Approved: 1-19-93
Date

MINUTES OF THE HOUSE COMMITTEE ON JUDICIARY.

The meeting was called to order by Chairman, Representative Michael R. O'Neal at 3:45 p.m. on January 13, 1993 in room 313-S of the Statehouse.

All members were present except:

Representative Clyde Graeber - Excused
Representative David Heinemann - Excused

Committee staff present:

Jerry Donaldson, Legislative Research
Mike Heim, Legislative Research
Jill Wolters, Revisor of Statutes
Cindy Wulfkuhle, Committee Secretary

Conferees appearing before the Committee:

Helen Pedigo - Staff Attorney, Kansas Sentencing Commission
Gary Stotts - Secretary of Department of Corrections

Helen Pedigo, Staff Attorney, Kansas Sentencing Commission, appeared before the Committee to request a bill introduction. (Attachment #1) She specifically made reference that the sexual predator provision in Section 270(d)(3) and (4) of Chapter 239, 1992 Kansas Session Laws needed to be further reviewed.

The Kansas Sentencing Commission made the recommendation that Section 270(d)(3) and all of the wording after the first sentence of Section 270(d)(4) be set aside and referred to the Judicial Council for review.

Mike Heim, Legislative Research, stated that we could repeal this section from the current statute and refer it to the Judicial Council for further study. According to the Sentencing Commission, the way it is right now is not workable, they suggest we have constitutional problems.

Chairman O'Neal stated that we will take up Committee action on this tomorrow in terms of the specific bill introduction and will consider this as a formal request from the Sentencing Commission.

Gary Stotts, Secretary of Department of Corrections, appeared before the Committee and gave a status report on the prison population and Sentencing Guidelines. Towards the end of last session, populations had been increasing monthly in the facilities and they were rapidly approaching capacity. Fortunately, this has reversed itself and population began to decrease. The number of inmates were being paroled was the major factor. The past several months the prison population has remained constant. We are running 500 - 600 below capacity.

Stotts stated that the Sentencing Guidelines have a retro-active provision that allows the modification of some sentences. They are in the process of doing file review of all the inmates in the system to determine what the sentence would be if modified. The major factor is getting criminal history from the KBI. At this point they have reviewed 1/3 of the cases they have asked for. They have had training for the Unit Team's at each of the facilities, so they will be ready to implement the guidelines.

Minutes of the House Committee on Judiciary, Room 313-S, Statehouse, at 3:45 p.m. on January 13, 1993.

Jerry Donaldson, Legislative Research, briefed the Committee on the Kansas Supreme Court holding in State *ex rel.* Braun v. A Tract of Land 251 Kan. 685. In that case, which was decided in July of 1992, the Kansas Supreme Court held that forfeiture, under the Kansas Forfeiture Law, is a forced sale which is not specifically authorized by any of the exceptions contained in Article 15, Section 9 of the Kansas Constitution and therefore K.S.A. 1991 Supp. 65-4135(a)(7)(A) is unconstitutional.

In so holding, the Court indicated that Kansas has zealously protected the family rights in homestead property by liberally construing the homestead provision in order to safeguard its humanitarian and sound social and economic purpose; and that nothing less than the free consent of the resident owner of the homestead, and joint consent of the husband and wife, where the relationship exists, will suffice to alienate the homestead.

The Court indicated that the homestead cannot be subjected to forced sale to satisfy debts except in the following situations: (1) to pay taxes; (2) to pay obligations contracted for the purchase of the homestead; or (3) to pay obligations contracted for the erection of improvements on the homestead. However, if a lien is given by both the husband and wife, then the homestead is not exempt from a forced sale.

The Kansas statute attempted to create a presumption of consent where a drug transaction was involved. The Court however, struck down this as being a legal fiction.

Donaldson indicated that the interim committee recommended that the statute be amended to delete the provision regarding the forfeiture of homestead property to bring the statute into compliance with *State ex rel Braun.* This recommendation is incorporated into H.B. 2009 which has been introduced. (Attachment #2)

Chairman O'Neal pointed out to the Committee that the Committee will need to make a decision at some point in time as to whether to simply appeal the statute and leave nothing in its place or to approve introduction of a constitutional amendment that would allow for the forfeiture of property in the event of drug convictions.

