Limits on the State's Power to Confine "Dangerous" Persons: Constitutional Implications of *Foucha v. Louisiana*

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On a number of occasions, the United States Supreme Court has decided cases regarding the state's ability to confine individuals in circumstances other than criminal convictions. In these cases, the Court has recognized that states pursue several public policies through non-conviction confinements, including involuntary treatment of mentally ill individuals, habilitation of developmentally disabled individuals, determination of competency to stand trial of accused individuals, and protection of public safety. For the Court, each such system presents unique issues involving achieving procedural fairness, achieving a balance between the state's interest in confinement and the individual's right to liberty, and achieving equal protection among the jurisdiction's various systems of confinement. The Court's cases have not, however, announced comprehensive constitutional principles addressing these issues.

In its recent decision in *Foucha v. Louisiana*,[1] the Court again declined to provide a complete set of constitutional guidelines, but it did give some guidance on the applicability of procedural due process, substantive due process, and equal protection principles. It also provided some indication of the views of the newer members of a changing Court. All of these concerns are raised by Washington's Sexually Violent Predators statute, providing for the confinement of individuals determined to be "sexual predators."

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1. 112 S. Ct. 1780 (1992).

This Article does not attempt a complete analysis of all the constitutional implications of *Foucha*, nor does it attempt to provide a definitive answer to the question of the constitutionality of Washington's sexual predator statute. Rather, because *Foucha* addressed important due process and equal protection questions relevant to the Washington statute, the Article is an attempt to analyze the case's basic constitutional holdings and discussion on the issue of state deprivation of physical liberty.

I. THE *FOUCHA* LITIGATION

The *Foucha* case involved a challenge to the constitutionality of Louisiana's statute providing for civil commitment subsequent to a criminal defendant's acquittal by reason of insanity. Louisiana law provided for automatic commitment of defendants who successfully asserted a defense of insanity. The constitutionality of automatic commitment of insanity acquittees had been upheld by the United States Supreme Court in *Jones v. United States*.[2] Louisiana, however, provided for the release of a person committed under this law only if the individual could demonstrate that he was no longer dangerous.[3] Thus, a person could be confined indefinitely in a mental hospital despite the fact that he was no longer mentally ill.

Terry Foucha was confined in a Louisiana state mental hospital under this statute. He had been prosecuted for aggravated burglary and illegal discharge of a firearm,[4] and was acquitted by reason of insanity. Following several years of confinement in a mental institution, Foucha sought his release in 1988. The superintendent of the facility in which he was confined recommended his discharge, and none of the mental disability professionals involved in the hearing (including the state's experts) disagreed with the conclusion that he no longer had a mental illness.[5] But the trial court concluded that Foucha had not carried the burden of persuasion that he was not prospectively dangerous, and his request for release was

2. 463 U.S. 354 (1983). *See* James W. Ellis, *The Consequences of the Insanity Defense: Proposals to Reform Post-Acquittal Commitment Laws*, 35 CATH. U. L. REV. 961, 968-83 (1986) [hereinafter Ellis, *Consequences*].

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

4. State v. Foucha, 563 So. 2d 1138, 1139 (La. 1990), *rev'd*, 112 S. Ct. 1780 (1992).

5. *Id.* at 1139-40.

denied. The Supreme Court of Louisiana affirmed on appeal,[6] and the Supreme Court of the United States granted certiorari[7] "because the case present[ed] an important issue and was decided by the court below in a manner arguably at odds with prior decisions of this Court."[8]

The Supreme Court of the United States reversed. Justice White's majority opinion was joined by Justices Blackmun, Stevens, Souter, and, for most issues, Justice O'Connor. Justice O'Connor filed a separate opinion concurring in part (with regard to procedural and substantive due process) and concurring in the judgment. Justice Kennedy filed a dissent, which was joined by Chief Justice Rehnquist; Justice Thomas also wrote a lengthy dissent that was joined by Justice Scalia and the Chief Justice.

Justice White's majority opinion held that the Louisiana statute is unconstitutional on grounds of both substantive and procedural due process. Writing for a plurality of four Justices, he also concluded that the statute violated equal protection. Although Justice O'Connor thought that the question raised about equal treatment was "serious," she declined to join this portion of the opinion because she believed it "unnecessary to reach equal protection issues on the facts before us. . . ."[9]

As is often true in difficult cases involving a close division of the Justices, the majority opinion is something less than a model of clarity. The remaining sections of this Article attempt to sort out what the Court has said about the constitutional doctrines of procedural and substantive due process and equal protection.

