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Foucha v. Louisiana: The Danger of Commitment Based on Dangerousness

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FOUCHA v LOUISIANA. THE DANGER OF COMMITMENT BASED ON DANGEROUSNESS

I. INTRODUCTION

The release of a person found not guilty by reason of insanity ("insanity acquittee") inevitably invokes public protests. Much of this outcry stems from fear that a dangerous individual will be placed back into society. The media perpetuates societal fears by bombarding the public with stories about insanity acquittees and reporting any crime they commit after release.

Consideration of whether to commit insanity acquittees based solely on their dangerousness reveals a tension between the legitimate concerns of the public and the constitutional rights of the individual. In Foucha v. Louisiana, the United States Supreme Court weighed societal safety concerns against the due process and equal protection rights of insanity acquittees. The Supreme Court struck down a Louisiana statute which allowed confinement of insanity acquittees, who were no longer mentally ill, solely on the basis of their dangerousness to society.

Foucha was the first case in which the Supreme Court addressed the continued commitment of insanity acquittees after they are no longer mentally ill. In light of the four-one-four decision,

1. See A.B.A. STANDARDS FOR CRIMINAL JUSTICE § 7-7.3 commentary at 7-373 (1980) [hereinafter A.B.A. STANDARDS] (noting "[i]t is undisputed that the public feels threatened by the potential release of mental nonresponsibility [insanity] acquittees"). The public may also perceive that the insanity acquittee has "gotten off" without punishment. See James W. Ellis, The Consequences of the Insanity Defense: Proposals to Reform Post-Acquittal Commitment Laws, 35 CATH. U. L. REV. 961, 963 (1986) (recognizing that public dissatisfaction with the insanity defense is fueled by the concern that too many defendants are "getting off" or "going free").

2. See infra notes 60-61 and accompanying text (discussing misperceptions caused by the selective reporting of crimes committed by insanity acquittees).

3. See discussion infra parts III, IV


5. Id. at 1788-89.
and Justice White's ambiguous plurality opinion, the constitutional- 
ity of a statute providing for continued commitment based solely 
on dangerousness is still unclear. Justice O'Connor's concurring 
opinion suggests that a narrower statute than Louisiana's may pass 
constitutional muster.6

This Note will analyze the *Foucha* decision and the constitu-
tionality of committing insanity acquittees based on their danger-
ousness. Part II discusses the failure of the Supreme Court to af-
ford the same equal protection and due process rights to insanity 
acquittees as have been afforded to civil committees. Part III dis-
cusses public safety considerations stemming from societal fears of 
insanity acquittees. Part IV weighs the state's interests in public 
safety against the due process and equal protection rights of insani-
ty acquittees; it concludes that even if a statute was sufficiently 
narrow to reflect pressing public safety concerns related to the in-
sanity acquittee's continuing dangerousness, the constitutional issues 
arising from such confinement would outweigh the government's 
interest. The commitment of insanity acquittees based on their 
dangerousness would open the door to a narrowing of the constitu-
tional rights of all individuals.

II. THE COMMITMENT OF CIVIL COMMITTEES AND INSANITY 
ACQUITTEES: DISPARITIES IN TREATMENT 
BY THE SUPREME COURT

While the Supreme Court has consistently protected the due 
process and equal protection rights of civil committees,7 the Court 
has not recognized the same constitutional rights for insanity 
acquittees.8 This dichotomy reflects societal feelings of fear and

6. Id. at 1789-90.
7. The term "civil committee," as used in this Note, describes an individual who has 
been civilly committed to a mental institution after it has been established that they are 
both mentally ill and a danger to themselves or others. See O'Connor v. Donaldson, 422 
U.S. 563, 576 (1975) (discussing considerations applicable in defining a civil committee); 
see also Developments in the Law: Civil Commitment of the Mentally Ill, 87 HARV. L. 
REV. 1190, 1993 n.1 (1974) (defining "civil commitment"). A state has a legitimate inter-
est in committing mentally ill individuals under its *parens patriae* power. Addington v. 
Texas, 441 U.S. 418, 426 (1979). The state also has the authority under its police power 
to protect society from the dangerous tendencies of mentally ill individuals. Id. See gener-
ally, John Q. La Fond, *An Examination of the Purposes of Involuntary Civil Commitment*, 
commitment).
standards for the commitment of insanity acquittees and civil committees). The disparities
anger toward insanity acquittees who, arguably, have the worst of both worlds.9 Unlike prisoners who are sentenced for a definite prison term, insanity acquittees may be confined indefinitely10 Furthermore, they lack the same procedural protections that have been provided for their civil counterparts prior to commitment.11 Abuse of the insanity defense may justify fewer constitutional protections for insanity acquittees. However, based on the infrequency in which the insanity defense has been raised successfully,12 its alleged abuse is not a persuasive reason for affording insanity acquittees lesser constitutional protections than civil commit-

tees.

The Supreme Court has recognized that there are significant liberty interests at stake in any commitment.13 In Specht v. Patterson,14 the Supreme Court held that a state cannot involun-
tarily commit an individual indefinitely without a hearing on the is-
sues of present mental illness and dangerousness.15 The Court in

between civil and criminal committee rights endure despite the existence of the modern insanity defense since 1800. See Stephen J. Morse, Excusing the Crazy: The Insanity Defense Reconsidered, 58 S. Cal. L. Rev. 777, 781 n.5 (1985) (stating that the insanity defense dates back to at least Rex v. Hadfield, 27 State Trials 1281 (1800)).

9. See June R. German & Anne C. Singer, Punishing the Not Guilty: Hospitalization of Persons Acquitted by Reason of Insanity, 29 Rutgers L. Rev. 1011, 1011-12 (1976) (arguing that insanity acquittees are doubly neglected: their mental illness denies them the due process safeguards given to prisoners but their connection with the criminal justice system diminishes their chance for release once they are sane).

10. See Jones, 463 U.S. at 368 (holding that a defendant who establishes by a prepon-
derence of the evidence that he is not guilty of a crime by reason of insanity may be committed to a mental institution automatically and indefinitely); see also infra notes 35-46 and accompanying text (discussing Jones).

11. See Jones, 463 U.S. at 366-68 (holding that following an acquittal an insanity acquittee, unlike a civil committee, can be committed automatically without proof by clear and convincing evidence of present mental illness and dangerousness).

12. Despite public opinion to the contrary, virtually every empirical study of the ins-

anity defense indicates the defense is rarely successfully raised. See 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, 967-69 (1987) (citing statistics from different jurisdictions, such as Michigan, which demonstrated a 0.009% success rate of the insanity defense for all persons accused of serious crimes over a five year period).

13. Specht v. Patterson, 386 U.S. 605, 608 (1967); see also Louise Dovre, Comment, Jones v. United States: Automatic Commitment of Individuals Found Not Guilty by Reason of Insanity, 68 Minn. L. Rev. 822, 825 (1983) (asserting that the high standard of proof required in civil commitment cases reflects the significance of the liberty interest at stake).


15. Id. at 610-11. The Colorado Sex Offenders Act provided that a person, convicted of certain sex offenses, could be sentenced indeterminately if the trial court found that he or she constituted a threat of bodily harm to the public or was a habitual offender and
Specht stated that "commitment proceedings whether denominated civil or criminal are subject to the Equal Protection Clause of the Fourteenth Amendment and the Due Process Clause."\(^6\) In \textit{Jackson v. Indiana},\(^17\) the Court stated that due process requires that the nature of the commitment "bear some reasonable relation to the purpose for which the individual is committed."\(^18\) The Court in \textit{Jackson} held that Indiana's statute allowing indefinite commitment of a criminal defendant solely because of his incompetency to stand trial violated the defendant's due process and equal protection rights.\(^19\)

The due process rights of civil committees were recognized in \textit{O'Connor v. Donaldson}\(^20\) and \textit{Addington v. Texas}.\(^21\) In \textit{O'Connor}, Donaldson brought a suit alleging that being civilly committed against his will for fifteen years violated his constitutional right to liberty.\(^22\) The Court held that a state could not constitutionally confine a nondangerous mentally ill individual capable of living peacefully in society.\(^23\) The Court noted that even if Donaldson was initially committed because he was mentally ill and dangerous, his commitment could not continue constitutionally once the basis for commitment no longer existed.\(^24\) In \textit{Addington}, the Court held that due process requires a state to show by clear and convincing evidence that an individual is mentally ill and dangerous before it can civilly commit the individual to a state mental

\footnotesize
\begin{itemize}
\item mentally ill. \textit{Id.} at 607 (citing COLO. REV. STAT. ANN. §§ 39-19-1 to 10 (West 1963)).
\item Specht was sentenced under the Act for an indeterminate period based on his conviction for indecent liberties which carried a maximum sentence of ten years. \textit{Id.}
\item \textit{Id.} at 608.
\item \textit{Id.} at 715 (1972).
\item \textit{Id.} at 738. In other words, the procedures invoked to commit the individual and the length of the commitment must further the state's articulated bases for commitment. \textit{Id.} at 737-38.
\item \textit{Id.} at 730, 738. Jackson, a deaf mute with the mental level of a pre-school child, was charged with two robberies totaling nine dollars in value. \textit{Id.} at 717. Jackson was found incompetent to stand trial and was committed to an institution until he was certifiably sane. \textit{Id.} at 718-19. After three and one-half years and with little chance of improvement, Jackson argued that commitment under these circumstances amounted to a "life sentence" and deprived him of his right to due process and equal protection. \textit{Id.} at 719, 738-39.
\item \textit{Id.} at 563 (1975).
\item \textit{Id.} at 418 (1979).
\item \textit{Id.} at 564-65.
\item \textit{Id.} at 576. The jury had found that Donaldson was not dangerous to himself or others. \textit{Id.} at 573.
\item \textit{Id.} at 575 (citing Jackson v. Indiana, 406 U.S. 715, 738 (1972) and McNeil v. Director, Patuxent Institution, 407 U.S. 245, 248-50 (1972)).
\end{itemize}
hospital against his or her will.\textsuperscript{25}

In the seminal equal protection case \textit{Baxstrom v. Herald},\textsuperscript{26} the Court upheld the rights of all civil committees to be afforded the same procedural protections. Baxstrom was certified as insane while serving his prison sentence. After completing his sentence he was civilly committed to a mental hospital without the opportunity for the jury review provided to all other civil committees in that state and without a determination of any present mental illness.\textsuperscript{27} The Supreme Court held that, for purposes of civil commitment, affording different procedures to persons near the end of a penal term than for all other civil committees violated Baxstrom's equal protection rights.\textsuperscript{28}

In \textit{Humphrey v. Cady},\textsuperscript{29} the Court adhered to \textit{Baxstrom} in holding that mentally ill, convicted criminals could not be distinguished from mentally ill, law-abiding citizens beyond the duration of the maximum sentence for the crime.\textsuperscript{30} Under the Wisconsin Sex Crimes Act, Humphrey was committed to a mental institution for a period equivalent to the maximum sentence of the crime for which he was convicted.\textsuperscript{31} At the end of that period, his commit-
ment was renewed for five years without the jury trial normally afforded to civil committees under Wisconsin law. The Court remanded the case for the evidentiary hearing the district court had denied.

The Court, however, has not recognized the same due process and equal protection rights for insanity acquittees during commitment proceedings as have been recognized for civil committees. In *Jones v. United States*, the Court held that an individual could be confined automatically and indefinitely to a mental institution if found to be not guilty by reason of insanity by a preponderance of the evidence. A judgment of not guilty by reason of insanity was interpreted to establish the mental illness and dangerousness necessary to justify commitment. The Court concluded that the *Addington* burden of proof by clear and convincing evidence was not required to commit an insanity acquittee. The Court reasoned that "the proof that he committed a criminal act as a result of mental illness eliminates the risk that he is being committed for mere 'idiosyncratic behavior.'" Therefore, a standard of proof by a preponderance of the evidence comportied with due process for the commitment of insanity acquittees.

