoner] may require care and treatment in an institution for the mentally ill." *Id.* at n.2 (quoting N.Y. CORRECTION LAW § 384 (McKinney 1961)).
117. This discretion rested in the administrators of the departments of Correction and Mental Hygiene. *Id.* In Baxstrom's case, the Department of Mental Hygiene determined that he was not a fit candidate for placement in a civil hospital, even before his section 384 hearing. *Id.* at 109. This meant that even though as an administrative matter, custody of Baxstrom reverted to the Department of Mental Hygiene upon the expiration of his prison sentence, he remained at Dannemora. *Id.* The insufficiency of this process is illustrated by the fact that no one from the Department of Mental Hygiene testified at the section 384 hearing, and Dr. Herold, Assistant Director of Dannemora, testified that he would have no objection to Baxstrom's placement in a civil hospital if it were possible. *Id.* at 112 n3.
118. *Id.* at 113.
119. *Id.* at 114–15.
120. *Id.*

confinement. Equal protection required that the determination of both *whether* a person was committed at all, and if committed *where* the commitment was to take place (e.g., in a regular or criminal mental hospital) be consistent across similarly situated people. While people currently serving prison terms were *not* sufficiently different from the general public to sustain the procedural differences involved in *Baxstrom*,[121] the differences between civil and criminal mental hospitals *were* sufficient to require procedural protections for the individuals subject to such a placement decision.[122]

This holding indicates the independence of the state's interest in each type of confinement. The fact that a state may have a legitimate interest in confining an individual as punishment for committing a crime is not by itself relevant to establishing an interest in confining that individual civilly for treatment or the protection of society. Furthermore, the fact that an individual is currently being held in a criminal setting for punishment is not by itself relevant to determining the appropriate site of a civil confinement once the term of the individual's criminal confinement expires.

As we will see, the Supreme Court's decision in *Foucha* is founded on the independence of these interests.[123] In *Baxstrom*, the state of New York's interest in criminally punishing an individual was irrelevant to the determination of whether the state also had an interest in civilly confining him for psychiatric treatment. By the same token, the fact that the state of Louisiana once held an interest in civilly confining Terry Foucha did not bear on the determination of whether Louisiana retained an interest in criminally confining him once the condition which occasioned his treatment (i.e., his mental illness) ended.[124]

For aid in further discerning the constitutional bounds between criminal and civil confinements, we look to *Vitek v. Jones*.[125] At issue in *Vitek* was the adequacy of procedures provided for determining whether to transfer Nebraska state prisoners from prison to mental hospitals.[126] In the course of deciding what process was due such prisoners, the Court had occasion to delineate a substantial portion of these bounds.

The petitioner in *Vitek*, Larry Jones, was involuntarily transferred to a mental hospital after an incident in which he set fire to his mattress and severely burned himself.[127] Nebraska law provided for such transfer upon a finding by a mental health professional that the prisoner suffered from a mental illness which could not be properly treated in prison.[128] The state gave Jones

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121. Francois v. Henderson, 850 F.2d 231, 236 (5th Cir. 1988).
122. Baxstrom v. Harold, 383 U.S. 107, 114–15 (1966).
123. *See infra* notes 185–211 and accompanying text.
124. The principal difference between the majority and dissenting opinions in *Foucha* as to whether Louisiana had an active interest in criminally confining Foucha was whether the verdict of "Not guilty by reason of insanity" had the effect of extinguishing it. Foucha v. Louisiana, 112 S. Ct. 1780, 1793 (1992).
125. 445 U.S. 480 (1980).
126. *Id.*
127. *Id.* at 484.
128. NEBRASKA REV. STAT. § 83–180(1) (1991) provides in relevant part:
> [W]hen a physician or psychologist designated by the Director [of Correctional Services] finds that a person committed to the department suffers from a mental disease or defect ... [and] the physician or psychologist is of the opinion that the person cannot be given proper treatment in [prison], the Director may arrange for

neither formal notice of the intended transfer,[129] nor an opportunity to be heard on the matter.[130]

The Court first found that although "a valid criminal conviction and prison sentence extinguish a defendant's right to freedom from confinement,"[131] Larry Jones "retained a residuum of liberty that would be infringed by a transfer to a mental hospital without complying with minimum requirements of due process."[132] The Court explicitly rejected Nebraska's contention that the conditions at the hospital were within the range of confinement justified by imposition of a criminal sentence.[133] The Court found that both the special stigma attached to transfer to a mental hospital and the mandatory behavior modification to which transferees were subjected made the change in circumstances substantial enough to require some minimal procedural protections.[134] The Court concluded that written notice, an opportunity to be heard, the opportunity to present and confront witnesses, and the assistance of a "competent and independent" advocate (though not necessarily a licensed attorney) were all necessary to protect the prisoners' interest in appropriate conditions of confinement.[135]

For our purposes, the significance of *Vitek* is that the Court again underscored that different state interests permit different intrusions into the liberties of confined individuals. Having validly convicted Jones, Nebraska was entitled to hold him in a prison, but could not subject him to the involuntary behavioral control entailed in a hospital confinement.