II. PROCEDURAL DUE PROCESS

The procedural challenge to Louisiana's statute involved the fact that acquittees were required to demonstrate their own lack of dangerousness to obtain their release. In 1979, the Supreme Court had held in *Addington v. Texas*[10] that civil commitment statutes violated the procedural meaning of the Due Process Clause unless the state were required to carry the

6. *Id.*
7. 111 S. Ct. 1412 (1991).
8. Foucha v. Louisiana, 112 S. Ct. 1780, 1783 (1992).
9. *Id.* at 1790 (O'Connor, J., concurring in part and concurring in the judgment).
10. 441 U.S. 418 (1979).

burden of persuasion by clear and convincing evidence.[11] By contrast, in the 1983 case of *Jones v. United States*,[12] the Court permitted some jurisdictions to place the burden of persuasion on insanity acquittees whose commitment is sought because the factual findings inherent in their acquittal were deemed sufficient to indicate prospective dangerousness and mental illness.[13] The issue in *Foucha* was whether Louisiana could constitutionally place the burden on acquittees whom it conceded no longer had any mental illness.

The Court concluded that this case was governed by *Addington* rather than *Jones*, and therefore, procedural due process required that Foucha be given a release hearing at which the state bore the burden by clear and convincing evidence. Thus the key to the procedural holding in *Foucha* was the determination that this case was distinguishable from *Jones*. The majority found the source of the distinction in the *Jones* opinion itself, which had limited the ability to hold an acquittee under special procedures only "until such time as he has regained his sanity or is no longer a danger to himself or society."[14] Because Foucha had "regained his sanity," the state lost its authority to treat him differently from other individuals whose confinement was sought.[15] Without that extraordinary authority, the procedural due process calculus was the same as the holding in *Addington*, in which the individual's interest in physical liberty outweighed the state's interest in a different burden of persuasion when considered in light of the risk of

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11. *Id.*

12. 463 U.S. 354 (1983). The holding of *Jones* could be read to extend only to jurisdictions that placed the burden of persuasion on the issue of insanity at the criminal trial on the defendant. *See* Ellis, *Consequences*, *supra* note 2, at 972 n.53; AMERICAN BAR ASSOCIATION, CRIMINAL JUSTICE MENTAL HEALTH STANDARDS, Standard 7-7.4 cmt. at 425 n.18 (First Tentative Draft 1989) [hereinafter ABA STANDARDS]. Louisiana's handling of the issue of insanity at trial does not differ from the District of Columbia's in *Jones*, and therefore, the holding of *Jones* applies to Louisiana's treatment of acquittees who remain mentally ill.

13. *Jones*, 463 U.S. at 364.

14. *Foucha*, 112 S. Ct. at 1784 (quoting *Jones*, 463 U.S. at 370).

15. The state argued that this passage in the *Jones* opinion was merely descriptive of the District of Columbia statute and thus not part of the decision's constitutional holding. But the *Jones* Court's citation to a constitutional case, O'Connor v. Donaldson, 422 U.S. 563, 575-76 (1976), as authority for this passage belies such a reading. Furthermore, the *Jones* Court's use of the disjunctive in the quoted passage was certainly not inadvertent. At another point in its opinion, the Court had emphasized that the release of an insanity acquittee "who recover[s] his sanity or is no longer dangerous" was required precisely because his "confinement rests on his continuing illness *and* dangerousness." *Jones*, 463 U.S. at 368-69 (emphasis added).

error and the likelihood that the requested procedure would reduce that risk.[16]

Justice Thomas's dissent addresses the procedural due process holding of the majority by first denying that it exists: "What the Court styles a 'procedural' due process analysis is in reality an equal protection analysis."[17] This hyperbolic statement is an introduction to a complaint that the majority does not spell out its analysis balancing out the state and individual interests: "[T]he Court does not even pretend to examine the fairness of the release procedures the State has provided."[18] Justice Thomas does not discuss that issue in detail either, but indicates that he is satisfied because Foucha had a forum in which to seek his release and because he "was represented by state-appointed counsel."[19] There is little discussion of the extent to which a different burden of persuasion might reduce the risk of erroneous commitment.

At a more basic level, Justice Thomas indicates that he disagrees with the majority about what he would consider an "error." Citing previous Supreme Court decisions, he finds assurance that the criminal trial court's finding that the defendant committed the underlying act "eliminates the risk that he is being committed for mere 'idiosyncratic behavior.' "[20] While the subject is not discussed directly in Justice White's opinion, it appears that the majority envisions a broader spectrum of potential "errors" than those described by Justice Thomas that must be guarded against, including confinement in a mental hospital of an individual who concededly has no mental illness and who may not be dangerous to himself or others.

Justice White's majority opinion does not discuss the elements of the procedural due process balancing test in detail, and thus the opinion does not advance our understanding of the Court's approach to the individual elements of that test or their interrelationship. Nevertheless, the *Foucha* decision has major significance in the field of procedural due process because it signals a return to that balancing process. The *Jones*

16. *See* Addington v. Texas, 441 U.S. 418 (1979). *See generally* Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

17. *Foucha*, 112 S. Ct. at 1800 (Thomas, J., dissenting).

18. *Id.* (Thomas, J., dissenting).

19. *Id.* at 1803 (Thomas, J., dissenting).

20. *Id.* at 1800-01 (Thomas, J., dissenting) (quoting Jones v. United States, 463 U.S. 354, 367 (1983)).