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32. *Id.*
33. *Id.* at 517.
34. *Foucha* was the first Supreme Court decision to address the constitutionality of release proceedings for insanity acquittees. *Foucha v. Louisiana*, 112 S. Ct. 1780, 1783 (1992).
36. *Id.* at 370.
37. *Id.* The Court also stated that the insanity acquittee could be confined until he either had regained his sanity or was no longer a threat to himself or society. *Id.* This portion of the Court's opinion constitutes dicta because the issue of release standards was not before the Court in *Jones*. *Id.* at 363 n.11; see also *Foucha*, 112 S. Ct. at 1806-07 (Thomas, J., dissenting) (noting that in *Jones* the Court was not called upon to decide whether the procedures for the release of insanity acquittees were constitutional). If the Court's statement was in fact part of the holding in *Jones*, it seems puzzling that after *Jones* eleven states, in addition to Louisiana, expressly provided that insanity acquittees should not be released as long as they were still dangerous. See *Id.* at 1802 n.9 (Thomas, J., dissenting) (listing the statutes). But see *Id.* at 1790 (O'Connor, J., concurring) (noting that most states adopted release standards consistent with the Court and that Justice Thomas' claim that eleven states had laws comparable to Louisiana was an exaggeration).
39. *Id.*
40. *Id.* at 367-68.
Whether an insanity acquittee's equal protection rights have been violated by state commitment proceedings has never been fully addressed by the Supreme Court. The Court in Jones summarily addressed Jones' equal protection argument in a footnote to the majority opinion.\(^{41}\) The Court stated that if the Due Process Clause does not require the insanity acquittee to be given the same procedural protections required in a civil commitment hearing,\(^{42}\) "there necessarily is a rational basis for equal protection purposes for distinguishing between civil commitment and commitment of insanity acquittees."\(^{43}\) By automatically applying a rational basis test, the Court avoided deciding whether a statute discriminating against the class of insanity acquittees was deserving of greater scrutiny \(^{44}\)

Jones also argued that equal protection required a jury hearing before commitment because a jury was allowed in a civil commitment hearing.\(^{45}\) The Court replied that a jury determination was not required before commitment because a jury made the initial determination of Jones' sanity at the time of the offense.\(^{46}\) The Court focused on the past criminal trial and thus ignored possible equal protection violations in regard to the insanity acquittee's subsequent commitment to a mental institution. The Supreme Court historically has failed to afford insanity acquittees the same due process and equal protection rights throughout the commitment process as have been afforded to civil committees.

## III. THE SIGNIFICANCE OF PUBLIC SAFETY CONCERNS

The public safety concerns related to an insanity acquittee's continuing dangerousness are significant and have had a great deal of influence in the commitment context. Assessments and predictions of an individual's dangerousness are an integral part of our

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41. *Id.* at 362 n.10.
42. The Court later decided that these procedural protections are required. *Id.* at 367-68.
43. *Id.* at 362 n.10. Because the equal protection argument "essentially duplicated the petitioner's due process argument," the Court addressed Jones' equal protection argument within its analysis of the Due Process Clause. *Id.*
44. For a discussion of whether insanity acquittees are a class deserving of greater protection, see infra part IV.C.
45. *Jones,* 463 U.S. at 362 n.10. Jones was referring to the hearing provided by statute fifty days after a finding of not guilty by reason of insanity. *Id.* at 360 (construing D.C. CODE ANN. § 24-301(3)(2)(A) (1989)).
46. *Id.* at 362 n.10.
legal system.47 In a number of decisions, courts have recognized that public safety concerns regarding potentially dangerous individuals are legitimate and have allowed the fact-finder to consider predictions regarding future dangerousness despite the possible inaccuracies of such predictions.48 For example, in *Barefoot v. Estelle*,49 the Supreme Court ruled that psychiatric testimony predicting a defendant’s future dangerousness was admissible when imposing the death penalty, despite uncertainties about the accuracy of such testimony 50. The Court believed that the defendant’s request to prohibit predictions of dangerousness in capital cases was

47. See Elyce H. Zenoff, *Controlling the Dangers of Dangerousness: The ABA Standards and Beyond*, 53 Geo. Wash. L. Rev. 562, 562 (1985) (stating that “[a]ssessments and predictions of dangerousness permeate every stage of the criminal justice, juvenile justice, and mental health systems”). Decisions involving a finding of dangerousness include: 1) conclusions regarding granting bail to persons accused of crimes and the level at which bail is set; 2) decisions concerning the waiver of juveniles charged with serious crimes to adult courts; 3) sentencing decisions following criminal convictions, including release on probation; 4) decisions regarding work-release and furlough programs for incarcerated offenders; 5) parole and other conditional-release determinations for offenders; 6) judgments regarding whether to remove a child from the home in child abuse or battery cases; 7) decisions to commit or release persons committed under quasi-criminal statutes for sex offenses; 8) resolutions to civilly commit criminal defendants after having been found incompetent to stand trial or when found not guilty by reason of insanity and release procedures for these individuals; 9) decisions regarding the special handling of disruptive prisoners; 10) decisions regarding the transfer of civilly committed patients to hospitals with security; 11) commitment of drug addicts; 12) findings concerning the emergency and long-term involuntary commitment of the mentally ill; 13) decisions concerning conditional and unconditional release of involuntary committed mentally ill patients; 14) conclusions concerning the continuing hospitalization of criminal defendants found not guilty by reason of insanity; 15) decisions to employ special legal provisions or sentencing proceedings for habitual offenders; and 16) rulings to impose the death penalty. S.A. Shah, *Dangerousness: Conceptual Prediction and Public Policy Issues*, in *VIOLENCE AND THE VIOLENT INDIVIDUAL* 151, 153-54 (J. Ray Hays et al. eds., 1981).

48. See *Jurek v. Texas*, 428 U.S. 262, 274-75 (1976) (recognizing that predicting future behavior is difficult but still essential to decisions rendered in the criminal justice system). There is still a great deal of controversy regarding the accuracy of predictions of dangerousness. The best clinical research based on institutionalized populations which have committed violence in the past and been diagnosed as mentally ill indicates that “psychiatrists and psychologists are accurate in no more than one out of three predictions of violent behavior.” John Monahan, *The Clinical Prediction of Violent Behavior* 47 (National Institute of Mental Health Monograph 1981).


50. Id. at 896-903. The Court noted that the defendant may counter any testimony given and that it is the responsibility of the fact-finder to sort out unreliable information. *Id.* at 898-99; see also *Jurek*, 428 U.S. at 274-76 (rejecting the claim that it is impossible to predict future behavior and that dangerousness is therefore an invalid consideration when imposing the death penalty).
"somewhat like asking us to disinvent the wheel." In the context of pretrial detention, the Seventh Circuit in United States v. Daniels held that danger to the community constituted a sufficient independent basis for pretrial detention.

A current illustration of a highly publicized release proceeding invoking public fears of the dangerousness of insanity acquittees is the Michael Levine case. Levine was found not guilty by reason of insanity of the aggravated murder of an elderly man, the attempted aggravated murder of the man's wife, and associated kidnapping, aggravated burglary and extortion charges. Although Levine was released in the summer of 1993, he endured a series of hearings in which he was denied his freedom. His incarceration continued despite the Ohio requirement that mental illness be present for any involuntary commitment and the evidence indicating that he was no longer mentally ill. Levine's alleged dangerousness and the public reaction to the gruesome crime appear to have influenced the

51. Barefoot, 463 U.S. at 896.
52. 772 F.2d 382, 383 (7th Cir. 1985).
53. Id. at 383. Daniels was detained pursuant to the Federal Bail Reform Act for distributing large quantities of controlled drugs in an operation that included bribing police officers for protection. Id. at 382. See also 18 U.S.C. § 3142(f)(1)(c) (1992) (allowing pretrial detention where the offense carries a maximum term of imprisonment of ten years or more and is prescribed by three different controlled substance acts). The court stated that Daniels "is being held on a conclusion that he is likely to commit more crimes on release, not on a charge that he is likely to flee." Daniels, 772 F.2d at 383.
54. See State v. Levine, No. 56203, 1990 Ohio Ct. App. LEXIS 152 (Jan. 25, 1990) (affirming the trial court conviction of Levine on these counts). By comparison, Levine's accomplice, John File, was found guilty of two counts of aggravated murder, one count of attempted aggravated murder, two counts of kidnapping, one count of aggravated burglary, and one count of extortion. State v. File, No. 41724 (Ohio Ct. App. Nov. 28, 1980). He was sentenced to life imprisonment on the first two counts, four to twenty-five years on the third, fourth, fifth and sixth counts and one to ten years on the seventh count. Id. The Ohio Parole Board has requested that File's sentence be commuted to the 14 years he has already served. James F. McCarty, Parole Board Wants to Free Levine Cohort, CLEVELAND PLAIN DEALER, October 15, 1993, at 1-B.
56. In accordance with Ohio law, hearings were held to determine if Levine should be released in 1980, 1983 and 1988. Each time, Judge John Angelotta of the Cuyahoga County Common Pleas Court determined that Levine remained mentally ill and subject to hospitalization. See discussion of Ohio release hearing requirements in Memorandum in Support of Respondent-Appellant's and Intervenor-Appellant's Motion For Stay of Order Releasing Petitioner-Appellee at 4-5. See generally OHIO REV. CODE ANN. § 5122.15(H) (Baldwin 1992) (governing requirements for release hearings). The Sixth Circuit Court of Appeals stated that there was no evidence to support Judge Angelotta's findings of insanity; in fact, the court found "enormous and overwhelming evidence to the contrary." Levine v. Cuyahoga County Court of Appeals, No. 92-3625/92-3712, slip op. at 6 (6th Cir. 1992).
delay in his release. The media roused public sentiment by producing story upon story about Levine, each time repeating the facts of the crimes and alluding to his dangerousness. The stories would also include a general discussion of the insanity defense and would assert that Levine's case demonstrated the inefficacy of the defense.

The Michael Levine case demonstrates the impact that public fear may have on the detention of insanity acquittees and the role the media plays in strengthening such fear. Public fear appears to be based almost exclusively on cases where a person was found not guilty by reason of insanity of a homicide, attempted homicide, or assault causing serious bodily injury. Not coincidentally, the

57. At Levine's 1983 hearing, Judge Angelotta focused on Levine's past crimes in assessing whether Levine would commit violent acts in the future; he treated the evidence that Levine was no longer mentally ill as nothing more than a "temporary" remission. Ohio v. Levine, Court's Supplemental Ruling, No. 47714 at 4-8 (Cuyahoga C.P. Jan. 17, 1984). Likewise, the Ohio Court of Appeals characterized Levine's illness as in remission, thus subjecting him to continued hospitalization. Ohio v. Levine, No. 47976 (Ohio Ct. App. Oct. 25, 1984). The public reacted to Levine's July 6, 1988 release hearing by sending a petition containing 4,500 signatures imploring Judge Angelotta to keep Levine hospitalized. Record at 301, Ohio v. Levine, No. 56203 (Cuyahoga C.P. July 6, 1988). In addition, Judge Angelotta received letters from both the Ohio Congress and the United States Congress stating: "[w]ithout reservation, I urge that you today rebuff any attempts to release Michael Levine, the murderer of Julius Kravitz." Id. at 302. Upon learning of Levine's pending release, the Ohio Attorney General's office and the Cuyahoga County Prosecuting Attorney filed a motion for a stay of the district court's order to release Levine. Respondent-Appellant's And Intervenor-Appellant's Motion For Stay Of Order Releasing Petitioner-Appellee at 1, Levine v. Torvik, No. 92-3625/92-3712 (6th Cir. 1992).

58. See Appeals Court Halts Man's Release, UPI, June 30, 1992, available in LEXIS, Nexis Library, UPI File (noting Ohio Attorney General Lee Fisher's concerns that Levine is "a violent man" whose mental problems "could re-emerge" as evidenced by the threatening letters he wrote to his former wife and the sentencing judge); see also Victim's Widow Wants Killer Locked Up, UPI, June 28, 1992, available in LEXIS, Nexis Library, UPI File (quoting Kravitz's widow as saying that she wants Levine incarcerated "so he can't hurt anyone like he did my family"). Judge Angelotta was quoted often as saying that Levine was dangerous and should be hospitalized. See, e.g., Levine Returned to Lima State, UPI, Nov. 22, 1980, available in LEXIS, Nexis Library, UPI File (quoting Judge Angelotta as saying that Levine should be hospitalized because "he is homicidal and dangerous to others").