Jerry Donaldson also briefed the Committee on the United States Supreme Court holding in Foucha v. Louisiana. (Attachment #3) In that case decided last year, the Supreme Court held that a Louisiana statute, similar to that which applies in Kansas, was unconstitutional with regard to the confinement of individuals found innocent by reason of insanity. The United Supreme Court held that the Louisiana statue, in so far as it permitted the indefinite detention of insanity acquittees, who were not mentally ill, but who did not prove that they would not be dangerous violated the due process clause of the United States Constitution. The Court further held that under the circumstances the State was not entitled to perpetuate confinement of a person solely on the basis of an anti-social personality disorder.

It was pointed out to the Committee that since the United States Supreme Court holding the Kansas Court of Appeals has held in The Matter of the Application of Carroll E. Noel, Jr., that the current statutory scheme used to determine the need for continued commitment of insanity acquittees violates the Due Process and Equal Protection clauses of the 14th Amendment by not placing the burden of proof upon the state to show by clear and convincing evidence both the committed person's continued insanity and dangerousness. Consequently, there is a need for the 1993 Legislature to amend our law relating to the commitment and release if a person is acquitted by reason of insanity and persons committed after convictions but prior to sentence.

Staff member Jill Wolters, Revisor of Statutes, then briefed the Committee on the provisions of SB 10, which was approved by introduction by the Special Committee on Judiciary. (Attachment #4) Wolters indicated that SB 10 was designed to meet the minimum requirements of the Courts decision and also addresses a concern raised by SRS regarding the circumstances under which persons are committed after convictions but prior to sentencing.

Meeting adjourned at 4:45 p.m. The next Committee meeting is scheduled for January 14, 1993 at 3:30 p.m. in room 313-S.

GUEST LIST

COMMITTEE: JUDICIARY DATE: 1/13/93

NAME (PLEASE PRINT)	ADDRESS	COMPANY/ORGANIZATION
Carla Dugger	KC MO	ACLU of KS
GINA SPADE	Wichita, Ks	
BEV BRADLEY	TOPEKA	KS Assoc of Counties
KEITH R. LANDIS	TOPEKA	CHRISTIAN SCIENCE COMMITTEE ON PUBLICATION FOR KS
JIM CLARK	Topeka	Kansas County & District Attorneys Assn
Jacqueline Cartwright	Topeka	KS Sentencing Comm
Evelyn Gates	Topeka	OJA
Paul Shelby	Topeka	OJA
Karen Spurlock	Topeka	Division of Budget
Chuck Simmons	Topeka	Dept. of Corrections
GARY STOTTS	Topeka	Dept of Corrections
Ron Smith	"	KS Bar Assoc
STEVE RODINA	TOPEKA	KHP
TERRY MAKE	"	KHP
John Peterson	"	
JIM COOPER	ST LOUIS MO	QUIKTRIP
Barbara Hadyszak	Leawood, Ks	NOW KS. Clinic Alliance

Testimony Provided

on Sentencing Guidelines

Section 270(d)(3) and (4)

to the

House Judiciary Committee

January 13, 1993

by

Helen J. Pedigo

Staff Attorney

Kansas Sentencing Commission

SUMMARY OF TESTIMONY

1. History of this section

2. Concerns regarding this section

   a. Subsection (3) gives the court the ability to order specific treatment once the defendant is sentenced to the Department of Corrections.

   b. Subsection (3) assumes the court retains jurisdiction after the offender is sentenced to the custody of the Department of Corrections.

   c. No procedure is defined regarding who may bring a motion to extend postrelease supervision period before the court for consideration.

   d. Four misdemeanors are included in subsection (4), sexual battery (class B misdemeanor), assault (class C misdemeanor), battery (class B misdemeanor), and unlawful restraint (class A misdemeanor).

3. Recommendation to set aside this provision and refer it to the Judicial Council for review

Thank you for the opportunity to testify before you today regarding the sexual predator provision inserted into Sentencing Guidelines (Section 270(d)(3) and (4) of Chapter 239, 1992 Kansas Session Laws, pp. 1378, 1379. See page 4 of this handout).