Court's acquiescence in shifting the burden of persuasion to insanity acquittees on the basis of presumptions has been viewed widely as a departure from established principles of procedural due process case law.[21] The *Foucha* case presented the Court with the choice between extending the *Jones* approach to new areas or limiting it to its facts. The majority chose to adhere to the general rules of procedural due process. In doing so, the Court appears to have sent a signal that it will continue to require states to provide individuals sufficient procedural protections to prevent erroneous deprivations of liberty.

III. EQUAL PROTECTION

The Louisiana statute was also challenged as violating the Equal Protection Clause. While there is no majority opinion on the equal protection issue, the positions on this issue in Justice White's plurality opinion,[22] Justice O'Connor's concurring opinion, and the dissenting opinions shed some light on the Justices' view of the appropriate implementation of equal protection doctrine.

Justice White began by identifying, as the appropriate point of comparison, the difference in treatment between insanity acquittees who are no longer mentally ill and other classes of persons who have committed criminal acts but cannot be punished under the law. These classes include individuals who commmitted a crime for which the statute of limitations expired before they could be tried, persons acquitted because of insufficient evidence where the later discovery of conclusive evidence of guilt precluded a conviction because of double jeopardy, and persons who completed their sentence of imprisonment. People in each of these classes are entitled to physical liberty unless the state obtains their commitment in a hearing at which the state is required to carry the burden

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21. *See generally* MICHAEL PERLIN, 1 MENTAL DISABILITY LAW: CIVIL AND CRIMINAL 332-38 (1989) (stating that "the Supreme Court's decision in *Jones v. United States*—criticized nearly universally by legal and mental health professional commentators—should be seen as a *political* decision, reflecting the Court's reluctance to contradict what it perceives as public sentiment") and authorities cited therein; Peter Margulies, *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 (1984); Ellis, *Consequences, supra* note 2, at 969-80.

22. Justice White's opinion, which speaks for a majority of the Court on both procedural and substantive due process issues, is a plurality opinion in Part III on equal protection issues because Justice O'Connor declined to join that section.

of persuasion by clear and convincing evidence.[23] By contrast, insanity acquittees who are no longer mentally ill can only obtain their release if they can demonstrate their own non-dangerousness.

To decide whether the state has a sufficient justification for treating these similarly situated groups differently, the Court customarily selects a level or tier of review, which is an indication of the degree of deference the Justices will bring to their evaluation of the state's choice. Either of two considerations will lead the Court to a heightened degree of skepticism about a discriminatory state law: the fact that the law discriminates against a suspect (or semi-suspect) classification[24] or the fact that the discrimination deprives someone of a fundamental right.[25] Since the discrimination inherent in the Louisiana statutory scheme does not involve anything similar to suspect classifications previously recognized by the Court,[26] the only possibility of heightened scrutiny would depend on the finding of a fundamental right. Discriminatory deprivation of a fundamental right traditionally requires the government to demonstrate that it has a "compelling state interest" for the deprivation and that no other means are available for carrying out its interests that are less restrictive of constitutional rights.[27]

Justice White clearly finds that such a right is involved in the Louisiana statute. "Freedom from physical restraint being a fundamental right, the State must have a particularly convincing reason, which it has not put forward, for such discrimination against insanity acquittees who are no longer mentally ill."[28] The opinion particularly calls attention to a comparison to convicts "who have completed their prison terms, or are about to do so."[29] Justice White observes that

> [m]any of them will likely suffer from the same sort of personality disorder that Foucha exhibits. However, state law

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23. *Foucha*, 112 S. Ct. at 1783.

24. *See generally* James W. Ellis, *On the "Usefulness" of Suspect Classifications*, 3 CONST. COMMENTARY 375 (1986).

25. *See generally* San Antonio Independent Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973); United States v. Carolene Products, 304 U.S. 144, 152 n.4 (1938); JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 573-80 (4th ed. 1991).

26. *See generally* City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985).

27. *See, e.g.*, Skinner v. Oklahoma, 316 U.S. 535 (1942); Boddie v. Connecticut, 401 U.S. 371 (1971); Kramer v. Union Free School Dist., 395 U.S. 621 (1969).

28. *Foucha*, 112 S. Ct. at 1788 (White, J., plurality opinion as to Part III).

29. *Id.* (White, J., plurality opinion as to Part III).