In *Jones v. United States*,[136] the Court further emphasized the independence of these interests. The *Jones* case dealt with the issue of whether a state can civilly confine an insanity acquittee for a period longer than that to which it might have confined him criminally, without additional process.[137]

The petitioner, Michael Jones, had been charged with petit larceny for trying to steal a jacket from a department store.[138] This misdemeanor offense carried a maximum prison sentence of one year.[139] At his criminal trial, Jones

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his transfer for examination, study, and treatment to any medical-correctional facility, or to another institution in the Department of Public Institutions where proper treatment is available.

Id.

129. Miller v. Vitek, 437 F. Supp. 569, 571 (1977), *aff'd*, 445 U.S. 480 (1980).

130. *Id.*

131. Miller v. Vitek, 445 U.S. 480, 493 (1980).

132. *Id.* at 491.

133. The Court stated in this regard:

> None of our decisions holds that conviction for a crime entitles a State not only to confine the convicted person but also to determine that he has a mental illness and to subject him involuntarily to institutional care in a mental hospital. *Such consequences visited on the prisoner are qualitatively different from the punishment characteristically suffered by a person convicted of crime.*

Id. at 493 (emphasis added).

134. *Id.* at 494.

135. *Id.* A four Justice plurality would have required that the assistance of an attorney be provided. *Id.* at 497.

136. 463 U.S. 354 (1983).

137. *Id.* at 356.

138. *Id.* at 359.

139. D.C. CODE ANN. §§ 22–103, 22–2202 (1981), *repealed by* D.C. CODE ANN. § 22–3811 (1981).

proved that he was insane at the time of the crime.[140] Consequently, he was automatically civilly committed.[141] After spending more than a year in a mental hospital, Jones reasoned that the District of Columbia's interest in confining him had expired, since he had been confined for a period longer than that to which he could have been sentenced had he been convicted.[142] His theory was that the behavior which supported the finding that he was dangerous and mentally ill (attempting to steal a jacket while insane) entitled the District of Columbia to confine him for a determinate period, namely, the term of the sentence, and no longer.[143] If the District wished to detain him any longer, Jones reasoned, due process required that he be afforded the same procedural protections that regular candidates for civil commitment receive.[144]

Jones also contended that the proof of his insanity at his criminal trial was insufficient to support a civil commitment, because the mere finding that he committed what would otherwise have been a criminal act while insane was insufficient to establish that he was presently mentally ill and dangerous.[145]

On the issue of whether the state could constitutionally confine Jones past the time of maximum sentence, the Court emphasized that the purposes behind criminal and civil commitments are different.[146] The Court stated criminal sentences are devised to reflect society's notion of an appropriate response to the crime committed, based on considerations such as "retribution, deterrence and rehabilitation."[147] By contrast, the purpose behind automatic commitment after an insanity acquittal is "to treat the individual's mental illness and protect him and society from his potential dangerousness."[148] Accordingly, there may be differences in the duration of the confinement, without any violation of due process.[149] The Court emphasized that the District of Columbia had no punitive interest in confining Jones.[150] Thus, the duration of an insanity acquittee's

140. Under the D.C. Code, criminal defendants have the burden of proving insanity by a preponderance of the evidence. D.C. CODE ANN. § 24–301(k) (1981).

141. D.C. CODE ANN. § 24–301(d)(1) (1981) provides: "If any person tried ... for an offense raises the defense of insanity and is acquitted solely on the ground that he was insane at the time of its commission, he shall be committed to a hospital for the mentally ill until such time as he is eligible for release." *Id.* Under this scheme of civil commitment, in order to obtain release, an insanity acquittee is required to prove in a hearing that he is no longer dangerous or no longer mentally ill. D.C. CODE ANN. § 24–301(k) (1981). Although not at issue in *Jones*, commentators have criticized shifting the burden of proof from the state to the acquittee as unconstitutional. *See, e.g.*, James W. Ellis, *Limits on the State's Power to Confine "Dangerous" Persons: Constitutional Implications of* Foucha v. Louisiana, 15 U. PUGET SOUND L. REV. 635, 640 (1992) and sources cited therein.

142. Brief for Petitioner at 6, Jones v. United States, 463 U.S. 354 (1983) (No. 81–5195).

143. *Id.*

144. 463 U.S. at 360.

145. Brief For Petitioner at 10, Jones v. United States, 463 U.S. 354 (1983) (No. 81–5195); *Jones*, 463 U.S. at 362. In order to successfully plead insanity at a criminal trial, an accused must prove that he was insane at the time of the crime by a preponderance of the evidence. *See supra* note 140. However, *Addington v. Texas* established that due process required proof of both mental illness and dangerousness by at least clear and convincing evidence in order to authorize civil commitment. 441 U.S. 418, 433 (1979). Thus there were difficulties both in the gap between the two standards of proof of mental illness/insanity, and in the passage of time between the time of the crime and the time of trial or re-evaluation.

146. 463 U.S. at 368–69.

147. *Id.*

148. *Id.*

149. *Id.* at 369.