This provision was inserted during conference committee in the 1992 session. It was originally introduced in 1992 as Senate Bill 18, a way to impose civil commitment upon individuals convicted of sexually violent crimes who were not currently subject to civil commitment, whose crime sentence had expired or was about to, and who continue to be a danger to the public. A great amount of testimony was heard on the bill in 1991. However, a request to refer the bill to interim study that year was denied. The bill saw some testimony during the 1992 session and passed in the Senate, but dies in the House Judiciary committee. It was then inserted into Sentencing Guidelines at Conference Committee.

In reviewing Sentencing Guidelines, we have several concerns regarding this provision.

1. Subsection (3) gives the judge the ability to order specific treatment once the defendant is sentenced to the Department of Corrections. Presently, the court may recommend, but cannot order specific treatment. Even if the court has this ability, there is no procedure defined in the section as to how this will be accomplished.

2. Section (3) assumes the court retains jurisdiction after the offender is sentenced to the Department of Corrections custody. However, the court

loses its jurisdiction over the case 90 days after sentencing is concluded and then only for correction of clerical errors (Sentencing Guidelines, Section 21(i). See page 5 of this handout).

3. No procedure is defined regarding who may bring a motion to extend the offender's postrelease supervision period before the court for consideration. This also brings double jeopardy and Ex Post Facto problems into play, because offenders are, in essence, retried and resentenced. It is important to note the purpose of Senate Bill 18 was to provide treatment for the offender through civil commitment. However, the partial drafting of Senate Bill 18 into Sentencing Guidelines results in the offender's lengthened custody within the correctional system with the possibility of imprisonment for revocation. The offender's due process rights must not be violated.

4. Four misdemeanors are included in subsection (4), sexual battery (a class B misdemeanor), assault (a class C misdemeanor), battery (a class B misdemeanor), and unlawful restraint (a class A misdemeanor). Sentencing Guidelines provide sentences for felonies only. Therefore, it is impossible to have a postrelease supervision period for misdemeanors. At the very minimum, the misdemeanors should be excluded from the list of sexually violent crimes.

Our recommendation is that Section 270(d)(3) and all of the wording after the first sentence of section 270(d)(4) be set aside and referred to the Judicial Council for review.

No. 66,641

STATE OF KANSAS, ex rel. GLENN R. BRAUN, ELLIS COUNTY ATTORNEY, *Appellee*, v. A TRACT OF LAND IN THE NORTHWEST QUARTER OF SECTION FOUR, TOWNSHIP ELEVEN SOUTH, RANGE NINETEEN WEST OF THE 6TH P.M., ELLIS COUNTY, KANSAS, COMMONLY KNOWN AS 918 NORTH COUNTY LINE ROAD, ELLIS COUNTY, KANSAS. CLARENCE GILBERT, *Appellant*.

SYLLABUS BY THE COURT

1. CONSTITUTIONAL LAW—*Constitution—Paramount Law*. It is fundamental that the written constitution is paramount law since it emanates directly from the people.

2. HOMESTEAD—*Exemption from Forced Sale—Exceptions*. A homestead cannot be subjected to forced sale to satisfy debts except in the following situations: (1) to pay taxes; (2) to pay obligations contracted for the purchase of the homestead; or (3) to pay obligations contracted for the erection of improvements on the homestead. However, if a lien is given by the consent of both husband and wife, then the homestead is not exempt from a forced sale.

3. SAME—*Family Rights in Homestead Liberally Construed*. Kansas has zealously protected the family rights in homestead property by liberally construing the homestead provision in order to safeguard its humanitarian and sound social and economic purposes; and nothing less than the free consent of the resident owner of the homestead, and joint consent of husband and wife where the relationship exists, will suffice to alienate the homestead, except under the specified exceptions provided in the constitution.

4. SAME—*Constitutional Protections—Alienation of Homestead Rights—Specific Enumeration in Constitution*. The homestead provision specifically enumerates the only circumstances where a homestead claimant may be deprived of his or her status. The courts and the legislature do not have the power to create new exceptions to the constitutional homestead protections.

5. SAME—*Forfeiture of Homestead for Violations of Uniform Controlled Substances Act—Forfeiture is Unconstitutional Forced Sale*. The record is examined and it is *held*: (a) Forfeiture under K.S.A. 1991 Supp. 65-4135(a)(7)(A) is a forced sale which is not specifically authorized by any of the exceptions contained in Article 15, § 9 of the Kansas Constitution; and (b) K.S.A. 1991 Supp. 65-4135(a)(7)(A) is unconstitutional.