> does not allow for their continuing confinement based merely on dangerousness. Instead, the State controls the behavior of these similarly situated citizens by relying on other means, such as punishment, deterrence, and supervised release.[30]

A similar equal protection challenge had been raised and rejected in *Jones*. But Justice White's *Foucha* opinion distinguishes that holding on the basis that, unlike Jones, Foucha is not currently mentally ill. He also appears to shift the point of comparison, describing the *Jones* decision as rejecting a comparison to civil mental patients, whereas *Foucha* relies upon a comparison to "other classes of persons who have committed criminal acts and who cannot later prove they would not be dangerous."[31]

Ordinarily, a plurality opinion on an issue unnecessary for the resolution of a Supreme Court case would attract relatively little interest. But Justice O'Connor, who declined to join this section of the opinion and whose views would constitute the fifth vote, also alludes to the equal protection issue:

> Equal protection principles may set additional limits on the confinement of sane but dangerous acquittees. Although I think it unnecessary to reach equal protection issues on the facts before us, the permissibility of holding an acquittee who is not mentally ill longer than a person convicted of the same crimes could be imprisoned is open to serious question.[32]

Thus, she appears to share the belief that there are equal protection limits on the ability of states to confine insanity acquittees who are no longer mentally ill, but expresses her concern specifically (although not necessarily exclusively) about equal protection problems surrounding dissimilar duration of confinement in contrast to the length of the imprisonment of individuals convicted of the same crime.[33]

Of particular interest is the *Foucha* opinion's use of the

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30. *Id.* (White, J., plurality opinion as to Part III).

31. *Id.* (White, J., plurality opinion as to Part III).

32. *Id.* at 1790 (O'Connor, J., concurring in part and concurring in the judgment).

33. *See infra* notes 63-71 and accompanying text. Justice O'Connor also indicates that it might be possible for a state to craft a narrower commitment law for the confinement of acquittees who are no longer mentally ill, which might pass constitutional muster. *Foucha*, 112 S. Ct. at 1789-90 (O'Connor, J., concurring). Speculation on the content of such a hypothetical statute is beyond the scope of this Article.

Court's earlier decision in *Baxstrom v. Herold*.[34] In *Baxstrom*, the Warren Court had struck down, as a violation of equal protection, a statute that permitted the state to continue the confinement of prisoners past the expiration of their sentences without granting them the rights of the civil commitment system. The passage of a quarter of a century and changes in the Court's personnel had engendered some doubt about the continued vitality of *Baxstrom*. The Court's decision in *Foucha* puts an end to such speculation. Justice White's majority opinion[35] notes, with apparent approval, that previous decisions of the Court had relied on *Baxstrom*.[36] The majority also refers, without further specific citation, to the *Baxstrom* principle. The Court observed that Louisiana sought to justify its continued confinement of Foucha on the basis that the criminal trial court had found that he had committed a criminal act.

> This rationale would permit the State to hold indefinitely any other insanity acquittee not mentally ill who could be shown to have a personality disorder that may lead to criminal conduct. *The same would be true of any convicted criminal, even though he has completed his prison term.*[37]

Indeed, the dissenting Justices offer no suggestion that they doubt the continuing vitality of the *Baxstrom* principle.[38] Although the equal protection discussion is not central to the Supreme Court's decision, its reaffirmation of the principle of *Baxstrom* may prove significant in future cases involving deprivation of physical liberty, including provisions for confining prisoners following the expiration of their criminal sentence.

IV. SUBSTANTIVE DUE PROCESS

The most significant portions of the *Foucha* decision involve the substantive meaning of the Due Process Clause.

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34. 383 U.S. 107 (1966).

35. While Justice O'Connor does not join the portion of Justice White's opinion that directly addresses equal protection, it is noteworthy that approving discussion of *Baxstrom* is to be found in portions of the opinion that Justice O'Connor does join.

36. *Foucha*, 112 S. Ct. at 1785 (citing Jackson v. Indiana, 406 U.S. 715 (1972)).

37. *Id.* at 1787 (emphasis added).

38. *See id.* at 1787 n.6 ("The [Thomas] dissent . . . does not challenge the holding of our cases that a convicted criminal may not be held as a mentally ill person without following the requirements for civil commitment, which would not permit further detention based on dangerousness alone"). Justice Thomas specifically observes that the state could not keep an individual beyond the expiration of his sentence, citing as a source of the constitutional limitation Article I, Section 10's prohibition on ex post facto laws. *Id.* at 1807 n.16 (Thomas, J., dissenting).

This segment of the opinion is important not only for the limitations on state power that it announces but also for the broadening of state powers that would have accompanied an opposite holding.

In recent years, the Court has renewed its use of substantive due process as a limitation on state restrictions of individual liberty.[39] As the majority observed, "The Due Process Clause contains a substantive component that bars certain arbitrary, wrongful government actions 'regardless of the fairness of the procedures used to implement them.' "[40] In the *Foucha* litigation, the claim was that Louisiana lacked the power to deprive an individual on a claim of dangerousness alone when it was not accompanied by any mental disability. In upholding this argument, the Justices addressed a number of substantive due process issues.

A. The Structure of Substantive Due Process

In its modern incarnation, substantive due process adjudication resembles the equal protection doctrine developed in the years since World War II. Infringement of a fundamental right requires the state to prove the existence of a "compelling governmental interest" and to demonstrate that no alternative means are available that involve a lesser deprivation of liberty.[41] By contrast, deprivation of a liberty interest that is not deemed fundamental will be allowed if it is "rationally related" to a legitimate governmental purpose.[42] As in modern equal protection analysis, use of the "compelling state interest" test signals extreme skepticism about a law's constitutionality, while the "rational basis" test is extraordinarily deferential to state choices.