150. "As [Jones] was not convicted, he may not be punished." *Id.*

conditions of dangerousness and mental illness were what determine the length of his legitimate civil confinement, not the length of time to which the state might have held him criminally had it convicted him.[151]

In response to Jones' assertion that his criminal trial afforded him insufficient opportunity to be heard on the issue of his present mental illness and dangerousness, the Court stated that acquittal by reason of insanity "establishes two facts: (i) the defendant committed an act that constitutes a criminal offense, and (ii) he committed the act because of mental illness."[152] The Court held that these facts were functionally equivalent to the findings of mental illness and dangerousness required for civil commitment.[153] Further, Congress' assumption that such conditions would continue until the time of trial and beyond was not so irrational as to offend the Constitution.[154]

The *Jones* decision completes the constitutional disentanglement of state interests in civil and criminal confinements. Not only are the natures of the two interests sufficiently different to require different conditions of confinement, but the predicates for the interests are sufficiently independent as to make their relative durations independent of one another. So, even though both criminal and civil commitments hold the common goal of controlling problem behavior, they are different in nature, and must be kept distinct. As we will see in the next section, the Supreme Court was able to maintain the integrity of the two systems of confinement in *Foucha*.

B. The Facts of Foucha

Following an incident in which he invaded the home of an elderly couple,[155] Terry Foucha was charged with aggravated burglary and illegal discharge of a firearm.[156] At a bench trial, the trial court found that he was not guilty by reason of insanity.[157] According to Louisiana law, Foucha was then granted a hearing to determine whether he was presently dangerous, which determination would control whether he would be civilly committed or go free.[158] At the hearing, Foucha was unable to bear the burden of proof of non-

151. "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." *Id.*

152. *Id.* at 363.

153. *Id.* at 364.

154. *Id.* There has been abundant criticism of the *Jones* decision on this point. *See, e.g.*, James W. Ellis, *The Consequences of the Insanity Defense: Proposals to Reform Post-Acquittal Commitment Laws*, 35 CATH. U. L. REV. 961, 969 (1986).

155. *See supra* notes 1–5 and accompanying text.

156. Louisiana v. Foucha, 563 So. 2d 1138–39 (La. 1990), *rev'd*, 112 S. Ct. 1780 (1992).

157. *Id.* at 1139.

158. LA. CODE CRIM. PROC. ANN. art. 654 (West 1981) provides in relevant part:

> When a defendant is found not guilty by reason of insanity in any other felony case, the court shall remand him to the parish jail or to a private mental institution approved by the court and shall promptly hold a contradictory hearing *at which the defendant shall have the burden of proof*, to determine whether the defendant can be discharged or can be released on probation, without danger to others or to himself. If the court determines that the defendant cannot be released without danger to others or to himself, it shall order him committed to a proper state mental institution or to a private mental institution approved by the court for custody, care, and treatment. If the court determines that the defendant can be discharged or released on probation without danger to others or to himself, the

dangerousness imposed on him by the Louisiana code of criminal procedure.[159] The court thereafter committed Foucha to the East Feliciana Forensic Facility—a correctional mental hospital.[160] He remained at Feliciana for approximately four years, at which point the superintendent of the facility initiated proceedings for his release.[161] The committing court then held another hearing to determine whether Foucha was at that time dangerous to himself or others.[162] Once again, Foucha bore the burden of proving that he might be released without danger to the community.[163]

At the release hearing, Drs. Kenneth Ritter and Ignacio Medina, the same psychiatrists who testified as to Foucha's sanity at his criminal trial, were called upon to determine whether Foucha was currently mentally ill and dangerous.[164] Dr. Ritter testified that Foucha was "in remission from mental illness [but] [we] cannot certify that he would not constitute a menace to himself or others if released."[165] Dr. Ritter also testified that upon admission, Foucha probably was suffering from a drug-induced psychosis,[166] but that this condition subsided during his time at Feliciana.[167]

However, Dr. Ritter further testified that Foucha suffered from Antisocial Personality Disorder, a condition which is not a mental illness in a legal sense,[168] but which predisposed Foucha to dangerous behavior.[169] This condition was evidenced by several altercations that Foucha had at Feliciana with other patients,[170] and an incident in which he reportedly stabbed a guard with a ballpoint pen.[171]

Consistent with Dr. Ritter's testimony, the trial court found Foucha dangerous,[172] but not mentally ill.[173] In accordance with Louisiana law the trial

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court shall either order his discharge, or order his release on probation subject to specified conditions for a fixed or an indeterminate period.

Id. (emphasis added).

159. *Id.*; 563 So. 2d at 1138–39.

160. 563 So. 2d at 1138–39.

161. *Id.* at 1139–40.

162. *Id.* at 1140.

163. LA. CODE CRIM. PROC. ANN. art. 657 (West 1981) provides that after considering the report of the hospital:

> the court may either continue the commitment or hold a contradictory hearing to determine whether the committed person can be discharged, or can be released on probation, without danger to others or to himself. At the hearing the burden shall be upon the committed person to prove that he can be discharged, or can be released on probation, without danger to others or to himself.

Id.

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

165. *Id.* This is substantially the same testimony that Dr. Ritter gave in another case which formed the sole basis of the denial of a release petition under LA CODE CRIM. PROC. ANN. art. 657; *see infra* note 178.

166. See the definition of psychosis, *supra* note 78.

167. 112 S. Ct. at 1782.