Review of the judgment of the Court of Appeals in 16 Kan. App. 2d 757, 829 P.2d 600 (1992). Appeal from Ellis district court; TOM SCOTT, judge.

Judgment of the Court of Appeals reversing the district court is affirmed. Judgment of the district court is reversed. Opinion filed October 30, 1992.

Richard D. Coffelt, of Hays, argued the cause and was on the brief for appellant.

Glenn R. Braun, county attorney, and *Robert T. Stephan*, attorney general, were on the brief for appellee.

Kyle G. Smith, assistant attorney general, argued the cause and was on the brief for *amicus curiae* Kansas Bureau of Investigation.

The opinion of the court was delivered by

ALLEGRUCCI, J.: This is a civil action involving the forfeiture of real property pursuant to K.S.A. 1991 Supp. 65-4135(a)(7)(A), a provision of the Uniform Controlled Substances Act. Clarence Gilbert, the property owner, entered a plea of no contest to one count of conspiracy to possess marijuana with intent to sell. The district court entered judgment subjecting Gilbert's real property to forfeiture. Gilbert appealed the forfeiture judgment on the ground that the property is his homestead and is protected from forfeiture by the Kansas Bill of Rights, § 12 and Article 15, § 9 of the Kansas Constitution. The Court of Appeals reversed. *State ex rel. Braun v. A Tract of Land*, 16 Kan. App. 2d 757, 829 P.2d 600 (1992). We granted the State's petition for review.

The State prefaces its argument with a reminder to this court that statutes enjoy a presumption of constitutionality. The State's argument centers on that portion of K.S.A. 1991 Supp. 65-4135(a)(7)(A) which provides that the claimant of a homestead who has been convicted of a violation of the uniform controlled substances act is "presumed to have *consented* to the forfeiture of the homestead by commission of the violation." (Emphasis added.) The State, as appellee, argues that the constitutional exemption for the homestead did not protect Gilbert because, pursuant to K.S.A. 1991 Supp. 65-4135(a)(7)(A), he had consented to forfeiture of his homestead by commission of the drug law violation.

Gilbert's argument is somewhat general in nature. He basically argues that the homestead exemption is a constitutional right not subject to intrusion by legislative action. He argues that the legislature lacks the authority or power to limit the homestead exemption. He argues that K.S.A. 1991 Supp. 65-4135(a)(7)(A) is

an attempt by the legislature to limit the homestead exemption granted to him by Article 15, § 9 of the Kansas Constitution.

The Court of Appeals concluded that K.S.A. 1991 Supp. 65-4135(a)(7)(A) is unconstitutional because a forfeiture is a forced sale which is not specifically authorized by Article 15, § 9 of the Kansas Constitution. In reversing the district court, the Court of Appeals relied on our decision in *State, ex rel., v. Mitchell*, 194 Kan. 463, 399 P.2d 556 (1965). In *Mitchell*, this court held that a provision of the intoxicating liquor law, K.S.A. 41-806, "insofar as it applies to the padlocking of a homestead, is in conflict with Article 15, section 9 [the homestead exemption], of our state constitution." 194 Kan. 463, Syl. ¶ 8. The State distinguishes *Mitchell* from the present case because K.S.A. 41-806 does not statutorily create consent.

The State is correct that the liquor law which Mitchell had violated contained no consent provision. In this respect it differs from 65-4135(a)(7)(A). In *Mitchell*, we stated that "the legislature has provided adequate remedies for punishment of [Mitchell] in the event she violates the injunction order issued or again violates the Kansas liquor control act." 194 Kan. at 467. These "adequate remedies" did not include consensual forfeiture of the homestead.

The Court of Appeals correctly held the forfeiture of Gilbert's real property, pursuant to K.S.A. 1991 Supp. 65-4135(a)(7)(A), was a forced sale in violation of Article 15, § 9 of the state constitution. Article 15, § 9 specifically provides for three exceptions to the homestead exemption. Forfeiture is not one of them. The State's argument that Gilbert consented to the forfeiture of his homestead by committing the drug law violation is without merit. In *Mitchell*, we said:

> "It suffices to say that Kansas has zealously protected the family rights in homestead property by liberally construing the homestead provision in order to safeguard its humanitarian and soundly social and economic purposes; *and nothing less than the free consent of the resident owner of the homestead*, and joint consent of husband and wife where the relation exists, will suffice to alienate the homestead, except under the specified exceptions provided in the constitution." (Emphasis added.) 194 Kan. at 466.