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39. There is, of course, a lengthy controversy about the legitimacy and scope of the substantive meaning of due process. *See, e.g,* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 362-80 (4th ed. 1991); ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 32 (1990); LAWRENCE L. TRIBE, AMERICAN CONSTITUTIONAL LAW 567-86, 1302-12 (2d ed. 1988). The merits of this controversy are beyond the scope of this Article. For these purposes, it is sufficient to note that the Court has relied on substantive due process in a considerable number of cases in recent years, especially cases involving mental disability. *See, e.g.,* O'Connor v. Donaldson, 422 U.S. 563 (1975); Youngberg v. Romeo, 457 U.S. 307 (1982); Washington v. Harper, 494 U.S. 210 (1990); Riggins v. Nevada, 112 S. Ct. 1810 (1992).

40. *Foucha,* 112 S. Ct. at 1785 (quoting Zinermon v. Burch, 494 U.S. 113, 125 (1990)).

41. *See, e.g.,* Roe v. Wade, 410 U.S. 113 (1973).

42. *See, e.g.,* Bowers v. Hardwick, 478 U.S. 186 (1986).

The *Foucha* decision begins its substantive due process analysis by recognizing the fundamental nature of an individual's liberty interest in freedom from physical confinement. "Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action."[43] Having identified that the state was depriving Foucha of a fundamental right, traditionally the next step is ascertaining whether the state has a compelling justification for the deprivation.[44]

B. The Relevance of Salerno

At this juncture, the Justices were required to address the relevance of their 1987 decision in *United States v. Salerno*.[45] That case upheld the constitutionality of the Federal Bail Reform Act of 1984, which provided for pretrial detention of certain defendants who were found likely to commit dangerous crimes while awaiting trial. The *Salerno* decision also found freedom from physical confinement to be a fundamental right, but found the "government's interest in preventing crime by arrestees [to be] both legitimate and compelling."[46] Thus, *Salerno* suggested the possibility that states could invariably succeed in immunizing deprivations of physical liberty from substantive due process challenge by merely reciting as a justification their "compelling" interest in crime prevention. When certiorari was granted, the *Foucha* case appeared to present a plausible vehicle for announcing such an extension of the *Salerno* holding.[47] Such an interpretation would essentially eliminate any substantive due process limitations on the state's ability to incarcerate individuals.

With elaborate care, the *Foucha* majority emphatically rejects such an expansive reading of *Salerno*. Justice White's

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43. *Foucha*, 112 S. Ct. at 1785 (citing Youngberg v. Romeo, 457 U.S. 307, 316 (1982)).

44. The majority's conclusion that Foucha has been deprived of a fundamental right, thus triggering strict scrutiny, is sharply disputed in Justice Thomas's dissenting opinion. *Id.* at 1804-08 (Thomas, J., dissenting). A detailed analysis of Justice Thomas's alternative framework for substantive due process is beyond the scope of this brief Article and is reserved for another occasion.

45. 481 U.S. 739 (1987).

46. *Id.* at 749.

47. It was the specter of such an expansive reading of *Salerno*, which could be used to greatly expand the power of the state to incarcerate without the protections of a criminal trial people deemed "dangerous," that led several of the amicus curiae organizations to enter the *Foucha* case.

opinion begins by detailing the particular substantive and procedural provisions of the Bail Reform Act that limited the government's ability to confine individuals for the protection of society. The Court notes that the statute "carefully limited the circumstances under which detention could be sought" by limiting the scope of the law to "the most serious of crimes."[48] Moreover, that law "was narrowly focused on a particularly acute problem in which the government interests are overwhelming."[49] The Court then addresses some of the procedural protections in the Act, noting that potential detainees were entitled to a "full-blown adversary hearing" at which the government was required to demonstrate, by clear and convincing evidence, that the individual presented "an identified and articulable threat to an individual or the community."[50] This statement appears to suggest that the presence of these *procedural* protections limited the scope of *Salerno's substantive* due process holding.

Furthermore, in *Salerno* the government was required to demonstrate, again by clear and convincing evidence, "that no conditions of release can reasonably assure the safety of the community or any person . . . ."[51] This latter reference appears to require, in the traditional formula of strict scrutiny analysis, that the state demonstrate that no "less drastic means" are available for the accomplishment of its "compelling" interests.[52] The *Foucha* opinion further observed that confinement under the statute in *Salerno* was strictly limited in duration because of the "stringent time limitations of the Speedy Trial Act,"[53] and pointedly noted that, under the Act if the arrestee "were acquitted, he would go free."[54] The majority also noted that the conditions of confinement of pretrial detainees were appropriate for the accomplishment of the government's stated purpose.[55]

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48. *Foucha*, 112 S. Ct. at 1786 (citing *Salerno*, 481 U.S. at 747).