168. *See generally* Emily Campbell, *supra* note 83. None of the symptoms listed in the diagnostic criteria for Antisocial Personality Disorder in the DSM–III–R include disruption in the perception of reality. DSM–III–R, *supra* note 78.

169. "People with Antisocial Personality Disorder tend to be irritable and aggressive and to get repeatedly into physical fights and assaults .... [T]hey generally have no remorse about the effects of their behavior on others." DSM–III–R, *supra* note 78, at 342.

170. 112 S. Ct. at 1783.

171. Alpert, *supra* note 12.

172. Brief of Respondent at 3, Foucha v. Louisiana, 112 S. Ct. 1780 (1992) (No. 90–

court denied Foucha's petition for release on the sole basis of his dangerousness.[174] Foucha challenged the denial of his petition on constitutional grounds, particularly that the Louisiana confinement scheme denied him due process and equal protection of the law.[175]

Foucha based his due process argument primarily on the Supreme Court's opinion in *Jones*.[176] He argued that *Jones* required findings of both mental illness and dangerousness in order to authorize indeterminate civil confinement.[177] His equal protection argument rested in part on dicta in the federal circuit court case *Francois v. Henderson*,[178] which explicitly condemned the scheme as unconstitutional.[179] He also relied on the Court's opinion in *Baxstrom*, which Foucha argued prohibits states from treating insanity acquittees differently from persons committed under ordinary civil commitment.[180]

The state argued that detention of individuals on the sole basis of their dangerousness comported with due process. It based this contention on the Court's decision in *United States v. Salerno*,[181] which allowed for the pretrial detention of arrestees who are found to pose a danger to the community.[182] The state noted in its brief that "although [Foucha] was found not guilty by reason of insanity, such an adjudication means that he did in fact commit the act which formed the basis of his criminal charge."[183] The state also read *Jones* to indicate that a finding of not guilty by reason of insanity indicates dangerousness on the part of the acquittee and allows the state to confine for "treatment and the protection of society."[184]

C. The Majority Opinion

In his opinion for the majority, Supreme Court Justice White characterized the issue in *Foucha* as whether a state can detain a person on the sole basis that it believes he is dangerous.[185] The Court had little trouble answering this question in the negative.[186] Justice White based his opinion for

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5884).

173. Brief for the Petitioner at 3, Foucha v. Louisiana, 112 S. Ct. 1780 (1992) (No. 90-5884).

174. *Id.* at 6.

175. *Id.*

176. *Id.* at 10.

177. *Id.* (citing Jones v. United States, 463 U.S. 354, 369 (1983)).

178. 850 F.2d 231 (5th Cir. 1988). Interestingly, this case also involved equivocal testimony as to the dangerousness of a petitioner given by Dr. Kenneth Ritter. "Dr. Ritter declined to certify that Francois would not be dangerous to himself or others." *Id.* at 234.

179. "This legislative change [eliminating the requirement of mental illness as a predicate for continued confinement of insanity acquittees] has provided for confinement of insanity-acquittees solely on a finding of dangerousness, and has made the mental institution the substitute for the prison in Louisiana. This violates the Constitution." (Citations omitted). *Id.* at 236

180. Brief for the Petitioner at 12, Foucha v. Louisiana, 112 S. Ct. 1780 (1992) (No. 90-5884).

181. 481 U.S. 739 (1987).

182. Brief of Respondent at 3, Foucha v. Louisiana, 112 S. Ct. 1780 (1992) (No. 90-5884).

183. *Id.* at 4-5.

184. *Id.* at 7.

185. 112 S. Ct. at 1784.

186. *Id.* at 1782.

the Court on both the procedural and substantive components of the due process clause of the fourth amendment,[187] and, in a separate section commanding a four-justice plurality, on the equal protection clause of the fourteenth amendment.[188]

The majority began by noting that, per *Jones*, Louisiana was entitled to presume that Foucha was mentally ill and dangerous by virtue of his being found not guilty of a crime by reason of insanity.[189] Furthermore, the state was entitled to authorize Foucha's initial commitment on that basis.[190] However, Justice White further noted that *Jones* also required Foucha's release once either of those conditions no longer obtained.[191] Since the state did not contend that Foucha was mentally ill, it could not confine him as a civil committee.[192] The Court implied that in this respect there was no constitutionally significant difference between insanity acquittees and other candidates for civil commitment.[193]

The majority saw several basic flaws in confining a recovered insanity acquittee in a mental hospital on the sole basis of dangerousness.[194] The first was that the nature of the commitment was inappropriate to Foucha's mental condition.[195] The state was holding Foucha in a mental hospital, despite the fact that he suffered from no treatable mental illness.[196] The majority cited *Vitek* for the proposition that the difference in the circumstances of confinement between prison and psychiatric hospitals is constitutionally significant.[197] Thus, even if Foucha's confinement were otherwise permissible, it could not take place in a mental hospital.[198]

The second problem in the Louisiana scheme derived from the fact that the state had explicitly renounced its interest in criminally punishing insanity acquittees.[199] Thus, any infringement of Foucha's fundamental right to freedom from bodily restraint must further a compelling state interest, and be closely tailored to the needs of the state.[200] Comparing Louisiana's confinement scheme to the one at issue in *United States v. Salerno*,[201] the Court found that the