59. See, e.g., Lee Leonard, Ohio Lawmakers Rejected Elimination of the Insanity Plea Two Years Ago, UPI, July 7, 1982, available in LEXIS, Nexis Library, UPI File (reporting that the bill creating a guilty but mentally ill verdict for Ohio was introduced in 1979 following Michael Levine's acquittal); see also Rosemary Armoo, Ohio Senate Committee to Speed Up Revision of State's Insanity Defense, UPI, June 22, 1982, available in LEXIS, Nexis Library, UPI File (noting that Michael Levine's insanity acquittal inspired a bill that would add the guilty but mentally ill verdict to Ohio insanity defense law).

60. See David B. Wexler, Symposium on the ABA Criminal Justice Mental Health Standards: Redefining the Insanity Problem, 53 GEO. WASH. L. REV. 528, 542 (1985)
most highly publicized insanity acquittals are those involving homicide and attempted homicide cases.\footnote{61} Both the American Psychiatric Association (APA) and the American Bar Association (ABA) promulgated standards for the insanity defense in the wake of John Hinckley's insanity acquittal for his attempted assassination of President Reagan.\footnote{62} Almost every state that has adopted a guilty but mentally ill verdict has done so in reaction to a controversial insanity acquittal or a violent crime committed by a recently released insanity acquittee.\footnote{63} In Michigan, the first state to adopt the guilty but mentally ill verdict, passage of the statute was sparked by public outcry over a murder and rape committed by two insanity acquittees within two years of their release.\footnote{64}

Public concern regarding safety has greatly influenced movements to reform the insanity defense.\footnote{65} This concern centers on the belief that insanity acquittees are often released prematurely\footnote{66} Critics doubt the ability of mental health professionals to predict

\footnote{61. See id. at 543 (stating that the media's selective reporting of homicide cases has led to the myth that "most insanity defendants are murderers who commit random acts of violence").}

\footnote{62. See American Psychiatric Association, Statement on the Insanity Defense in Issues in Forensic Psychiatry 12 (1984) [hereinafter A.P.A., Statement] (stating that the Hinckley verdict was a catalyst for the APA's drafting of its first comprehensive statement on the insanity defense); see also A.B.A. Standards, supra note 1, at 3 (explaining that the trial of Hinckley resulted in the increased scrutiny of the role of mental health professionals in the criminal justice system).

63. See Christopher Slobogin, The Guilty But Mentally Ill Verdict: An Idea Whose Time Should Not Have Come, 53 Geo. Wash. L. Rev. 494, 497 (1985) (stating that public outcry over violent crimes committed by insanity acquittees after their release triggered adoption of the guilty but mentally ill verdict in Michigan, Illinois, Georgia and Indiana). Id. at 495. A defendant who is found guilty but mentally ill is eligible for specialized treatment in a prison or mental hospital while incarcerated. Id. at 495. Thus, the verdict provides the fact-finder with an option other than the traditional verdicts of guilty, not guilty, and not guilty by reason of insanity. Id. See also A.P.A., Statement, supra note 62, at 12 (remarking that following the Hinckley verdict, twenty bills were introduced in Congress seeking to create a federal insanity defense which was more restrictive than that employed by the states).

64. Slobogin, supra note 63, at 497.

65. See generally Ellis, supra note 1 (discussing proposals to reform commitment laws for insanity acquittees in light of public perception of the consequences of acquittal by reason of insanity).

66. See Morse, supra note 8, at 827 (emphasizing that the major concern of insanity defense critics is the early release of insanity acquittees); see also Ellis, supra note 1, at 962 (asserting that the public's main concern regarding the insanity defense is not in assessing blame but in determining when a defendant will get out).
that insanity acquittees will no longer be a threat.\textsuperscript{67}

Proposed reforms to the insanity defense have addressed public concerns by including special release procedures for insanity acquittees. In its official position on the insanity defense, the APA declared that the decision to release an insanity acquittee should not be a purely clinical judgment left to the discretion of mental health professionals.\textsuperscript{68} The APA further suggested that acquittees not amenable to treatment be transferred to a nontreatment facility with the necessary security.\textsuperscript{69} The APA prefaced its official position by stating: "The public's perception that a successful plea of insanity is a good way to 'beat the rap' contributes to a belief that the criminal insanity defense is not only fundamentally unfair ('for after all, he did do it') but also that insanity is a dangerous doctrine."\textsuperscript{70}

Similarly, in formulating mental health standards, the American Bar Association (ABA) adopted special commitment and release procedures for acquittees charged with violent crimes.\textsuperscript{71} These procedures include the insanity acquittees' ability to request a hearing one year after his initial commitment (and at two-year periods thereafter)\textsuperscript{72} or to obtain release upon petition by the su-

\textsuperscript{67} Morse, supra note 8, at 827.

\textsuperscript{68} A.P.A., Statement, supra note 62, at 1. The APA procedures apply only to individuals charged with a violent crime. Id. The APA praised the Oregon system which has a Psychiatric Security Review Board to decide who to release and recommit. Id., Or. Rev. Stat. § 161.327-336 (1985).

\textsuperscript{69} A.P.A., Statement, supra note 62, at 22.

\textsuperscript{70} Id. at 12. Recent causes for the public and psychiatric profession's concern about the insanity defense include: the rapid release of insanity acquittees due to recent "civil-libertarian-type" court rulings; the increased pleading and success of the insanity defense; the use of anti-psychotic drugs to restore sanity; and the hardening of American attitudes towards crime. Id. at 11.

\textsuperscript{71} See generally A.B.A. STANDARDS, supra note 1, at § 7 (describing the commitment and release procedures). The standards were incorporated into the more comprehensive body of Association Standards for Criminal Justice which address a wide variety of criminal law and procedure issues. See Kenneth J. Hodson, The American Bar Association Standards for Criminal Justice: Their Development, Evolution and Future, 59 DenV. L.J. 3, 3-15 (1981) (providing the history of the standards' incorporation into the Association Standards for Criminal Justice).

\textsuperscript{72} A.B.A. STANDARDS, supra note 1, § 7-7.8(a). Under this standard, the court can set a shorter interval between petitions if warranted by the acquittee's mental conditions and "other relevant factors." Id. At these review hearings, the state must prove by clear and convincing evidence that the acquittee meets the commitment criteria: 1) that the acquittee is "currently mentally ill or mentally retarded" and 2) that "as a result, [the acquittee] poses a substantial risk of serious bodily harm to others." Id. § 7-7.4(b).
perintendent of the facility. When an insanity acquittee is released under these standards, he or she is under “authorized leave” to permit a more tentative testing of his readiness to return to the community. Like the APA's standards, those of the ABA provide more rigorous and deliberate procedures preceding the release of insanity acquittees. These procedures are in response to the perceived threat to the public of releasing persons acquitted of violent crimes. Although the need for public safety plays an important role in determining the propriety of releasing an insanity acquittee, these safety concerns must always be weighed against the insanity acquittee's constitutional rights.

IV Weighing the Insanity Acquittee's Constitutional Rights Against the Government's Interest in Protecting Society

It may be argued that a statute permitting the detention of insanity acquittees based on dangerousness does not infringe upon their due process and equal protection rights. In Foucha, the plurality reversed the Louisiana Supreme Court's decision to hold Foucha but did not fully explore these constitutional issues. However, Justice O'Connor's concurring opinion suggests that the Due Process and Equal Protection Clauses do not prevent detaining insanity acquittees based solely on their dangerousness where there are adequate procedural safeguards. This view is mistaken. The Due Process and Equal Protection Clauses of the Constitution prohibit any statute which permits continued confinement of an insanity acquittee based solely on his or her dangerousness regardless of any procedural safeguards.

A. The Foucha Plurality Opinion

The Court in Foucha held that since Foucha was no longer mentally ill, the State could not continue to hold him as an insani-

73. Id. § 7-7.9.
74. Id. § 7-7.11.
75. See, e.g., Levine v. Cuyahoga County Court of Common Pleas, No. C-3-85-493, slip op. at 5 (S.D. Ohio June 25, 1992) (In deciding to adopt the Magistrate's decision to release Levine, Judge Walter Herbert Rice held that under the authority of Foucha, the Court had to order Levine's release due to the lack of evidence to support that he was still mentally ill.).
76. See infra notes 154-67 and accompanying text (discussing the procedural safeguards recommended by O'Connor to preserve an insanity acquittee's constitutional rights).
However, the Court did not go so far as to find that the Due Process Clause prohibits a state from confining an insanity acquittee based solely on his or her dangerousness. The plurality opinion merely emphasized that the Louisiana statute was lacking in the procedural protections necessary for continued confinement. Therefore, in light of Justice White's ambiguous opinion and the egregious facts of the case, it is still possible for an insanity acquittee to face continued commitment based solely on dangerousness.

Following his cursory review of the constitutional rights of insanity acquitees, Justice White concluded that there were three difficulties with Foucha's continued confinement. First, White stated that if Foucha was to be held, he should not be held as a mentally ill person. This was because "due process requires that the nature of commitment bear some reasonable relation to the purpose for which the individual is committed." Accordingly, the Court left room for an insanity acquittee to be committed on the basis of dangerousness as long as the commitment is not to a mental institution.

Second, White explained that if Foucha was to be held in a mental institution, he would be entitled to the same constitutional protections afforded to a civil committee. This included a proceeding where his mental illness and dangerousness was proven by clear and convincing evidence. Therefore, because Foucha was no longer mentally ill, he could not be held in a mental institution.

Finally, White emphasized that substantive due process rights

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78. The Due Process Clause of the Fourteenth Amendment states that "nor shall any State deprive any person of life, liberty, or property, without due process of law" U.S. CONST. amend. XIV § 1.
80. Id. at 1784.
81. Id.
82. Id. at 1785 (citing Jones v. United States, 463 U.S. 354, 368 (1983) and Jackson v. Indiana, 406 U.S. 715, 738 (1972)); see also supra text accompanying note 18 (discussing Jackson).
83. Foucha, 112 S. Ct. at 1785.
84. Id.
85. Id.
prevent arbitrary government action. Because Foucha was not convicted, he could not be punished. The Court, however, did not define punishment and merely concluded that the State had no punitive interest in detaining a person who had not been found guilty. The issue of whether detaining an insanity acquittee based on dangerousness was punitive was not specifically addressed. In fact, the Court noted that "in certain narrow circumstances persons who pose a danger to others or to the community may be subject to limited confinement."

The Foucha Court concluded that the pretrial detention of arrestees, upheld in United States v. Salerno, was one of those carefully limited exceptions. White asserted that unlike the Bail Reform Act involved in Salerno, Louisiana's statute was not sufficiently narrow to qualify as a "due process exception." The Bail Reform Act permits a judge to detain arrestees prior to trial where it is established by clear and convincing evidence that they are dangerous to the community. The Louisiana statute, by contrast, placed the burden on the insanity acquittee to prove they were no longer dangerous and permitted their unlimited detention if they failed to meet this burden. In addition, the Bail Reform Act was limited to the detention of offenders of more serious crimes (where the government interest in protecting society was the strongest) unlike the Louisiana statute which failed to distinguish between types of offenders.

The Court's holding in Foucha can be confined to the deplorable facts of the case. Under Louisiana's statute, Foucha could have been held indefinitely after being found not guilty by reason of insanity for any criminal offense. At the time of his release,

86. Id.
87. Id.
88. Id.
89. Id.
90. Id. at 1786.
91. 481 U.S. 739 (1987); see Foucha, 112 S. Ct. at 1787 (noting that detention is one of "those carefully limited exceptions permitted by the Due Process Clause").
93. Foucha, 112 S. Ct. at 1786.
95. Foucha, 112 S. Ct. at 1786.
96. Id. at 1787.
97. Id. at 1786; see also 18 U.S.C. §§ 3142(e), (f)(1) (1992) (allowing detention for crimes of violence, offenses punishable by life imprisonment or death, serious drug offenses and certain repeat offenders).
98. Foucha, 112 S. Ct. at 1787 (1992). Foucha was found not guilty by reason of
Foucha had already served over seven years in a psychiatric institution even though there had been no evidence of his mental illness since his admission. Foucha's release was recommended in 1988, approximately four years before the case came before the Supreme Court. While Foucha was found to have an incurable antisocial personality disorder, this diagnosis fell short of the definition of mental disease.