The legislature's attempt to create a statutory waiver or consent is a fiction, at best, and does not constitute a waiver of the

Attachment #2 - 3
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homestead exemption or a "free consent" to alienation of a homestead.

We have carefully reviewed the record and briefs of the parties and *amicus curiae* and adopt the opinion of the Court of Appeals.

The judgment of the Court of Appeals is affirmed. The judgment of the district court is reversed.

TERRY FOUCHA, Petitioner

v

LOUISIANA

504 US —, 118 L Ed 2d 437, 112 S Ct —

[No. 90-5844]

Argued November 4, 1991. Decided May 18, 1992.

Decision: Louisiana statute, permitting indefinite detention of insanity acquittees who are not mentally ill but who do not prove they would not be dangerous, held to violate Fourteenth Amendment's due process clause.

SUMMARY

A criminal defendant was found by a Louisiana trial court to have been insane at the time of the offense, and accordingly the court ruled that he was not guilty by reason of insanity. The person was committed to a psychiatric facility until such time as doctors recommended that he be released, and until further order of the court. When the superintendent of the facility and a three-member panel at the facility recommended that the person be conditionally discharged, the trial judge appointed a commission of two doctors, who reported that the person was in remission from mental illness, but that he had an antisocial personality, and that this condition was not a mental disease but was untreatable. One of the doctors testified that the person had been involved in several altercations at the facility and that the doctor would not feel comfortable in certifying that the person would not be a danger to himself or to other people. After it was stipulated that the other doctor would have given essentially the same testimony, the court ruled that the person was dangerous to himself and to others and ordered him returned to the facility. The Court of Appeals of Louisiana refused supervisory writs. The Supreme Court of Louisiana, affirming, held that (1) neither the due process clause nor the equal protection clause of the Federal Constitution's Fourteenth Amendment was violated by a Louisiana statutory provision under which an insanity acquittee who has been committed to a mental hospital, but whose release from the hospital has been recommended by a hospital review panel, may be returned to the hospital after a court hearing, regardless of whether the acquittee is then mentally

ill, if the acquittee fails to prove that the acquittee is not dangerous; and (2) the person had not carried the burden of proving that he was not dangerous (563 So 2d 1138).

On certiorari, the United States Supreme Court reversed. In that portion of the opinion by WHITE, J., joined by BLACKMUN, STEVENS, O'CONNOR, and SOUTER, JJ., which constituted the opinion of the court, it was held that (1) the Louisiana statute, insofar as it permitted the indefinite detention of insanity acquittees who were not mentally ill but who did not prove that they would not be dangerous, violated the due process clause; and (2) under the circumstances, the state was not entitled to perpetuate the confinement of the person in question solely on the basis of his antisocial personality, given that (a) even if such continued confinement were constitutionally permissible, keeping the person against his will in a mental institution was improper absent a determination in civil commitment proceedings of a current mental illness and dangerousness, (b) if the person could no longer be held as an insanity acquittee in a mental hospital, he was entitled to constitutionally adequate procedures to establish the grounds for his confinement, (c) the state had no punitive interest in imprisoning the person for the purposes of deterrence and retribution, and (d) the state had not explained why, if the person had committed criminal acts while at the psychiatric facility, the state's interest would not be vindicated by other permissible ways of dealing with patterns of criminal conduct. Also, WHITE, J., joined by BLACKMUN, STEVENS, and SOUTER, JJ., expressed the view that the Louisiana statute discriminated against the person in violation of the equal protection clause.

O'CONNOR, J., concurring in part and concurring in the judgment, (1) agreed that Louisiana could not, consistent with the due process clause, indefinitely confine the person in a mental facility on the ground that the person, although not mentally ill, might be dangerous to himself or to others if released; and (2) expressed the view that (a) it might be permissible for Louisiana to confine an insanity acquittee who had regained sanity if, unlike the situation in the case at hand, the nature and duration of detention were tailored to reflect pressing public safety concerns related to the acquittee's continuing dangerousness, (b) the court's holding placed no new restriction on the states' freedom to determine whether and to what extent mental illness should excuse criminal behavior, and (c) it was unnecessary for the court to reach equal protection issues on the facts presented.