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187. *Id.* at 1781–87.
188. *Id.* at 1788. The three other Justices were Blackmun, Stevens and Souter. *Id.* at 1781.
189. *Id.* at 1783
190. *Id.* at 1783.
191. *Id.* at 1784. "[T]he acquittee may be held as long as he is both mentally ill and dangerous, but no longer." *Id.*
192. *Id.*
193. *See* Bochnewich, *supra* note 75, at 292.
194. 112 S. Ct. at 1784.
195. *Id.*
196. Indeed, even Dr. Ritter testified at the hearing that Foucha would not benefit from continued confinement at Feliciana. Brief of Respondent at 6, Foucha v. Louisiana, 112 S. Ct. 1780 (1992) (No. 90–5884); Marcus, *supra* note 1, at A3.
197. 112 S. Ct. at 1784.
198. *Id.* at 1785.
199. LA. REV. STAT. ANN. § 14:14 (West 1986) provides that "If the circumstances indicate that because of a mental disease or mental defect the offender was incapable of distinguishing between right and wrong with reference to the conduct in question, *the offender shall be exempt from criminal responsibility.*" *Id.* (emphasis added).
200. 112 S. Ct. at 1785–86.
201. 481 U.S. 739 (1987) (upholding the pretrial detention of arrestees after "full blown adversary hearing" and for a sharply limited time).

Louisiana scheme was not closely tailored to its purpose.[202] This was so because the duration of confinement was indeterminate, and the burden of proof of non-dangerousness was placed on acquittees.[203] The Court stated that this rationale for legitimating confinement could easily be applied to convicted criminals.[204] If dangerousness alone was adopted as a sufficient basis for police power confinement "[i]t would ... be only a step away from substituting confinements for dangerousness for our present system which, with only narrow exceptions and aside from permissible confinements for mental illness, incarcerates only those who are proved beyond reasonable doubt to have violated a criminal law."[205]

In a section of his opinion which commanded only a plurality of the Court, Justice White went on to hold the Louisiana scheme violative of equal protection as well.[206] The plurality noted that there are other groups situated similarly to Foucha, as regards prior criminal acts and inability to prove their non-dangerousness, for whom such confinements would clearly be impermissible. Criminals who have recently completed their prison terms are "an obvious and large category of such persons."[207] Furthermore, the Court had held in past cases that due process requires the state to prove both mental illness and dangerousness for the civil commitment of both non-criminal citizens and even convicts nearing the end of their sentences. Justice White stated he could find no good reason for denying the procedural safeguards due both convicts and ordinary civil committees to presently sane insanity acquittees.[208]

Likewise, since recovered insanity acquittees are similarly situated to civil committees, the Court required the state to afford them the same procedural protections.[209] Therefore, in order to keep Foucha confined, the state would have to assume the burden of proving, by at least clear and convincing evidence, that Foucha was both mentally ill and dangerous.[210]

Justice White's opinion for the majority holds unequivocally that the state of Louisiana had no interest in punishing Foucha. The *Foucha* case thus makes mandatory the distinction between confinements which have a punitive component, and those which are imposed merely for purposes of psychiatric treatment and societal protection. This distinction is necessary to cabin the impulse toward confounding the two types of confinements and thereby unduly enlarging the government's power to effect confinements. While this impulse may have the result of preserving societal comfort, it does so at the cost of the confined individuals' freedom. If indeed "[i]n our society, liberty is the norm and detention ... is the carefully limited exception"[211] then such a bargain is unacceptable. By virtue of making this distinction mandatory, Justice White's opinion maintains the integrity of both criminal and civil confinement in the United States.

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202. 112 S. Ct. at 1786.
203. *Id.* at 1787.
204. *Id.*
205. *Id.*
206. *Id.* at 1788. Justice O'Connor thought "it unnecessary to reach equal protection issues on the facts before us." *Id.* at 1790.
207. *Id.* at 1788.
208. *Id.* at 1789.
209. *Id.* at 1788–89.
210. *Id.*

D. Justice O'Connor's Concurrence

Having concurred in the due process portion of the majority opinion, Justice O'Connor declined to take part in the equal protection analysis in that opinion.[212] She rejected the notion that insanity acquittees stand in the same relation to civil confinement that non-acquittees do.[213] The Justice asserted that in Louisiana insanity is an affirmative defense, inquired into *only after* the government has established all necessary elements of a criminal offense.[214] "[T]his finding of criminal conduct sets them apart from ordinary citizens" according to Justice O'Connor.[215] Thus according to Justice O'Connor, the Court's opinion should not be read to imply that more narrowly drawn schemes for confining insanity acquittees or for punishing people who commit crimes while mentally ill are unconstitutional.[216]

Justice O'Connor explored the issue in some detail, venturing that confining sane insanity acquittees might be permissible if the detention were for a determinate period of time, in a facility appropriate to the mental condition of the confinees, and the state took into account the nature of the dangerous behavior (i.e., whether or not it was violent).[217]