In addition, although he was being held on the basis of his dangerousness, Foucha was never found to be dangerous. Upon the superintendent's recommendation for Foucha's release, the trial judge appointed a sanity commission consisting of two doctors to testify as to Foucha's present condition. Only one of the doctors testified at the release hearing and he said that because of some altercations Foucha was involved in, he would not "feel comfortable in certifying that [Foucha] would not be a danger to himself or to other people." Louisiana asserted that because Foucha committed a criminal act and had an incurable personality disorder, which sometimes led to aggressive conduct, he could be held indefinitely. Justice White's noncommittal plurality opinion, as applied to the specific, egregious facts of the Foucha case, thus may leave room for continued confinement of insanity acquittees based on dangerousness under a more narrowly drawn statute.

**B. Due Process Analysis**

To determine whether a statute providing for the continued commitment of an insanity acquittee on the basis of dangerousness

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99. *Id.* at 1782 (Foucha was committed in October, 1984 and released in May, 1992).

100. *Id.*

101. *Id.* *Foucha* does not expressly define what constitutes mental disease. Stedman's Medical Dictionary defines mental disease or mental illness as "a broadly inclusive term, generally denoting one or all of the following: 1) a disease of the brain, with predominant behavioral symptoms, as in paresis or acute alcoholism; or 2) a disease of the 'mind' or personality, evidenced by abnormal behavior, as in hysteria or schizophrenia." *Stedman's Medical Dictionary* 450, 764 (25th ed. 1990).

102. Although a three-member panel from the institution was charged with determining Foucha's dangerousness, "its report did not expressly make a finding in that regard." *Foucha*, 112 S. Ct. at 1782 n.2 (1992).

103. *Id.* at 1782.

104. *Id.* at 1782-84. It was stipulated at trial that the other doctor, if present, would have given the same testimony. *Id.* at 1784. On the basis of the doctor's testimony, the trial court found Foucha to be dangerous and committed him to a mental institution. *Id.*

105. *Id.* at 1787.
violates the Due Process Clause, the Court should apply a two prong test which has evolved from recent pretrial detention decisions. The first prong weighs the governmental interests sought to be advanced by the statute against the intrusion into the fundamental rights of the individual to determine whether the statute deprives the individual of his or her "substantive" due process rights. If the individual's interest outweighs the governmental interest, then the statute is unconstitutional. The second prong of the test examines whether the procedural safeguards advance the government's interest.

1. Substantive Due Process

The strength of the state interest needed to legitimize a statute depends on the degree to which the statute encroaches upon an individual's fundamental rights. Although the Court has described the right to be free from pretrial detention as "substantial" and of an "important and fundamental nature," it has not recognized this right as a fundamental right deserving of strict scrutiny.

106. E.g., Schall v. Martin, 467 U.S. 253 (1984). In Schall, the Court stated that two separate inquiries were necessary to determine if a state statute providing for preventive detention of juveniles was compatible with the "fundamental fairness" required by due process. Id. at 263. The Court upheld New York's preventive detention statute for juveniles under the Due Process Clause of the Fourteenth Amendment due to its regulatory purpose and procedural protections. Id. at 281. These two inquiries also form the basis for the Court's decision in Salerno. United States v. Salerno, 481 U.S. 739, 746 (1987); see also Michael W. Youtt, The Effect of Salerno v. United States on the Use of State Preventive Detention Legislation: A New Definition of Due Process, 22 GA. L. REV. 805, 814-20 (1988) (detailing the Court's application of the two-prong test in determining the constitutionality of detention).

107. See, e.g., Bell v. Wolfish, 441 U.S. 520, 534 (1979) (applying the first prong in determining whether pretrial detention was regulatory or punitive); see also Schall, 467 U.S. at 263-74 (analyzing the first prong of the due process test).

108. See Roe v. Wade, 410 U.S. 113, 156-66 (1973) (invalidating a state law forbidding abortions because in the first trimester the woman's interest in privacy outweighed the state's interest in protecting the unborn fetus).

109. See Schall, 467 U.S. at 263 (analyzing the second prong of the due process test).


111. In Schall, the Court referred to the juvenile's interest in freedom from detention as "substantial." Schall, 467 U.S. at 265. In Salerno, the Court made reference to the "important and fundamental nature" of the right of an adult not to be detained but stated that the right to be free from pretrial detention cannot categorically be ranked as a fundamental right. United States v. Salerno, 481 U.S. 739, 750-51 (1987). It is ironic that, while recognizing an individual's strong interest in liberty, the Court in Salerno summarily dismissed this interest in favor of the government's "legitimate" interest. Id. at 750.
The Court in *Salerno* stated that "[w]e cannot categorically state that pretrial detention 'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'"[112] Therefore, the Court determined that it would apply the minimum rationality test to pretrial detention cases, requiring only that the state prove it had a "legitimate" interest which outweighed individual rights.[113] Both the *Schall* and *Salerno* courts recognized the legitimacy of state interests in protecting communities from crime.[114] Thus, applying the minimum rationality test employed in *Schall* and *Salerno*, the insanity acquittee's interest in freedom from restraint would be subordinated to the state's legitimate interest in protecting society from dangerous individuals.[115] The statute would be held valid on due process grounds.

However, an insanity acquittee's freedom from continued confinement based solely on his or her dangerousness is a fundamental right, the restriction of which must be justified by a compelling state interest.[116] If "liberty" means anything, it means freedom from physical restraint absent a compelling governmental interest.[117] Freedom from bodily restraint has long been recognized as "the core of the liberty protected by the Due Process Clause".[118] Unlike in *Schall* and *Salerno*, where the Court dealt with a very short period of detention,[119] the detention of an

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[112] *Salerno*, 481 U.S. at 751 (quoting Snyder v. Massachusetts, 291 U.S. 97, 105 (1934)).
[113] Id. at 747.
[114] Id., *Schall*, 467 U.S. at 264; see also Terry v. Ohio, 392 U.S. 1, 22 (1968) (stating "[o]ne general [governmental] interest is of course that of effective crime prevention and detection"); De Veau v. Braisted, 363 U.S. 144, 155 (1960) (holding that combating local crime was a compelling state interest).
[115] See *Salerno*, 481 U.S. at 750-51 (stating that, "where the government's interest is sufficiently weighty, [the individual's strong interest in liberty can] be subordinated to the greater needs of society.").
[116] See *Roe v. Wade*, 410 U.S. 113, 155 (1973) (stating that, where fundamental rights are involved, a limitation of these rights can only be justified by a compelling state interest).
[119] In *Schall*, the New York statute provided that if the juvenile denied the charges at the initial appearance, a probable cause hearing must be held not more than three days after the initial appearance or four days after the filing of a petition, whichever was sooner. *Schall*, 467 U.S. at 269-70. Once probable cause had been established, the juvenile
insanity acquittee could last years in order to serve societal safety interests. The insanity acquittee’s deprivation thus rises to the level of a fundamental right and therefore the government’s interest in protecting society must be compelling. Accordingly, the individual’s interests should be weighed against those of the government rather than being summarily dismissed as in Salerno.  

The state will argue that protecting society from dangerous insanity acquittees is a compelling interest which justifies the restriction of their rights. This approach, labeled a prediction-prevention strategy, incapacitates persons thought likely to commit crimes before they have an opportunity to do so.  A forward-looking assessment requires that prior violent acts be considered but these considerations are not the sole basis for continued commitment.

There are many problems in employing a prediction-prevention strategy. Confinement based merely on a prediction arguably would violate the Fourteenth Amendment as unconstitutional punishment based on status. In addition, confinement based on dangerousness unrelated to mental illness may be considered unconstitutionally vague. The Supreme Court in Papachristou v. Jacksonville,

was entitled to a fact-finding hearing not more than fourteen days after the initial hearing for a felony and three days after the initial hearing for a lesser offense.  In Salerno, the length of pretrial detention was limited by the time limitations of the Speedy Trial Act. United States v. Salerno, 481 U.S. 739, 747 (1987).  See generally 18 U.S.C. § 3161 (1988) (governing “speedy trials”).

120. Salerno, 481 U.S. at 750-51.

121. See Alan M. Dershowitz, The Law of Dangerousness: Some Fictions About Predictions, 23 J. LEGAL EDUC. 24, 25 (1970) (stating that society has two main approaches to discouraging behavior: the predictive-preventive approach which asks the question “[w]ill he do it?,” and the punishment-deterrence strategy which asks “[d]id he do it?”).

122. See Warren J. Ingber, Note, Rules For An Exceptional Class: The Commitment and Release of Persons Acquitted of Violent Offenses By Reason of Insanity, 57 N.Y.U. L. REV. 281, 287 (1982) (warning that focusing solely on the violent act which led to an acquittee’s commitment may result in retributive motives characteristic of the punishment-deterrence strategy); see also Kathleen A. Kunde, Note, The Validity of the Dangerousness Standard for Recommitment of Persons Found Not Guilty by Reason of Mental Disease or Defect, 1980 WIS. L. REV. 391, 400 (stating that behavior in the institution would be one factor a jury may consider in recommitting an insanity acquittee based on dangerousness).

123. See Robinson v. California, 370 U.S. 660, 667 (1962) (holding that a state law which made the status of narcotic addiction a criminal offense was an unconstitutional infliction of cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments). The Court in Robinson recognized the strong state interest in regulating narcotic drug traffic but stated that valid measures could be taken in place of the statute.  Id. at 664-66; see also Kunde, supra note 122, at 401 (arguing that recommitment of an insanity acquittee based solely on dangerousness was recommitment based on status and thus unconstitutional).

held that a statute may be struck down on grounds of vagueness if it fails to provide adequate notice of wrongdoing. As the dangerousness standard is a subjective standard with no valid criteria for how dangerousness should be ascertained, it fails to provide adequate notice of wrongdoing. Therefore, under *Papachristou*, any statute committing individuals based on dangerousness should be void for vagueness.

Not only is a propensity toward future dangerousness hard to define, but actual predictions of dangerousness are so problematic as to make a dangerousness standard an unreasonable justification for the continued deprivation of liberty. Studies show that the ability of mental health professionals to predict dangerousness is unreliable. An individual's commission of a violent act does not necessarily lead to a propensity for committing future violence. Therefore, the prediction-prevention strategy should be limited in order to promote individual autonomy and assure that

125. *Id.* at 162 (holding that a vagrancy statute was void for vagueness because it failed to give notice of what conduct was forbidden and encouraged arbitrary and erratic arrests); see also *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939) (requiring that statutes give fair notice of the offending conduct).

126. See Stepan G. Meštrović and John A. Cook, *The Dangerousness Standard: What Is It and How Is It Used?*, 8 INT'L J. OF L. & PSYCHIATRY 443, 467 (1986) (stating that "the value of the dangerousness standard is utilitarian, to control certain kinds of deviants, but not others, and the truth of a person's dangerousness is actually created in the examination of the patient because there are no valid criteria for how it should be ascertained"); see also *Dershowitz*, *supra* note 121, at 43 (concluding that each psychiatrist decides for himself or herself what constitutes dangerousness).

127. See Bernard L. Diamond, *The Psychiatric Prediction of Dangerousness*, 123 U. PA. L. REV. 439, 444 (1974) (stating that "the fact that certain signs may sometimes be associated with violent behavior in no way meets the legal need for criteria which will discriminate between the potentially violent and the harmless individual.").

128. See Christopher Slobogin, *Dangerousness and Expertise*, 133 U. PA. L. REV. 97, 110 (1984) (explaining that of those individuals predicted by mental health professionals to be violent, anywhere from fifty-four to ninety-two percent were not violent over the three to five year follow-up periods of the studies). The great number of erroneous predictions of dangerousness (called "false positive" rates) have been characterized as the central problem in predicting dangerousness. *Id.* at 110-11. High "false positive" rates are the result of both clinical and actuarial prediction methods. *Id.* at 110-11, 117-18.