49. *Id.* (citing *Salerno*, 481 U.S. at 750). This passage, at least in the *Foucha* context, appears to address the "narrow focus" of the possibility that serious crimes might be committed during the limited time before trial. It is difficult to read this passage as approving a more general exercise of the state's interest in crime prevention.

50. *Id.* (quoting *Salerno*, 481 U.S. at 751).

51. *Id.* (citing *Salerno*, 481 U.S. at 751).

52. *Cf.* Shelton v. Tucker, 364 U.S. 479 (1960).

53. *Foucha*, 112 S. Ct. at 1786 (quoting *Salerno*, 481 U.S. at 747).

54. *Id.*

55. "Moreover, the Act required that detainees be housed, to the extent

The Court then explicitly distinguishes *Salerno* and details how the Louisiana statute lacks each of these limitations and protections. "Unlike the sharply focused scheme at issue in *Salerno*, the Louisiana scheme of confinement is not carefully limited."[56] The Court notes such differences as the lack of any durational limitation on confinement and the placement of the burden of persuasion on the acquittee. Justice White quotes the state's expert witness at the commitment hearing as saying only "I don't think I would feel comfortable in certifying that he would not be a danger to himself or to other people." Justice White observes that "[t]his, under the Louisiana statute, was enough to defeat Foucha's interest in physical liberty. It is not enough to defeat Foucha's liberty interest under the Constitution in being freed from indefinite confinement in a mental facility."[57]

Because the limitation on the reach of *Salerno's* substantive due process holding is arguably the most significant aspect of the *Foucha* decision, it is worth noting that the dissenting Justices do not appear to disagree with the conclusion that *Salerno* is inapposite. Justice Kennedy's dissenting opinion does not rely on *Salerno* and cites that case only for the proposition that deprivations of liberty prior to trial have been subjected to "heightened due process scrutiny, with regard to both purpose and duration."[58] Justice Thomas's dissenting opinion explicitly states that Louisiana's reliance on *Salerno* is misplaced because "[t]hat case, as the Court notes, . . . is readily distinguishable."[59]

The principal fear about an extension of *Salerno* was that it would permit more novel uses of the state's power to prevent dangerous acts. The amicus curiae brief for the American Orthopsychiatric Association and other groups presented the argument directly:

> If that were an accurate reading [of *Salerno*], every state would be free to establish general "dangerousness" courts, and every time the state could persuade the trier of fact that any citizen would be prospectively dangerous, it could lock him up indefinitely in "regulatory" confinement until the

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practicable, in a facility separate from persons awaiting or serving sentences or awaiting appeal." *Id.* (citing *Salerno*, 481 U.S. at 747-48).

56. *Id.*

57. *Id.*

58. *Foucha*, 112 S. Ct. at 1792 (Kennedy, J., dissenting).

59. *Id.* at 1807 (Thomas, J., dissenting).

> individual could prove that he no longer posed a threat to public safety.[60]

The majority agreed that this was a constitutionally unacceptable prospect. It observed that approval of the Louisiana scheme "would also 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 a reasonable doubt to have violated a criminal law."[61]

Justice Kennedy's dissenting opinion appears to agree on this point. "We would not allow a State to evade its burden of proof by replacing its criminal law with a civil system in which there is no presumption of innocence and the defendant has the burden of proof."[62]

Thus, *Foucha* makes clear that the Supreme Court would be skeptical of the constitutionality of any attempt to employ an expansive reading of *Salerno* to justify novel systems of civil confinement in the name of public safety and the prevention of future dangerous acts.

C. Limitations on the Nature and Duration of Confinement

In one of the first substantive due process cases of the modern era, *Jackson v. Indiana*,[63] the Supreme Court held that in cases involving civil confinement, "[a]t the least, due process requires that the nature and duration of commitment must bear some reasonable relation to the purpose for which the individual is committed.[64]" The Court in *Foucha* addressed both the nature and duration of confinement under the Louisiana statutory scheme.

Addressing the nature of his confinement, the majority places special emphasis on the fact that Foucha, who no longer had a mental illness, was incarcerated[65] in a mental hospital. "[E]ven if his continued confinement were constitutionally per-

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60. Amicus Curiae Brief of the American Orthopsychiatric Association, et al. at 13, Foucha v. Louisiana, 112 S. Ct. 1780 (1992) (No. 90-5844).

61. *Foucha*, 112 S. Ct. at 1787.

62. *Id.* at 1793 (Kennedy, J., dissenting).

63. 406 U.S. 715 (1972).

64. *Id.* at 738.

65. As the American Orthopsychiatric Association noted, "[t]he 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.' "

missible, keeping Foucha against his will in a mental institution is improper absent a determination in civil commitment proceedings of current mental illness and dangerousness."[66] As authority for this proposition, Justice White cited the statement in *Vitek v. Jones* that "[t]he loss of liberty produced by an involuntary commitment is more than a loss of freedom from confinement."[67] Justice O'Connor's concurring opinion, also citing *Vitek*, stated: "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."[68] Even Justice Thomas, who objected vigorously to the conclusion that Foucha's confinement in a mental hospital violated substantive due process, conceded that there could be some circumstances in which the nature of the confinement could have due process dimensions.[69]

The Court was similarly concerned about the potentially indefinite duration of Foucha's confinement. In *Jones v. United States*, the Court declined to impose a durational limitation on the commitment of insanity acquittees equivalent to

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Amicus Curiae Brief of the American Orthopsychiatric Association, *supra* note 60, at 18 n.10.