The concurrence goes on to emphasize that the Court's decision in *Foucha* "places no new restriction on the States' freedom to determine whether and to what extent mental illness should excuse criminal behavior .... It likewise casts no doubt on laws providing for prison terms after verdicts of 'guilty but mentally ill.'"[218]

E. The Dissents

In their dissenting opinions, Justices Kennedy and Thomas both emphasized that *Foucha* was a criminal case, in which Terry Foucha was found,

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211. United States v. Salerno, 481 U.S. 739, 755 (1987).
212. 112 S. Ct. at 1790.
213. *Id.* at 1789.
214. *Id.* at 1789 (citing Louisiana v. Marmillion, 339 So. 2d 788 (La. 1976)) (Presumption of sanity/responsibility obtains in criminal cases, relieving prosecution of burden of proving sanity).
215. 112 S. Ct. at 1789. One could certainly argue that Justice O'Connor is mistaken in making this discrimination. An insanity acquittal indicates that the presumption of sanity was successfully rebutted. If insanity precludes the formation of mens rea, there was no "criminal conduct" at all. Joseph Goldstein & Jay Katz, *Abolish the "Insanity Defense"—Why Not?*, 72 YALE L.J. 853 (1963) (concluding that since insanity is logically inconsistent with mental elements of crime insanity defense is superfluous); Bonnie, *supra* note 51. In that event, the only attribute which might set an acquittee apart from the ordinary citizen would be dangerousness, which Justice O'Connor found an insufficient basis of confinement on due process grounds. 112 S. Ct. at 1786. Alternatively, one might argue that the statutory exemption from criminal responsibility for acquittees, *see* text of LA. REV. STAT. ANN. § 14:14 (West 1986), *supra* note 199, could not be given meaning if conduct for which the confinee is not responsible is used as the sole basis for even a non-punitive confinement.
216. 112 S. Ct. at 1789.
217. *Id.* at 1789–90.
218. *Id.* at 1790. The guilty but mentally ill verdict is intended as a compromise between verdicts of "guilty" and "not guilty by reason of insanity" for juries in insanity cases. It is typically based upon findings that 1) the defendant performed the acts which are the basis of the charged offense, 2) the defendant was mentally ill at the time he did so, but 3) was not so disturbed that he cannot be held responsible for his actions. *See infra* notes 232–40 and accompanying text.

beyond a reasonable doubt, to have committed a crime.[219] The dissenters would hold that once a confinee is proven to have engaged in criminal behavior, a state may detain him on any reasonable basis.[220] Justice Thomas in particular, complained bitterly of the Court's attaching "talismanic significance" to the verdict of not guilty by reason of insanity, and maintained that Louisiana's interest in confining Foucha was *not* thus extinguished.[221]

Taken together, Justice O'Connor's concurrence and the dissenting opinions of Justices Thomas and Kennedy invite states with similar provisions for confining sane insanity acquittees to include the guilty but mentally ill (GBMI) verdict among those already available to its criminal defendants.[222] For this reason, this Note briefly examines this alternate scheme for dealing with mentally disordered offenders and evaluates its desirability. This Note concludes that the GBMI verdict requires an ill-advised inquiry into questions which are irrelevant to determining criminal responsibility and runs the additional risk of misleading juries into the belief that defendants so convicted are given a claim to psychiatric treatment.

III. THE GUILTY BUT MENTALLY ILL VERDICT

The GBMI verdict was devised as a means of quelling public concern that too many mentally ill defendants were going free because of insanity acquittals.[223] It is intended as a compromise verdict between "not guilty by reason of insanity" (NGRI), "not guilty" and "guilty".[224] The GBMI verdict allows a jury to decide, in effect, that the defendant, while not so disturbed as to make the imposition of criminal responsibility unjust, is impaired enough to require special treatment.[225] Once found GBMI, a criminal defendant is liable to the same punishment as he would be if he were found simply guilty.[226] To date, twelve states have adopted provisions for the GBMI verdict.[227] The GBMI

219. "This is a criminal case." 112 S. Ct. at 1791 (Kennedy, J., dissenting). "Unlike civil committees, who have *not* been found to have harmed society, insanity acquittees have been found in a judicial proceeding to have committed a criminal act." *Id.* at 1800 (Thomas, J., dissenting).

220. Justices Thomas and Kennedy characterized the finding of "not guilty by reason of insanity" as functionally equivalent to a finding of guilt. "Petitioner has suggested no grounds on which to distinguish the liberty interests involved or procedural protections afforded as a consequence of the State's ultimate choice of nomenclature." *Id.* at 1793. This is of course the same objectionable reasoning in which Justice O'Connor engaged in her rejection of Foucha's equal protection argument. *See supra* note 215.

221. *Id.* at 1805 n13.

222. Indeed, this has already been suggested. Angela Paulsen, Note, *Limiting The Scope of State Power to Confine Insanity Acquittees:* Foucha v. Louisiana, 28 TULSA L.J. 537 (1993).

223. There is abundant evidence that public perception of this "problem" is extremely distorted, due in large part to selective reporting of incidents where insanity acquittees are set free and subsequently commit crimes. Michael L. Perlin, *Unpacking the Myths: The Symbolism Mythology of Insanity Defense Jurisprudence*, 40 CASE W. RES. L. REV. 599, 609 (1989); La Fond, *supra* note 66, at 716.