129. See Harry L. Kozol et al., *The Diagnosis and Treatment of Dangerousness*, 18 CRIME & DELINQ. 371, 383-86 (1972) (emphasizing that no single factor can predict dangerous behavior); see also Barry Kirschner, Note, *Constitutional Standards for Release of the Civilly Committed and Not Guilty By Reason of Insanity: A Strict Scrutiny Analysis*, 20 ARIZ. L. REV. 233, 274 (1978) (asserting that a past violent act committed by an insanity acquittee is not indicative of future dangerousness any more so than a civil committee's past dangerousness). But see *Monahan*, *supra* note 48, at 3-5 (concluding that the history of violent behavior in an individual is the single best predictor of future violence).
arbitrary government action will not be taken against targets of societal hostility or fear.\textsuperscript{130} Moreover, recitation of a regulatory interest may disguise the government's true, illegitimate interest in punishment.\textsuperscript{131} "[U]nder the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law"\textsuperscript{132} An adjudication of guilt requires that both mens rea and actus reas be proven so as to justify punishment.\textsuperscript{133} Despite his or her prior detention in a mental institution, an insanity acquittee has not been adjudged guilty and thus the requisite findings of mens rea and actus reas are lacking. The Court in \textit{Kennedy v. Mendoza-Martinez}\textsuperscript{134} described the factors traditionally considered to determine whether the government's act is punitive in nature:

> Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of \textit{sciente re}, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned are all rele-

\textsuperscript{130} See Ingber, supra note 122, at 300-01 (arguing that by not treating people as mere objects of prediction, society promotes a sense of independence in both thought and action and decreases the risk of chilling harmless behavior).

\textsuperscript{131} Salerno argued that the Federal Bail Reform Act violated substantive due process because it was impermissible punishment. United States \textit{v.} Salerno, 481 U.S. 739, 747 (1987).

\textsuperscript{132} Bell \textit{v.} Wolfish, 441 U.S. 520, 535 (1979) (distinguishing a pretrial detainee from a sentenced inmate who may be punished as long as the punishment is not "cruel and unusual"); see also Ingraham \textit{v.} Wright, 430 U.S. 651, 674 (1977) (holding that Fourteenth Amendment liberty interests are implicated where school authorities punish a child by restraining the child and inflicting appreciable physical pain); Wong Wing \textit{v.} United States, 163 U.S. 228, 237 (1896) (holding that persons cannot be subjected to punishment at hard labor without a judicial trial to establish guilt).

\textsuperscript{133} See \textsc{Jerome Hall}, \textsc{General Principles of Criminal Law} 18 (2d ed. 1960) (stating that the principles of criminal law include: mens rea, actus reus, concurrence of mens rea and actus reus, harm, causation, punishment, and legality); \textsc{Wayne R. LaFave} \& \textsc{Austin W. Scott, Jr.}, \textsc{Criminal Law} § 1.2(b), at 8 (2d ed. 1986) (including mens rea (guilty mind) and actus reus (guilty act) as basic principles underlying criminal responsibility in Anglo-American criminal law). \textit{But see} Dershowitz, supra note 121, at 31-32 (discussing the instances where a showing of mens rea and actus reus may not be necessary as the basis of incapacitation including: times of emergency, pretrial detention of arrestees, and civil commitment of the mentally ill).

\textsuperscript{134} 372 U.S. 144 (1963).
vant to the inquiry, and may often point in differing directions. In determining whether pretrial detention constituted impermissible punishment, the Court in Salerno applied an empty, watered-down version of the Kennedy test. First, the Court looked to legislative intent. In the absence of an express intention by the legislature to punish, the Court next inquired whether an alternative purpose could rationally be connected to the statute. Since the statute surpassed this hurdle, then the Courts evaluated whether the legislation appeared “excessive” in relation to this “alternative purpose.”

In applying this test, the Salerno Court dismissed the possibility that the Bail Reform Act constituted punishment by relying heavily on the legislature’s declaration of intent. Inquiring whether an alternative purpose may be assigned to a regulation is therefore meaningless. The legislature would not admit its intent was punitive and, where Congress is silent, some rational purpose can always be found.

A meaningful determination of whether a statute constitutes punishment must therefore be based on a full examination of all the factors in Kennedy, rather than the limited examination employed in Salerno. Applying Kennedy, the statute allowing de-

135. Id. at 168-69 (footnotes omitted). Kennedy involved enforcement of a statute divesting an American of citizenship for leaving or remaining outside the United States during a time of war or national emergency for purpose of evading the draft. Id. at 186. The statute was held to be unconstitutional as a punishment without the procedural safeguards guaranteed by the Fifth and Sixth Amendments. Id.

136. The Court in Salerno stated that “the mere fact that a person is detained does not inexorably lead to the conclusion that the government has imposed punishment.” Salerno, 481 U.S. at 746 (citing Bell v. Wolfish, 441 U.S. 520, 537 (1979)); see also Youtt, supra note 106, at 817-18 n.53 (discussing the Court’s application of Kennedy test in Salerno).

137. Salerno, 481 U.S. at 747.

138. Id.

139. Id.

140. The Court concluded that the detention imposed by the Federal Bail Reform Act was regulatory based on the legislative history recorded in the Senate Reports. Id. (citing S. REP. No. 225, 98th Cong., 2nd Sess. 8 (1983)).

141. “If legislative intent is the sole determinant of punishment, legislatures could circumvent rights expressly protecting the individual from government authority [which would result in] an empty conception of liberty.” Marc Miller & Martin Guggenheim, Pretrial Detention and Punishment, 75 MINN. L. REV. 335, 367 (1990).

142. See supra notes 135-36 and accompanying text (discussing the Kennedy factors); see also United States v. Ward, 448 U.S. 242, 249 (1980) (stating that the list of considerations in Kennedy is “neither exhaustive nor dispositive”).
tention of insanity acquittees based on dangerousness would fail as impermissible punishment. Detention based on dangerousness involves an affirmative disability or restraint which appears excessive in relation to the assigned purpose of protecting society. Detention based on dangerousness also promotes traditional aims of punishment—deterrence and incapacitation.\textsuperscript{143} The statute would focus on individual behavior and responsibility—necessary elements of punishment.\textsuperscript{144} Like the draft-evaders in \textit{Kennedy}, insanity acquittees are a class of people whom the community has historically desired to punish.\textsuperscript{145} Furthermore, incapacitation has been regarded historically as punishment and no alternative purpose could rationally be related to it which is disassociated from punishment.\textsuperscript{146} A full consideration of the factors set forth in \textit{Kennedy} results in a determination that a statute permitting detention based on dangerousness constitutes impermissible punishment.

Even if initially presumed to be regulatory, a statute imposing an excessive length of detention would constitute impermissible punishment. Unlike the statute in \textit{Salerno} which limited detention to the stringent time limitations of the Speedy Trial Act,\textsuperscript{147} a statute that permits the detention of an insanity acquittee may not include such limitations. Even if a statute did stipulate time limitations, at some point an insanity acquittee's internment becomes punishment.\textsuperscript{148} The Court in \textit{Salerno} stated: "[w]e intimate no view as to the point at which detention in a particular case might become excessively prolonged, and therefore punitive, in relation to

\begin{itemize}
\item[143.] Detention based on dangerousness may also be in retribution for the past acts for which the insanity acquittee escaped punishment. \textit{See} Miller \& Guggenheim, \textit{supra} note 141, at 367 (determining that there are at least three kinds of government intent that suggests a finding of punishment: retribution, deterrence and incapacitation).
\item[144.] \textit{See id.} at 362-63 (distinguishing the selective service draft and compulsory education laws from punishment because they are imposed universally on persons subject to the law).
\item[145.] \textit{Kennedy}, 372 U.S. at 172-80; \textit{see also} Wexler, \textit{supra} note 60, at 545-46 (proposing that legislatures, courts and the public hold insanity acquittees objectively responsible especially where the consequences of their actions were severe).
\item[146.] \textit{See} Miller \& Guggenheim, \textit{supra} note 141, at 368-69 (noting that imprisonment is the modern norm of punishment).
\item[147.] United States \textit{v.} Salerno, 481 U.S. 739, 747 (1987); \textit{see also} Speedy Trial Act, 18 U.S.C. § 3161 (1988) (generally limiting the length of detention to 130 days following arrest).
\item[148.] \textit{See} Miller \& Guggenheim, \textit{supra} note 141, at 368 ("The more severe and extended the deprivation of rights recognized under the Constitution or laws, the more the deprivation will take on the character of punishment, and the stronger the government's justification should be.").
\end{itemize}
Congress' regulatory goal. Historically, an eight month incarceration period has been regarded as punishment. The Tenth Circuit held that pre-trial detention intended to prevent flight before trial constituted impermissible punishment where the defendant had been held for four months. A statute which would allow an insanity acquittee to be detained based on dangerousness would need to allow for lengthy detentions to address public safety concerns and would, therefore, constitute an impermissible punishment under the Due Process Clause.

2. Procedural Due Process

Assuming that a statute allowing an insanity acquittee to be detained does not violate substantive due process rights, the insanity acquittee’s procedural due process rights still should be considered. The proper inquiry is whether there are procedural safeguards adequate to authorize the deprivation of liberty. In her concurring opinion in Foucha, Justice O’Connor suggested limitations on the nature and duration of the detention of insanity acquittees—limitations which would balance public safety concerns with the individual liberty interest at stake. However, the greater number of procedural restraints incorporated into any statute, the more continued confinement of insanity acquittees resembles punishment. Moreover, given an insanity acquittee’s fundamental liberty interest in freedom, no procedural safeguards could constitutionally authorize the deprivation of that interest.

149. Salerno, 481 U.S. at 747 n.4.
150. United States v. Melendez-Carron, 790 F.2d 984, 1008 (2d Cir.) (Feinberg, C.J., concurring), cert. dismissed, 479 U.S. 978 (1986). In Melendez-Carron, the court held that pretrial detention based solely on dangerousness was unconstitutional. Id. at 1004. Chief Judge Feinberg concurred only in result in regard to the two defendants who were held for eight months based on dangerousness but stated that pretrial detention would not necessarily be unconstitutional for a competent adult held for a brief period of time. Id. at 1005.
151. United States v. Theron, 782 F.2d 1510, 1516 (10th Cir. 1986).
152. But see infra notes 154-69 and accompanying text (discussing O’Connor’s concurrence in Foucha which would allow for incarceration based on dangerousness provided certain procedural matters are addressed).
155. For example, if the time an insanity acquittee could be detained, based solely on dangerousness, was limited to that of a prison sentence for the same crime, and if detention was separate from other insanity acquittees, the detention would resemble the punishment given to prisoners.
O'Connor began her analysis with the proposition that absent some medical justification, insanity acquittees could not be held as mental patients because there must be a connection between the nature and purposes of confinement. The term “medical justification” is vague; it would not serve as an effective procedural safeguard because many “medical” conditions do not rise to the level of mental illness. Foucha’s incurable, antisocial personality disorder would surely qualify as a “medical justification” but did not meet the definition of a mental disease under Louisiana law. Such a vague standard may be easily manipulated and its use threatens to deprive an insanity acquittee of his or her liberty interest in violation of procedural due process.