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

67. *Id.* at 1785 (quoting Vitek v. Jones, 445 U.S. 480, 492 (1980)). The suggestion that *Vitek* provided a source of a substantive due process limitation on the use of mental hospitals to confine persons who had no mental illness came from the amicus curiae brief of the American Psychiatric Association: "In that circumstance, the use of a psychiatric hospital worsens the deprivation of liberty suffered by an individual." Amicus Curiae Brief of the American Psychiatric Association at 10, Foucha v. Louisiana, 112 S. Ct. 1780 (1992) (No. 90-5844). Justice Kennedy's dissenting opinion criticizes this use of *Vitek*, noting that in *Vitek* the incremental loss of liberty had been stigmatization as a person with mental illness, which is not comparable for an individual who has asserted an affirmative defense of insanity. *Foucha*, 112 S. Ct. at 1797 (Kennedy, J., dissenting). The amicus curiae brief of the American Orthopsychiatric Association made a similar point as a policy argument. "The statute . . . transforms mental hospitals into prisons and turns mental health professionals into jailors. Therapists are required to confine individuals whom they cannot treat because they have no illness." Amicus Curiae Brief of American Orthopsychiatric Association, *supra* note 60, at 18-19.

68. *Foucha*, 112 S. Ct. at 1789-90 (O'Connor, J., concurring in part and concurring in the judgment).

69. "*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." *Id.* at 1809 n.18 (Thomas, J., dissenting) (emphasis added). It may be worth noting that it is not customary to refer to the rooms in psychiatric hospitals as "cells."

the length of imprisonment that could have followed conviction because "[t]here simply is no necessary correlation between severity of the offense and the length of time necessary for recovery."[70] As noted earlier, the *Foucha* decision distinguished *Jones* because the state was not entitled to confine an acquittee awaiting a "recovery" that had already occurred. And as discussed earlier, the limited duration of the confinement in *Salerno* was a distinguishing feature that the majority emphasized.

It is also noteworthy that even the dissenting Justices expressed some concern about potential confinement of excessive duration. For example, Justice Thomas stated: "I fully agree with Justice O'Connor . . . that there would be a serious question of rationality had Louisiana sought to institutionalize a sane insanity acquittee for a period longer than he might have been imprisoned if convicted."[71]

The *Foucha* decision thus gives some indication of the meaning of the now familiar declaration that the confinement's nature and duration must be sufficiently related to its purpose, including special concern about unlimited duration in the absence of mental illness requiring active medical treatment.

V. *FOUCHA* AND THE INSANITY DEFENSE

The Court's decision also gives some indication of the Justices' views about the insanity defense. Justice O'Connor's concurring opinion, which provides the fifth vote for the Court's majority, emphasizes that the Court's holding places no new restriction on the states' freedom to determine whether and to what extent mental illness should excuse criminal behavior. The Court does not indicate that states must make the insanity defense available. "If a State concludes that mental illness is best considered in the context of criminal sentencing, the holding of this case erects no bar to implementing that judgment."[72]

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70. 463 U.S. 354, 369 (1983).

71. *Foucha*, 112 S. Ct. at 1808 n.17 (Thomas, J., dissenting). Justice Kennedy appears to share this view, emphasizing that Foucha had not yet been confined for a period that exceeded the term of imprisonment for individuals who were convicted of the crime for which he was acquitted. *Id.* at 1796 (Kennedy, J., dissenting).

72. *Id.* at 1790 (O'Connor, J., concurring in part and concurring in the judgment). Justice O'Connor also indicates that the *Foucha* holding is not dispositive on the constitutionality of statutes providing the alternative verdict form of "guilty but

Justice O'Connor's point is, of course, that these issues are unrelated to the *Foucha* case. Neither the members of Justice White's majority/plurality nor any of the dissenters provide any indication of how they would resolve such constitutional questions if they should ever reach the Court.