224. Joseph D. Amarillo, *Insanity—Guilty but Mentally Ill—Diminished Capacity: An Aggregate Approach to Madness*, 12 J. MARSHALL J. PRAC. & PROC. 351, 355 (1979).

225. William French Smith, *Limiting the Insanity Defense: A Rational Approach to Irrational Crimes*, 47 MO. L. REV. 605 (1982).

226. Ira Mickenberg, *A Pleasant Surprise: The Guilty but Mentally Ill Verdict Has Both Succeeded in its Own Right and Successfully Preserved the Traditional Role of the Insanity Defense*, 55 U. CIN. L. REV. 943 (1987).

227. ALASKA STAT. § 12.47.030 (1990); DEL. CODE ANN. tit. 11 § 408 (Supp. 1992); GA. CODE ANN. § 17-7-131 (1990); ILL. ANN. STAT. ch. 725 ¶ 5/115-2 (Smith-Hurd

verdict has withstood constitutional challenge in many different jurisdictions, and on several grounds.[228]

A. Intended Effect

First enacted in 1975, the GBMI verdict was conceived as a compromise between verdicts of guilty, and not guilty by reason of insanity.[229] Proponents have argued that this middle ground is necessary to reflect the fact that insanity is not an all or nothing issue—that there is a continuum of mental functioning, and a given defendant may come close to insanity without being truly insane.[230] Thus, the GBMI option would reduce the number of unwarranted insanity acquittals. Proponents have also lauded the GBMI option as allowing jurors to provide for a mitigated sanction, in that GBMI convicts are afforded treatment in prison which will help them avoid repeating their offenses.[231]

B. Criticism

There has been abundant criticism of the GBMI verdict in the commentaries.[232] The most common criticism is that while the verdict is ostensibly a method for ensuring psychiatric treatment for defendants so convicted, in fact, they have no special claim to treatment.[233] In this way having a GBMI alternative may well fool juries into believing that the finding of mental illness in addition to guilt will have the additional consequence of securing treatment for the defendant.

But surely the most damning criticism of the GBMI alternative is that the inquiry into the defendant's mental health at the time of the crime is not really

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1993); IND. CODE ANN. § 35–36–2–5 (Burns Supp. 1993); KY. REV. STAT. ANN. § 504.130 (Michie 1990); MICH. STAT. ANN. § 28.1059 (Callaghan 1986); N.M. STAT. ANN. § 31–9–3 (Michie 1984); 18 PA. CONS. STAT. ANN. § 314 (1983); S.C. CODE ANN. § 17–24–20 (Law. Co-Op. Supp. 1992); S.D. CODIFIED LAWS ANN. § 23A–7–16 (1988); UTAH CODE ANN. § 77–16a–103 (Supp. 1993).

228. In Illinois: People v. Seaman, 561 N.E.2d 188, 197–98 (Fundamental right not threatened; GBMI scheme violates neither Due Process nor Equal Protection, nor is it unconstitutionally vague), *appeal denied*, 564 N.E.2d 845 (1990). Alaska: Barrett v. Alaska, 772 P.2d 559, 573 (Alaska Ct. App. 1989) (Imprisoning accused found GBMI is not cruel and unusual punishment). Indiana: Taylor v. Indiana, 440 N.E.2d 1109 (Ind. 1982) (verdict of GBMI not unconstitutionally vague). South Dakota: Robinson v. Solem, 432 N.W.2d 246, 248 (S.D. 1988) (GBMI scheme not violative of due process merely because psychiatric treatment not assured); South Dakota v. Baker 440 N.W.2d 284, 289–90 (S.D. 1989) (GBMI scheme does not violate equal protection, is not cruel and unusual punishment). Georgia: Salter v. Georgia, 356 S.E.2d 196, 198 (Ga. 1987) (GBMI scheme not unconstitutionally vague). New Mexico: New Mexico v. Neely, 819 P.2d 249 (N.M. 1991) (statute permitting verdict of guilty but mentally ill does not deprive defendant of due process, equal protection, or a fair trial). Pennsylvania: Commonwealth v. Trill, 543 A.2d 1106, 1127–1128 (Pa. Super. Ct. 1988) (GBMI scheme does not run afoul of equal protection or due process).

229. MICH. STAT. ANN. § 28.1059 (Callaghan 1986).

230. Amarillo, *supra* note 224.

231. Mickenberg, *supra* note 226.

232. *See, e.g.*, Christopher Slobogin, *The Guilty but Mentally Ill Verdict: An Idea Whose Time Should not Have Come*, 53 GEO. WASH. L. REV. 494 (1985).