O'Connor accepted the idea of confining an insanity acquittee based solely on dangerousness and merely took issue with the continued confinement taking place in a mental institution. O'Connor insinuates that insanity acquittees could be held in a “dangerous person” facility once they are no longer found to be mentally ill. She also intimates that equal protection principles may also limit the duration of commitment to no longer than the time a person convicted of the same crime would be imprisoned. The imposition of this procedural safeguard suggests an intent to punish, for why else would someone found not guilty

156. Foucha, 112 S. Ct. at 1789-90.
157. See AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (DSM-III-R) 401 (3d ed. 1987) (defining mental disorders as a “clinically significant behavioral or psychological syndrome or pattern that occurs in a person and that is associated with present distress disability increased risk of suffering death, pain or disability, [or] an important loss of freedom”). Deviant behavior alone is not a mental disorder unless it is a symptom of dysfunction. Id.
158. Foucha, 112 S. Ct. at 1782.
159. Holding an individual with “some medical justification” in a mental institution absent a civil proceeding establishing mental illness and dangerousness would also violate individual substantive due process rights. Id. at 1785; see also O'Connor v. Donaldson, 422 U.S. 563, 576 (1975) (establishing that an individual can be civilly committed only after a finding of both the presence of mental illness and dangerousness).
160. See Foucha, 112 S. Ct. at 1789 (O'Connor, J., concurring) (“It might therefore be permissible for Louisiana to confine an insanity acquittee who has regained sanity if, unlike the situation in this case, the nature and duration of detention were tailored to reflect pressing public safety concerns related to the acquittee’s continuing dangerousness.”).
161. As in Humphrey, where persons could be committed to a “sex deviate facility” within the state prison, a “dangerous person institution” could thus be a separate facility within the mental institution to confine only persons who are dangerous but not mentally ill. See Humphrey v. Cady, 405 U.S. 504, 506 (1972).
162. Foucha, 112 S. Ct. at 1790.
of an offense by reason of insanity be confined for the same duration as a prisoner found guilty of that offense? Modeling an insanity acquittee's detention after that of a convicted criminal would suggest that the true intent in confining the insanity acquittee is punitive and, therefore, would not pass a substantive due process challenge.\(^{63}\)

O'Connor further stated that the governmental interest in protecting society only outweighed the individual liberty interests of those who committed violent crimes.\(^ {64}\) She relied on Congress' finding that those who commit violent crimes are more likely to be responsible for dangerous acts in the community after arrest.\(^{65}\)

The flaw in this analysis, however, is that there is no basis for concluding that insanity acquittees found not guilty of violent crimes are any more dangerous than prisoners found guilty of the same crime and released without a determination of current dangerousness.\(^ {66}\) The means of continued commitment of insanity acquittees who committed violent crimes therefore would not be narrowly tailored to fit the objective of preventing dangerous acts.

O'Connor did not address the procedures the Court found determinative in \textit{Salerno} such as the opportunity for an adversarial hearing, the state having the burden of proof, and the application of the standard of proof by clear and convincing evidence.\(^{67}\) A

\(^{163}\) See Miller & Guggenheim, supra note 141, at 368 (stating that "[t]he more severe and extended the deprivation of rights recognized under the Constitution or laws, the more the deprivation will take on the character of punishment").

\(^{164}\) \textit{Foucha}, 112 S. Ct. at 1790.

\(^{165}\) \textit{Id.} (citing \textit{Salerno}, 481 U.S. at 750).

\(^{166}\) See Dershowitz, supra note 121, at 33 (emphasizing that "[r]ecent studies suggest that the mentally ill do not, as a class, engage in more acts of violence than those not so diagnosed").

\(^{167}\) In \textit{Salerno}, the Court suggested that for a preventive detention statute to satisfy procedural due process, the procedures used by a judicial officer to evaluate the likelihood of future dangerousness must be specifically designed to further the accuracy of that determination. \textit{Salerno}, 481 U.S. at 751; see also \textit{Youtt}, supra note 106, at 827-30 (stating that procedural due process concerns can be alleviated by incorporating federal statute safeguards into state prevention detention legislation). The procedures in \textit{Salerno} which the Court said ensured the accuracy of predicting dangerousness at the detention hearing included: 1) the detainee's right to counsel, 2) the right to testify, present information and cross-examine witnesses, 3) statutorily enumerated factors other than the danger to the community to guide the judicial officer, 4) a standard of proof by clear and convincing evidence, 5) a statement of reasons for the decision, and 6) an opportunity for immediate appellate review of the detention decision. \textit{Salerno}, 481 U.S. at 751-52. In addition, the Court based its "disposal" of the respondents' facial challenge to procedural due process on the premise that "there is nothing inherently unattainable about a prediction of future criminal conduct." \textit{Id.} at 751 (citing \textit{Schall} v. \textit{Martin}, 467 U.S. 253, 278 (1984)); see
statute like the one proposed by O'Connor would require an insanity acquittee to convince the court that he or she is no longer dangerous before being released. Yet an insanity acquittee being held in an institution would not have an opportunity to establish the necessary proof. In his dissent in Jones, Justice Brennan noted that "extended institutionalization may effectively make it impossible for an individual to prove that he is no longer mentally ill and dangerous, both because it deprives him of the economic wherewithal to obtain independent medical judgments and because the treatment he receives may make it difficult to demonstrate recovery."168 In addition, incorporating the Salerno protections into a statute providing detention of insanity acquittees would produce strange results. Because the procedural standards mandated by statute in Salerno are also mandated in civil commitment hearings, applying these standards to an insanity acquittee's detention would cloud the Court's clear distinction between insanity acquittees and civil committees.169

Even if the additional procedures found determinative in Salerno were required,170 they would not ensure against erroneous and unnecessary deprivations of liberty. As the appellees in Schall argued, the "risk of erroneous and unnecessary detentions is too high despite these procedures because the standard for detention is fatally vague."171 Like the provision in Schall which allowed for the detention of a juvenile based on the "serious risk" that they wouldcommit a crime,172 any provision providing for detention based on "dangerousness" would be arbitrary.173 The Court in

also Jurek v. Texas, 428 U.S. 262, 274-75 (1976) (arguing that prediction of criminal behavior is an essential element in criminal justice which, while difficult to ascertain, is not impossible).


169. The Court in Jones distinguished civil committees from insanity acquittees and therefore held that the procedural protections afforded civil committees were not necessary for the commitment of insanity acquittees. Id. at 367. This may not be a very strong argument, however, because one of the distinctions the Court made between civil committees and insanity acquittees was that with insanity acquittees there was no risk of being committed for mere "idiosyncratic behavior." Id. Where a hearing is held solely for the purpose of determining an insanity acquittee's dangerousness, this risk may arise thus justifying the higher standard of proof by clear and convincing evidence. Cf. Addington v. Texas, 441 U.S. 418, 433 (1979) (requiring a clear and convincing standard of proof to civilly commit an individual to a mental hospital).

170. See supra note 167 and accompanying text.

171. Schall v. Martin, 467 U.S. 253, 278 (1984); see also supra notes 125-26 (arguing that the criteria used to establish the dangerous standard is vague).

172. Schall, 467 U.S. at 278.

173. See Meštrović & Cook, supra note 126, at 466 (concluding from an examination
Schall and Salerno dismissed a vagueness argument upon the assumption that, from a legal point of view, a prediction of future criminal conduct is attainable.\textsuperscript{174} Numerous studies show that this assumption is necessarily flawed.\textsuperscript{175} The Court in Schall was also influenced by the existence of post-detention remedies which provided a sufficient mechanism for correcting errors on a case-by-case basis.\textsuperscript{176} Whereas the only harm a pretrial detainee suffers would be confinement for a few days or months before trial,\textsuperscript{177} an insanity acquittee may be confined erroneously for years during an appeals process.

Furthermore, procedures which are more narrowly tailored would achieve the end of protecting society without depriving the insanity acquittee of his or her freedom. Conditional release would protect society without infringing upon the insanity acquittee's due process rights. An insanity acquittee could be closely monitored for signs of recurring mental illness and hospitalized immediately if such signs are observed.\textsuperscript{178} Increased police protection and com-

\begin{footnotesize}
\textsuperscript{174} United States v. Salerno, 481 U.S. 739, 750 (1987); Schall, 467 U.S. at 278-80.
\textsuperscript{175} See supra note 128 and accompanying text (discussing the difficulties in predicting an individual's future dangerousness).
\textsuperscript{176} Schall, 467 U.S. at 280-81. Post-detention remedies under the New York statute included: a review of the pretrial detention order by writ of habeas corpus brought in the state supreme court, reviewability of the state supreme court's ruling, permissive appeal from a family court order by the appellate court and a motion for reconsideration directed to the family court judge. Id.
\textsuperscript{177} In Schall, the maximum possible detention before trial for a serious crime was seventeen days and, for a less serious crime, six days. Id. at 270; see also Speedy Trial Act, 18 U.S.C. § 3161 (1988) (providing generally for the trial of a defendant within a maximum of 130 days following arrest). But see Allen Daniel Applebaum, Note, As Time Goes By: Pretrial Incarceration Under the Bail Reform Act of 1984 and the Speedy Trial Act of 1974, 8 CARDOZO L. REV. 1055, 1083 (1987) (arguing that loopholes in the Speedy Trial Act could allow for a detention for more than eight months thereby resulting in possible due process violations).
\textsuperscript{178} See German & Singer, supra note 9, at 1068 (advocating conditional release as an important treatment tool because it allows doctors to monitor patients and slowly lift restraints on their freedom). Michael Levine's release was ordered pursuant to conditions recommended by a psychiatrist. Levine v. Cuyahoga County Court of Appeals, No. 92-3625/92-3712, slip op. at 5 (6th Cir. 1992). The conditions included: 1) that Levine reside in a different county than the victim's family; 2) that he receive follow up treatment once every two weeks at a community mental health center or from a private psychologist or psychiatrist; 3) that the court be notified within 24 hours if Levine missed an appointment without an excuse; 4) that the person giving follow up treatment to Levine write progress reports to the court once every six months; and 5) that in the case of any signs of mental deterioration he is immediately rehospitalized and the court is informed within 24 hours. Id. at n.9.
\end{footnotesize}
munity crime watch organizations could further protect society from dangerous individuals. The fundamental nature of an insanity acquittee’s right to be free from restraint dictates a level of procedural protection unattainable in any detention based solely on dangerousness.

C. Equal Protection Analysis

The Equal Protection Clause guarantees that people who are similarly situated will be treated similarly. As in Jones, the Court in Foucha took only a cursory look at the equal protection rights of insanity acquittees. A full analysis under the Equal Protection Clause should focus on the “suspect” nature of possible classifications and the corresponding level of scrutiny applicable to a statute which discriminates against these classifications.

In the portion of his opinion that commanded only three other votes, Justice White concluded that the Louisiana statute discriminated against Foucha in violation of the Equal Protection Clause. He first argued that the State failed to put forward a “particularly convincing reason” for treating insanity acquittees who were no longer mentally ill differently than prisoners who had completed serving sentences for the same crime. Next, he compared the Louisiana statute with the procedural protections afforded to civil committees. He emphasized that because civil commitment requires establishing mental illness and dangerousness by clear and convincing evidence, Louisiana could not confine Foucha without meeting this burden. Thus, Justice White left open the possibility that if a convincing reason was provided by the State and dangerousness was proven by a standard of clear and convinc-

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179. LAWRENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16.1, at 1438 (2d ed. 1988); see also U.S. CONST. amend. XIV, § 1 (“No State shall make or enforce any law which shall deny to any person within its jurisdiction the equal protection of the laws.”).


181. The analysis under the Equal Protection Clause is similar to the analysis under the Due Process Clause where there are inequalities bearing on a fundamental right of individuals. TRIBE, supra note 179, at 1454; see also JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 11.4 at 371 & n.174 (4th ed. 1991) (explaining that courts can use a due process or equal protection analysis since “virtually all government laws regulating fundamental rights involve classifications”).

182. Foucha v. Louisiana, 112 S. Ct. 1780, 1788 (1992). Justices Blackmun, Souter and Stevens joined Justice White on this part of the opinion. Id. at 1781.

183. Id. at 1788.

184. Id. at 1788-89.

185. Id.
ing evidence, detention based on dangerousness may not violate the Equal Protection Clause.

The constitutionality of detaining insanity acquittees based on their dangerousness depends on the level of scrutiny that courts would apply in reviewing the statute. Historically, the mentally ill, as a group, have been the victim of discrimination and have lacked political representation. Therefore, any regulations singling them out as a class should be treated as suspect. Insanity acquittees who are no longer mentally ill have an even stronger case for protection as a suspect class. A statute which provides differential treatment for a class of persons with reduced capabilities may be presumptively valid. Where mental illness is no longer present, however, continued discrimination reflects only prejudice and antipathy and should require compelling justification.