KENNEDY, J., joined by REHNQUIST, Ch. J., dissenting, expressed the view that (1) the conditions for incarceration imposed by Louisiana were in accord with legitimate and traditional state interests, vindicated after full and fair procedures; and (2) the majority impermissibly conflated the standards for civil and criminal commitment.

THOMAS, J., joined by REHNQUIST, Ch. J., and SCALIA, J., dissenting,

expressed the view that nothing in the Constitution, the Supreme Court's precedents, or society's traditions authorized the court to invalidate the Louisiana scheme either (1) on the ground that the scheme provided for the continued confinement of insanity acquittees who, although still dangerous, have recovered their sanity, or (2) on the ground that the scheme provided for the indefinite confinement of sane insanity acquittees in a mental facility.

TOTAL CLIENT-SERVICE LIBRARY® REFERENCES

21 Am Jur 2d, Criminal Law §§ 88-94

8 Am Jur Pl & Pr Forms (Rev), Criminal Procedure, Forms 211, 212

8 Am Jur Proof of Facts 1, Mental Disorder and Incapacity; 28 Am Jur Proof of Facts 547, Confinement to Mental Institution

26 Am Jur Trials 97, Representing the Mentally Ill: Civil Commitment Proceedings; 27 Am Jur Trials 1, Representing the Mentally Disabled Criminal Defendant

USCS, Constitution, Amendment 14

L Ed Digest, Constitutional Law § 528.3

L Ed Index, Hospitals and Asylums; Incompetent or Insane Persons

Index to Annotations, Incompetent and Insane Persons

Auto-Cite®: Cases and annotations referred to herein can be further researched through the Auto-Cite® computer-assisted research service. Use Auto-Cite to check citations for form, parallel references, prior and later history, and annotation references.

ANNOTATION REFERENCES

Supreme Court's views as to concept of "liberty" under due process clauses of Fifth and Fourteenth Amendments. 47 L Ed 2d 975.

Validity of conditions imposed when releasing person committed to institution as consequence of acquittal of crime on ground of insanity. 2 ALR4th 934.

Modern status of rules as to standard of proof required in civil commitment proceedings. 97 ALR3d 780.

Release of one committed to institution as consequence of acquittal of crime on ground of insanity. 95 ALR2d 54.

HEADNOTES

Classified to U.S. Supreme Court Digest, Lawyers' Edition

Constitutional Law § 528.3 — due process — indefinite confinement — insanity acquittee — dangerousness

1a-1g. A state statute, under which persons who have been found not guilty of a crime by reason of insanity may be indefinitely detained in a mental institution if such persons are not mentally ill but do not prove that they would not be dangerous to others, violates the due process clause of the Federal Constitution's Fourteenth Amendment; thus, a state violates an insanity acquittee's due process liberty interest in being freed from indefinite confinement in a mental facility, where (1) at a trial court hearing to determine whether the acquittee should be discharged from the facility, it is established that (a) the acquittee has an antisocial personality, (b) the acquittee's condition, though not a mental disease, is untreatable, and (c) the acquittee had been involved in several altercations at the psychiatric facility, and (2) a doctor testifies at the hearing that he is unable to certify that the acquittee would not be dangerous, but (3) the state does not contend that the acquittee was mentally ill at the time of the hearing; under such circumstances, the state is not entitled to perpetuate the acquittee's confinement solely on the basis of his antisocial personality, given that (1) even if such continued confinement were constitutionally permissible, keeping the acquittee against his will in a mental institution is improper absent a determination in civil commitment proceedings of a current mental illness and dangerousness, (2) if the person in question can no longer be held as an insanity acquittee in a mental hospital, he is entitled to constitutionally adequate procedures to establish the grounds for his confinement, (3) the state has no punitive interest in imprisoning the acquittee for the purposes of deterrence and retribution, since the acquittee was not convicted but was exempted from criminal responsibility by reason of his acquittal, and (4) the state has not explained why, if the acquittee committed criminal acts while at the psychiatric facility, the state's interest would not be vindicated by the ordinary criminal processes involving charge and conviction, the use of enhanced sentences for recidivists, and other permissible ways of dealing with patterns of criminal conduct. (Kennedy, J., Rehnquist, Ch. J., and Thomas and Scalia, JJ., dissented from this holding.)