233. "Dr. John Prelesnick, Superintendent of the Reception and Guidance Center at the Jackson State (Michigan) Penitentiary asserted that 'in reality GBMI prisoners are treated like any other prisoners; they will get extra treatment if they need it, but that's the same treatment we give everyone else.'" Mickenberg, *supra* note 226, at 993 (quoting Gare A. Smith & James A. Hall, *Project, Evaluating Michigan's Guilty But Mentally Ill Verdict: An Empirical Study*, 16 U. MICH. J.L. REF. 77 n.138 (1982)).

relevant to the purpose of a criminal trial—determining guilt.[234] The defendant's mental functioning is relevant *only so far as it goes to the question of sanity*. While it may be true that mental function falls at varying points along a continuum, the result of a trial is still dichotomous: the defendant is either held responsible for his behavior, or he is not.[235] To the extent that it makes the defendant's mental health an issue beyond what is necessary to apply the appropriate test of insanity, the GBMI verdict injects irrelevant considerations into criminal trials.[236] The fact that the defendant's mental health at the time of the crime may be no indication whatever of his present treatment needs,[237] throws the irrelevance of the GBMI inquiry into sharp relief. Thus, even if GBMI convicts were given a claim to psychiatric treatment in prison, there is little guarantee that they would benefit from it.[238]

Perhaps because the concepts "mental illness" and "insanity" both lack precise definition, it is superficially tempting to merge the two.[239] But in order to maintain its integrity, the criminal law must be cognizant of the fact that insanity is a legal/moral concept and mental illness is a medical/psychological one. Because they serve different purposes (mental illness for the explanation and treatment of apparently irrational behavior, and insanity for assessing moral agency) they must remain distinct. For this reason, the mental illness inquiry of the GBMI verdict is unnecessary and likely to confuse jurors into thinking that mental illness per se bears on both culpability and sanction, when in fact it does not.[240] For all these reasons, states are ill-advised to adopt the GBMI verdict as a way of circumventing the mandate of *Foucha*.

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234. Slobogin, *supra* note 232.

235. This is of course, not true in jurisdictions which recognize a diminished capacity defense. The diminished capacity defense inquires into the degree of mental functioning as a gauge of culpability, and holds the defendant responsible in proportion to that culpability. *See* Amarillo, *supra* note 224.

236. Slobogin, *supra* note 232, at 517.

237. Many mental illnesses are notoriously episodic. A defendant suffering from schizophrenia may have been floridly psychotic at the time of the offensive behavior, and then "recompensate" days or weeks before trial, as a result of psychotropic medication, or the mere passage of time. Such a defendant may not require any more treatment than medication and monitoring in prison, but might be segregated from other prisoners in a forensic section of the prison, and be subject to the stigma and involuntary behavioral control with which the Court was so concerned in *Baxtrom v. Herold, see supra* notes 108–22 and accompanying text.

238. Indeed, the danger that the label "mentally ill" may long outlast a given defendant's actual mental problems has prompted one commentator to conclude that the verdict poses an equal protection problem. Note, *The Guilty But Mentally Ill Verdict and Due Process*, 92 Yale L.J. 475 (1983).

239. Recognition of this temptation motivated the authors of the Federal Rules of Evidence to adopt rule 704(b), which prohibits expert testimony in insanity cases from expressing an opinion as to the "ultimate issue" of insanity.

> Rule 704(b) of the Federal Rules of Evidence forbids experts in criminal cases from testifying with respect to the "ultimate issues" of a defendant's "mental state or condition." In a case where the defendant makes insanity his or her defense, those "ultimate issues" are whether at the time of the crime the defendant "appreciated the nature and quality or the wrongfulness of his acts," 18 U.S.C. § 17, or, in other words, whether the defendant knew what he or she was doing and that it was wrong. On those issues, because of Rule 704(b), no expert may testify.

United States v. West, 962 F.2d 1243, 1246 (1991) (citation omitted).

240. Slobogin, *supra* note 232.

CONCLUSION

The fear of harmful behavior creates an impetus to identify and confine people who are thought likely to engage in it. The difficulty in securing criminal confinements, combined with the fear of future harm caused by individuals with "demonstrated propensities" toward harm, creates the further impetus to misuse police power civil confinements for people who are not mentally ill. But this net swings too wide, capturing both the non-mentally ill criminal (as in the Sexually Violent Predator law) and the non-criminal recovered insanity acquittee. Terry Foucha's confinement in a mental hospital in spite of the fact that he was not mentally ill was such an abuse of civil confinement. Such abuses unreasonably subordinate individuals' liberty interest in freedom from restraint, to public fear.

The guilty but mentally ill verdict, an option which Justice O'Connor's concurring opinion in *Foucha* indicates may find favor with a majority of the Court, is an ill-advised inquiry into the largely irrelevant issue of the defendant's mental health at the time of the crime. It also runs the risk of misleading jurors into thinking that defendants found GBMI are subject to diminished liability, and gives them a claim to treatment. The GBMI option is thus an inadvisable, if constitutional "solution" to the "problem" of suffering the freedom of those who though not blameworthy, have committed a harmful act in the past.

Because of the profound deprivation of liberty involved in any type of confinement, procedures which provide sufficient inquiry into legitimate reasons for confinement, and make only legitimate distinctions between prospective candidates for confinement are essential. In so far as the majority opinion in *Foucha v. Louisiana* vindicates this basic principle of ordered liberty, it is indeed a good decision. It erects a barrier to the strong human impulse to confine individuals on a "better safe than sorry" rationale, and thereby cause them to suffer imprisonment for the mere comfort of society.