Convincing a court to categorize insanity acquittees as a "sus-

186. See, e.g., Vitek v. Jones, 445 U.S. 480, 492 (1980) (recognizing that commitment to a mental hospital "can engender adverse social consequences to the individual" which can be labeled "stigma") (quoting Addington v. Texas, 441 U.S. 418, 425-26 (1979)); see also Dershowitz, supra note 121, at 40 (suggesting that the mentally ill have historically been committed because they "were regarded as intolerably obnoxious to the community"); German & Singer, supra note 9, at 1011 (stating that insanity acquittees have been stigmatized by society "as both criminal and mentally ill—twice-cursed as mad and bad").

187. See Note, Mental Illness: A Suspect Classification?, 83 YALE L.J. 1237, 1259 (1973) (arguing that the political impotence of the mentally ill is manifested by: deprivation of the right to vote, differentiation as minorities in society, regular consignment to insularity because of minority status and victimization by ill-fitting legislative classifications).

188. See, e.g., Graham v. Richardson, 403 U.S. 365, 372 (1971) (holding that strict scrutiny should be applied to discrete and insular minorities such as aliens); see also McLaughlin v. Florida, 379 U.S. 184, 192 (1964) (holding that whenever the state regulation weighs heavily on a group or individual, the Court should examine the policy closely under the Equal Protection Clause). The application of stricter judicial scrutiny to a statute discriminating against a class lacking political representation dates back to the famous Carolene Products footnote. United States v. Carolene Prods. Co., 304 U.S. 144, 153 n.4 (1938). In Carolene Products, Justice Stone suggested more exacting judicial scrutiny be applied where "prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities." Id.

189. See City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 442 (1985) (explaining that the reduced ability of the mentally retarded to function in the everyday world justifies the State in treating the mentally retarded differently).

190. See id. at 440 (stating that a statute which classifies by race, alienage or national origin, can reflect only prejudice and antipathy and is thus strictly scrutinized); see also U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973) (treating with suspicion a statute which had a true legislative purpose of preventing "hippies" from participating in the food stamp program).
pect” class may, however, be difficult. Courts have never used strict scrutiny in a commitment case,¹⁹¹ and the mentally ill have never been labeled a suspect class.¹⁹² Furthermore, the Supreme Court has been reluctant to expand the current number of recognized “suspect” classes and would likely be reticent to do so now.¹⁹³

Treating insanity acquittees as a “quasi-suspect” class is a viable alternative. Classification as a “quasi-suspect” class would force the courts to assess the constitutionality of any statute affecting insanity acquittees with intermediate scrutiny; thus would require the government to justify differential treatment by proving it is substantially related to an important state objective.¹⁹⁴ Intermediate scrutiny would protect an insanity acquittee’s individual rights from improper legislative motives and public hostility.¹⁹⁵ Intermediate scrutiny is appropriate for insanity acquittees because they have an immutable characteristic which makes them different from the general public; in addition, they are targets of public prejudice who lack recourse to the political process.¹⁹⁶

¹⁹¹. Hickey v. Morris, 722 F.2d 543, 545-46 (9th Cir. 1983). The court has applied strict scrutiny in a commitment case but the equal protection question was presented apart from its involuntary commitment aspect. See United States v. Cohen, No. 81-1036, slip op. at 5-6 (D.C. Cir. Mar. 5, 1982) (examining a federal commitment statute which, as applied, imposed a burden on District of Columbia residents that was not imposed on other citizens of the United States).

¹⁹². The Court thus far, has only treated classifications which are based on race, alienage and national origin as fully “suspect.” See, e.g., City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) (applying strict scrutiny to a city plan favoring businesses owned by black, Spanish-speaking, Oriental, Latin-Americans, Eskimos or Aleut citizens); cf. Schweiker v. Wilson, 450 U.S. 221, 234 (1981) (holding it unnecessary to reach the issue of whether mental illness is a suspect class since the statute which denied federal comfort allowances to certain inmates of public mental institutions did not classify directly on the basis of mental health).

¹⁹³. See, e.g., Massachusetts Board of Retirement v. Murgia, 427 U.S. 307, 313 (declining to extend heightened review to differential treatment based on age); James v. Valtierra, 402 U.S. 137, 141 (1971) (rejecting strict scrutiny of classifications based on poverty); see also Maher v. Roe, 432 U.S. 464, 470-71 (1977) (stating that: “[a]n indigent woman desiring an abortion does not come within the limited category of disadvantaged classes so recognized by our cases”).


¹⁹⁵. See Ingber, supra note 122, at 294 (discussing equal protection review of criminal commitment procedures in order to guard against improper legislative motives).

¹⁹⁶. See supra notes 186-87 and accompanying text (noting a pattern of discrimination against the mentally ill as a group and their lack of political representation); cf. Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 446 (1985) (holding that mental retardation was not a quasi-suspect classification which required a higher standard of judicial review).
As previously discussed, the reasons for granting the class of "insanity acquittees who are no longer mentally ill" quasi-suspect status are even more compelling than granting such status to all mentally ill persons. Unlike in Cleburne, where the reduced ability of the mentally retarded to function in society was a reason invoked by the Court for not treating them as a quasi-suspect class, insanity acquittees who are no longer mentally ill are fully capable of functioning in society. In addition, the legislative protections designed to prevent prejudice based on mental retardation are absent for insanity acquittees who are no longer mentally ill. The "real and undeniable differences" between the mentally retarded and other members of society cannot be applied to a "sane" insanity acquittee whose only distinction from other members of society lies in his or her past behavior. However, the Court has hesitated to extend the protection of being labeled a quasi-suspect class to the mentally ill and therefore may avoid attaching this label to insanity acquittees as well.

The next option for the Court is to apply a form of "heightened" scrutiny to legislation affecting the class of insanity acquittees or, more narrowly, the class of "insanity acquittees who are no longer mentally ill." When applying a "heightened" scrutiny test, the Court inquires "whether the challenged distinction rationally furthers some legitimate, articulated state purpose." The state objective must be "nonillusory" and the Court will not supply any "imaginary basis or purpose" to sustain the statutory

197. See discussion supra notes 191-92 and accompanying text.
198. Cleburne, 473 U.S. at 442.
199. See id. at 443-44 (listing as examples national acts preventing discrimination against the mentally retarded in federally funded programs and state acts conferring upon the mentally retarded the right to live in a setting suited to their needs and abilities).
200. Id. at 444.
201. See id. at 445-46 (explaining that if the Court were to label the mentally retarded as quasi-suspect, other groups such as the aged, disabled, mentally ill, and infirm would also require such a classification). See generally Schweiker v. Wilson, 450 U.S. 221, 231 n.13 (1981) (by deciding that the statute did not "classify directly on the basis of mental health," the five-justice majority avoided deciding what standard of review applies to legislation "expressly classifying the mentally ill as a discrete group").
202. This heightened scrutiny approach has been defined as the "newer equal protection." See generally Gerald Gunther, Forward: In Search of Evolving Doctrine on a Changing Court: A Model For a Newer Equal Protection, 86 HARV. L. REV. 1 (1972) (explaining that the "newer equal protection" seeks to raise the minimum rationality test slightly to give it "bite" but does not raise the scrutiny all the way up to the levels of intermediate or strict scrutiny).
scheme.204

"Heightened" scrutiny has been applied, under the guise of a rational basis test, to invalidate legislation differentiating the classes of the mentally ill and the mentally retarded.205 In cases involving the commitment of the mentally ill, the Supreme Court invalidated the classifications using the normally deferential language of the rational basis test.206 In his dissenting opinion in Schweiker v. Wilson,207 Justice Powell applied heightened scrutiny to a statute classifying on the basis of mental illness stating that "[t]his marginally more demanding scrutiny indirectly would test the plausibility of the tendered purpose, and preserve equal protection review as something more than 'a mere tautological recognition of the fact that Congress did what it intended to do.'"208 In the involuntary commitment context, the Ninth Circuit applied heightened scrutiny to evaluate whether the disparity between procedures for the commitment and release of insanity acquittees and civil committees was in violation of the Equal Protection Clause.209 Heightened scrutiny

204. Id. at 276-77.
205. See John B. Scherling, Recent Development, Automatic and Indefinite Commitment of Insanity Acquittees: A Procedural Straitjacket, 37 VAND. L. REV. 1233, 1254 (1984) (arguing that because the Supreme Court invalidated the statutes in Baxstrom, Humphrey and Jackson based on the rational basis test, the Court should apply intermediate scrutiny to classifications of commitment procedures).
206. See, e.g., Baxstrom v. Herold, 383 U.S. 107, 111 (1966) (stating that equal protection requires "that a distinction made have some relevance to the purpose for which the classification is made"); see also Harper v. Virginia Bd. of Elections, 383 U.S. 663, 670 (citing Baxstrom as a case where the protection of a fundamental right justified heightened scrutiny under the Equal Protection Clause).
208. Id. at 245 (Powell, J., dissenting) (citing United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166, 180 (1980)). Justice Powell's dissent was joined by Justices Brennan, Marshall and Stevens. Id. at 239. Powell proposed that, where there is no legislative history, the classification must bear a 'fair and substantial relation' to the asserted purpose. Id. at 245. Powell concluded that "Congress had no rational reason for refusing to pay a comfort allowance to [the challengers], while paying it to numerous otherwise identically situated disabled indigents." Id. at 247.
209. Hickey v. Moms, 722 F.2d 543, 546 (9th Cir. 1983). The court in Hickey held that the challenged classifications were substantially related to important governmental objectives and therefore upheld the statute as constitutional. Id. at 547. The Court's application of what it called a "heightened rational basis" test thus resembled what has been defined in this note as intermediate scrutiny. Supra note 194 and accompanying text. The Hickey court used a "heightened rational basis" test because of the Supreme Court's use of rational basis language to invalidate statutes in previous cases. Id. at 546; see also Benham v. Edwards, 678 F.2d 511, 515 (5th Cir. 1982) (applying heightened scrutiny to decide an equal protection challenge to Georgia's procedures governing commitment and release of insanity acquittees), vacated on other grounds sub nom., Ledbetter v. Benham, 463 U.S. 1222 (1983).
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has also been applied to statutes differentiating the mentally retarded.\textsuperscript{210} Although hesitant to label the mentally retarded as a type of suspect class, the Court in \textit{Cleburne} invalidated an ordinance singling them out while applying a rational basis test.\textsuperscript{211}

The heightened scrutiny utilized by the Court to review statutes affecting the mentally ill and mentally retarded should also be applied to statutes differentiating insanity acquittees or the class of “insanity acquittees who are no longer mentally ill.” This class often includes mentally retarded and mentally ill individuals and, notwithstanding a verdict of not guilty by reason of insanity, they should still be afforded the same constitutional protections.\textsuperscript{212} Likewise, since “insanity acquittees who are no longer mentally ill” belong to the class of insanity acquittees, both classes should be afforded the same constitutional protections. By applying “heightened” scrutiny to legislation distinguishing insanity acquittees or “insanity acquittees who are no longer mentally ill,” the Court can avoid expanding the group of “quasi-suspect” classifications while still protecting insanity acquittees from legislation furthering a hidden, illegitimate state purpose.