But *Foucha* does address directly what an acquittal by reason of insanity means. The dissenting Justices express the view that such an acquittal means only what the state wants it to mean. Justice Thomas expresses the point bluntly:

> Conviction is, of course, a significant event. But I am not sure that it deserves talismanic significance. Once a State proves beyond a reasonable doubt that an individual has committed a crime, it is, at a minimum, not obviously a matter of Federal Constitutional concern whether the State proceeds to label that individual "guilty," "guilty but insane," or "not guilty by reason of insanity." A State may just as well decide to label its verdicts "A," "B," and "C." It is surely rather odd to have rules of Federal Constitutional law turn entirely upon the *label* chosen by the State.[73]

Justice Kennedy indicated a similar view: "A verdict of not guilty by reason of insanity is neither equivalent nor comparable to a verdict of not guilty standing alone."[74] Thus, the dissenters' perspective is that states are free to treat insanity acquittals as fundamentally dissimilar from all other acquittals —indeed to treat them as equivalent to convictions—so long as they do not employ the terminology of "punishment."[75]

But the majority of the Justices clearly reject this view. Justice White's opinion explicitly declines to view the state's granting of the status of acquittal as a mere matter of semantics and concludes that such a contention was precluded by *Jones*.[76] Although the Court does not address the controversial question of whether states are obligated to offer defendants some form of the insanity defense,[77] it thus makes clear that

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mentally ill." *Id.* (citations omitted). *See generally* Christopher Slobogin, *The Guilty But Mentally Ill Verdict: An Idea Whose Time Should Not Have Come*, 53 GEO. WASH. L. REV. 494 (1985).

73. *Foucha*, 112 S. Ct. at 1805-06 n.13 (Thomas, J., dissenting) (citations omitted).

74. *Id.* at 1793 (Kennedy, J., dissenting).

75. *See* Jones v. United States, 463 U.S. 354, 369 (1983) ("As [an insanity acquittee] was not convicted, he may not be punished.").

76. *Foucha*, 112 S. Ct. at 1783-84 n.4.

77. *See generally* Richard G. Singer, *Abolition of the Insanity Defense: Madness and the Criminal Law*, 4 CARDOZO L. REV. 683 (1983).

they are not permitted to acquit a defendant and then treat him as if he had been convicted.

VI. THE CONSTITUTIONAL CONSEQUENCES OF PSYCHIATRIC UNCERTAINTY

A final topic addressed by the Justices involves the constitutional significance of professional and scientific uncertainty in the field of psychiatry and other mental disability professions. The Justices' various opinions in *Foucha* address this question.

Justice Thomas's dissenting opinion, quoting previous cases, recites the Court's now familiar caveats about the imprecision of psychiatry as a field of scientific study:

> [W]e have recognized repeatedly the "uncertainty of diagnosis in this field and the tentativeness of professional judgment. The only certain thing that can be said about the present state of knowledge and therapy regarding mental disease is that science has not reached finality of judgment." The lesson we have drawn is not that government may not act in the face of this uncertainty, but rather that courts should pay particular deference to reasonable legislative judgments.[78]

Justice Thomas interprets this admonition to require deference to Louisiana's legislative judgment that psychiatric doubt about an individual's future dangerousness is sufficient justification for his continued and indefinite confinement.[79]

The majority acknowledges the reality of psychiatric uncertainty and imprecision, but derives from it the opposite conclusion. Justice White noted that states (including Louisiana) have found the condition of psychiatric knowledge to be sufficiently reliable to justify civil commitment, and indeed insanity acquittals themselves, based upon such testimony.[80] The amicus brief of the American Orthopsychiatric Association reached a similar conclusion by somewhat different reasoning.

> In previous cases involving mental disability, this Court has observed that some degree of judicial deference is warranted when legislatures "act in areas fraught with medical and scientific uncertainties. . . ." But no such deference is owed to

78. *Foucha*, 112 S. Ct. at 1801 (Thomas, J., dissenting) (quoting *Jones*, 463 U.S. at 365 n.13).

79. *Id.* at 1802 (Thomas, J., dissenting).

80. *Id.* at 1783 n.3.

> the Louisiana statute because it involves no "medical or scientific uncertainties" because the commitment of a person who has no mental illness involves no "medical or scientific" issues. It is either punishment under the guise of civil commitment, or unvarnished preventive detention without the substantive, procedural, or durational limits that this Court has found to be required under the Due Process Clause.[81]

VII. CONCLUSION

The Supreme Court in *Foucha* declined several opportunities to expand the power of the state to deprive citizens of their physical liberty without convicting them of criminal offenses. It declined to give an expansive reading to previous case law that would have allowed confinement to be based on predictions of future dangerous conduct alone. It also declined to permit a diagnosis of "anti-social personality"[82] to substitute for mental illness as a predicate for civil commitment.[83] And it refused to allow the state to place on an individual who had no mental illness the burden of somehow proving that he would not, in the future, be dangerous.

While each of these holdings can be viewed as negative, their sum is an important affirmation that "[f]reedom from bodily restraint [is] at the core of the liberty protected by the Due Process Clause from arbitrary governmental action,"[84] and that "[i]n our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception."[85]

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81. Amicus Curiae Brief of the American Orthopsychiatric Association, *supra* note 60, at 20.

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

83. *See generally* Gerald F. Uelman, *The Psychiatrist, the Sociopath and the Courts: New Lines for an Old Battle*, 14 LOY. L.A. L. REV. 1 (1980); MODEL PENAL CODE § 4.01(2) (1985).

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

85. United States v. Salerno, 481 U.S. 739, 755 (1987).