Courts have occasionally applied the rational basis test in the commitment context\textsuperscript{213} but statutes reviewed under this level of

\begin{itemize}
  \item \textsuperscript{210} See \textit{Cleburne v. Cleburne Living Ctr.}, 473 U.S. 432, 446-48 (1985) (invalidating a statute discriminating against the mentally retarded using a rational basis test).
  \item \textsuperscript{211} Id. at 448.
  \item \textsuperscript{212} To establish a defense on the ground of insanity, all jurisdictions require some finding of mental disease or defect. See A.P.A., \textit{Statement}, supra note 62, at 7-10 (describing the different standards for the insanity defense). In \textit{Foucha}, Louisiana law provided a traditional statement of the M’Naghten test: “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.” \textit{Foucha}, 112 S. Ct. at 1794 (Kennedy, J., dissenting) (quoting LA. REV. STAT. ANN. § 14:14 (West 1990). The M’Naghten test is used by one-third of the states. A.P.A., \textit{Statement}, supra note 62, at 9. The American Law Institute test, adopted in all federal jurisdictions, and half the states, provides: “A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality (wrongfulness) of his conduct or to conform his conduct to the requirements of the law.” Id. (citing \textit{MODEL PENAL CODE} § 4.01 (1962)).
  \item \textsuperscript{213} See \textit{People v. Chavez}, 629 P.2d 1040, 1051-52 (Colo. 1981) (asserting that people found not guilty by reason of insanity are not a “suspect class,” and therefore, the rational basis test should be applied). The Court’s dicta in \textit{Jones} suggests that classifications that distinguish between civil and insanity acquittees only deserve a rational basis test. \textit{Jones v. United States}, 463 U.S. 354, 362 n.10 (1983); \textit{see also} Scherling, \textit{supra} note 205, at 1253 (discussing the Court’s application of the rational basis test in \textit{Baxstrom} and other cases).
\end{itemize}
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scrutiny are generally ones which involve economic issues.\footnote{See, e.g., Williamson v. Lee Optical Co., 348 U.S. 483, 486 (1955) (applying the rational basis test to economic regulation of opticians); see also Railway Express Agency v. New York, 336 U.S. 106, 110 (1949) (applying the rational basis test to a statute regulating advertisements on business vehicles).} Because of an insanity acquittee's important liberty interest in freedom from restraint, the Court should not apply a rational basis test. A rational basis test is merely a rubber stamp of constitutionality\footnote{United States v. Sahhar, 917 F.2d 1197, 1201 n.5 (9th Cir. 1990), cert. denied, 499 U.S. 963 (1991); see also Tribe, supra note 179, at 1443 (stating that the rational basis test gives "remarkable deference to state objectives").} and would do little to protect insanity acquittees from being the victims of societal rage and fear.

The government's interest in protecting the community from dangerous individuals may be strong enough to pass whatever level of scrutiny the Court applies. If "heightened" scrutiny is applied, the government interest in protecting society from dangerous individuals is a legitimate purpose which justifies differential treatment between insanity acquittees and civil committees, provided this interest is articulated by the legislature.\footnote{In Schall the Court concluded that preventing danger to the community is a legitimate regulatory goal. Schall v. Martin, 467 U.S. 253, 269 (1984). Therefore, it is unnecessary to evaluate the statute under a rational basis test since it has already been established that a genuine application of the test almost always results in a finding of constitutionality. See supra note 215 and accompanying text.} The government's interest would probably be classified as an important interest if the Court applied intermediate scrutiny. Given the amount of crime in our society, the government's interest may even be considered compelling enough to survive strict scrutiny.\footnote{In Salerno the Court stated that the "government's interest in preventing crime by arrestees is both legitimate and compelling." United States v. Salerno, 481 U.S. 739 749 (1987).} Even if a statute allowing detention of insanity acquittees based on dangerousness met the requisite government interest, however, such a scheme would still fail because the means could not be narrowly drawn to fit the government's end of protecting society

Insanity acquittees, like civil committees, have been confined for the safety of themselves or the community and have not been convicted of wrongdoing. To determine whether a statute violates equal protection, the rights of insanity acquittees should thus be evaluated in comparison with the rights of civil committees.\footnote{See Ingber, supra note 122, at 290 (equating an insanity acquittal with a form of civil status). In both Jones and Foucha, the Court compared the procedural protections granted to civil committees with those granted to insanity acquittees for purposes of de-
The classification scheme allowing for greater confinement of insanity acquittees than of civil committees would be both over and under inclusive. Supra note 219. The statute would be underinclusive for the purpose of protecting society because civil committees can be more dangerous than insanity acquittees. Supra note 220. The statute would be overinclusive because inaccuracies in the prediction of dangerousness would lead to the continued commitment of insanity acquittees who were not dangerous. Supra note 221. Essentially, the only difference between the two classes of individuals may be that the state reached the civil committee before he committed a crime or because civil rather than criminal proceedings were instituted. Supra note 222. An insanity acquittee who is no longer mentally ill deserves the same procedural rights as a civil committee: the state should have to prove by a minimum standard of clear and convincing evidence that he or

219. The Court rarely invalidates an underinclusive law. Tribe, supra note 179, at 1448 n.11. Such schemes are validated on the basis that legislatures are allowed to solve problems "one step at a time." Railway Express Agency v. New York, 336 U.S. 106, 110 (1949). Arguably, however, an underinclusive law should be subject to real judicial review because of the possibility of leaving out the politically disadvantaged. See id. at 112-13 (Jackson, J., concurring) ("Nothing opens the door to arbitrary action so effectively as to allow officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected."). A law that is overinclusive is flawed because it does not protect individual liberties and should arguably be given intermediate scrutiny. See Tribe, supra note 179, at 1450 n.22 (stating that courts must display heightened sensitivity to the risk that overinclusive measures may rest upon stigmatizing stereotypes).

220. See Note, Commitment and Release of Persons Found Not Guilty By Reason of Insanity: A Georgia Perspective, 15 Ga. L. Rev. 1065, 1079 n.78 (1981) (stating that "[s]cientific studies, while not conclusive, do indicate that [insanity acquittees] as a group are not substantially more dangerous than their civilly committed counterparts"); see also Diamond, supra note 127, at 444-47 (citing statistical studies which demonstrate the unreliability of psychiatric predictions of dangerousness).

221. See supra note 128 and accompanying text (discussing the difficulties in predicting dangerousness).

222. Scherling, supra note 205, at 1256; see also German & Singer, supra note 9, at 1023 (pointing out that hospitalization, rather than being charged with a crime, may have been instituted for civil committees). Another difference may be that the civil committee was incompetent to stand trial and was therefore not tried. Cf. Dusky v. United States, 362 U.S. 402, 402 (1960) (holding that a defendant must be competent to stand trial before being convicted). Competence includes the ability of the defendant to understand what he or she is on trial for and to help prepare a defense. Id.
she is mentally ill and dangerous.\textsuperscript{223} Because there can be no proof of mental illness, continued confinement of an insanity acquittee on the basis of dangerousness alone would be a violation of the Equal Protection Clause.

The disparity in treatment between insanity acquittees who are no longer mentally ill and prisoners convicted of the same crime who have finished serving their sentences would also violate the Equal Protection Clause. Like the convicted criminal, an insanity acquittee has been charged with a criminal offense and given the procedural protections of the criminal process.\textsuperscript{224} A statute protecting society by confining insanity acquittees and not persons convicted of the same crime would be both over and underinclusive. The statute would be underinclusive because convicted criminals can be more dangerous than insanity acquittees and should therefore also be confined based on their dangerousness in order to protect society adequately.\textsuperscript{225} The statute would be overinclusive because many insanity acquittees are not as dangerous as many convicted criminals who are released following completion of a prison sentence.\textsuperscript{226}

In her concurring opinion in \textit{Foucha}, Justice O'Connor recognized a possible equal protection conflict between holding an insanity acquittee who is not mentally ill longer than a person convicted of the same crimes.\textsuperscript{227} O'Connor suggested that to remedy this conflict, a statute may have to provide that an insanity acquittee's sentence can be no longer than the prison sentence he or she would have served had he or she been found guilty.\textsuperscript{228} Even if an insanity acquittee were held no longer than if he or she had been found guilty, such a statute would, by its nature, still violate the

\textsuperscript{223} See Addington v. Texas, 441 U.S. 418, 432-33 (1979) (holding that a clear and convincing standard of proof is required to civilly commit an individual to a mental hospital); see also O'Connor v. Donaldson, 422 U.S. 563, 576 (1975) (holding that, to be civilly committed, a person must be both mentally ill and dangerous).

\textsuperscript{224} See Kirschner, supra note 129, at 261 (noting that until the insanity acquittee is found not guilty by reason of insanity, he or she is a criminal defendant).

\textsuperscript{225} See Note, supra note 187, at 1260-61 (arguing that "[a]s long as the dangerousness standard is a constant, dangerous persons not mentally ill are by definition just as dangerous (as a group) as dangerous persons who are mentally ill").

\textsuperscript{226} See E. Michael Coles & Faye E. Grant, \textit{Detention of Accused Persons Found Not Guilty by Reason of Insanity: Diversion or Preventive Treatment}, 10 HEALTH L. IN CANADA 239, 245 (1990) (explaining that the mentally ill are generally no more dangerous than people who are not mentally ill and "as a group, present a lower risk of committing a violent act against others").


\textsuperscript{228} Id.
Equal Protection Clause. There is no accurate way to determine the length of the sentence the insanity acquittee would have actually served in prison and, therefore, compared to random prisoners convicted of the same crime, the insanity acquittee may still be held longer. Prisoners can have their sentences reduced for good behavior or be released on shock probation.\textsuperscript{229} A person tried for the same crime also has the opportunity to plea bargain to receive a shortened sentence\textsuperscript{230} whereas an insanity acquittee may be detained for a predetermined time period.

The time an insanity acquittee actually is confined is not an adequate measure of the effect that being labeled "insane" has on his or her life. An insanity acquittee has a greater loss in liberty than a convicted criminal because he or she is branded both criminal and insane.\textsuperscript{231} If such a stigma could even be quantified, further detention based on dangerousness would pose a greater burden on an insanity acquittee than on a convicted criminal. Equating an insanity acquittees’ detention period with that of a convicted criminal may also reveal an intent to punish which would violate the Due Process Clause.\textsuperscript{232} Under both a due process and an equal protection analysis, a statute allowing continued commitment of insanity acquittees on the basis of dangerousness alone would be unconstitutional.

V CONCLUSION

There is a great danger that by making one constitutional exception for the commitment of dangerous insanity acquittees, the constitutional protections we all rely on will be eroded. "The most striking feature of preventive detention is its capacity to swallow up the whole of the criminal justice system."\textsuperscript{233} One "due process

\textsuperscript{229} See generally WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 26 (2d ed. 1992) (discussing sentence reduction and probation).
\textsuperscript{230} Id. § 21.1, at 900-01.
\textsuperscript{231} See Vitek v. Jones, 445 U.S. 480, 492 (1980) ("The loss of liberty produced by an involuntary commitment is more than a loss of freedom from confinement."); see also German & Singer, supra note 9, at 1011 (arguing that because of the stigma of being labeled crazy and criminal, insanity acquittees are often "in a worse position than if they had been convicted, sentenced, and imprisoned").
\textsuperscript{232} See supra notes 131-78 and accompanying text (discussing due process concerns).
\textsuperscript{233} Miller & Guggenheim, supra note 141, at 357; see also United States v. Melendez-Carron, 790 F.2d 984, 1000 (2d Cir.) (noting that even though under our Constitution the Government could not jail innocent people solely to prevent them from committing a crime, "such a police state approach would undoubtedly be a rational means of advancing the compelling state interest in public safety"), cert. dismissed, 479 U.S. 978
exception" can lead to another and another until there is nothing left of the protections of the Due Process Clause. In his dissenting opinion in Salerno, Justice Marshall stated that if the majority’s reasoning were applied, a hypothetical statute placing a curfew on the unemployed based on the determination that such people were dangerous would be constitutional. This kind of “police state” seems incompatible with fundamental human rights protected by the Constitution.

For now, the Supreme Court has upheld the rights of insanity acquittees not to be held solely on the basis of dangerousness. If a more narrowly defined statute than Louisiana’s comes before this Court, this may change. Although the opinions of lifetime appointees to the Supreme Court may be inflexible, we can influence the legislation passed by those we elect. Also, we can be aware that the stories reported by the media of “dangerous” insanity acquittees being released or of crimes committed by acquittees following release only reflect a small minority of the cases in which insanity acquittees are released. Finally, we can encourage the passage of legislation which imposes a stringent form of conditional release to ease societal fears. The constitutional protections afforded to everyone in this society are too important to compromise in order to seek relief from the perceived danger of a few

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(1986).
235. See, e.g., In re Young, 857 P.2d 989, 1006-07 (Wash. 1993) (finding support in Foucha to uphold a state statute permitting indefinite commitment in a mental health facility, based solely on dangerousness, of individuals who have already served sentences for sex crimes).