Constitutional Law §§ 528.3, 830.7 — due process — commitment for insanity — burden of proof

2a-2d. Although a state, in order to commit an individual to a mental institution in a civil proceeding, is required by the due process clause of the Federal Constitution's Fourteenth Amendment to prove by clear and convincing evidence that the person is mentally ill and that the person requires hospitalization for the person's own welfare and protection of others, a state may, consistent with the due process clause, commit a person without satisfying such a burden with respect to mental illness and dangerousness where the person is charged with having committed a crime and is found not guilty by reason of insanity, given

that it may be properly inferred that at the time of the verdict, the person is still mentally ill and dangerous; for due process purposes, the period of time during which an insanity acquittee may properly be held in a mental institution is not measured by the length of a sentence that might have been imposed had the acquittee been convicted; rather, the acquittee may be held until the acquittee is either not mentally ill or not dangerous. (Kennedy, J., Rehnquist, Ch. J., and Thomas and Scalia, JJ., dissented in part from this holding.)

Evidence § 649 — psychiatric opinion — mental illness

3a, 3b. Although psychiatry may not be an exact science and psychiatrists may widely disagree on what constitutes a mental illness, psychiatric opinion is reliable enough to permit the courts (1) to base civil commitments on clear and convincing medical evidence that a person is mentally ill and dangerous, and (2) to base release decisions on qualified testimony that the committed person is no longer mentally ill or dangerous.

Evidence § 650 — psychiatric opinion — insanity of accused

4a, 4b. Although psychiatry may not be an exact science and psychiatrists may widely disagree on what constitutes a mental illness, psychiatric opinion is reliable enough (1) for the state not to punish a person who, by a preponderance of the evidence, is found to have been insane at the time that the person committed a criminal act, and (2) for the state not to try a person who is, at the time, found incompetent to understand the proceedings.

Criminal Law § 70 — punishment — validity

5a, 5b. Although the states have wide discretion in determining punishment for convicted offenders, the Federal Constitution's Eighth Amendment insures that such discretion is not unlimited.

Constitutional Law § 525 — due process — commitment

6a, 6b. Commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection under the Federal Constitution; due process requires that the nature of commitment bear some reasonable relation to the purpose for which the individual is committed.

Constitutional Law § 514 — substantive due process

7. The due process clause of the Federal Constitution's Fourteenth Amendment contains a substantive component that bars certain arbitrary, wrongful government actions regardless of the fairness of the procedures used to implement such actions.

Constitutional Law § 921 — police powers — crimes

8. A state may, pursuant to its police power, imprison convicted criminals for the purposes of deterrence and retribution.

Criminal Law § 1 — constitutional limits

9. There are federal constitutional limitations on the conduct that a state may criminalize.

Constitutional Law § 853.4 — due process — pretrial detention

10. For purposes of due process under the Federal Constitution, liberty is the norm, and detention prior to trial or without trial is the carefully limited exception.

Criminal Law § 53 — commitment as mentally ill

11a, 11b. A convicted criminal may not be held as a mentally ill person where the requirements for civil commitment, which requirements would not permit further detention based on the criminal's dangerousness alone, are not followed. (Kennedy, J., Rehnquist, Ch. J., and Thomas and Scalia, JJ., dissented from this holding.)

SYLLABUS BY REPORTER OF DECISIONS

Under Louisiana law, a criminal defendant found not guilty by reason of insanity may be committed to a psychiatric hospital. If a hospital review committee thereafter recommends that the acquittee be released, the trial court must hold a hearing to determine whether he is dangerous to himself or others. If he is found to be dangerous, he may be returned to the hospital whether or not he is then mentally ill. Pursuant to this statutory scheme, a state court ordered petitioner Foucha, an insanity acquittee, returned to the mental institution to which he had been committed, ruling that he was dangerous on the basis of, inter alia, a doctor's testimony that he had recovered from the drug induced psychosis from which he suffered upon commitment and was "in good shape" mentally; that he has, however, an antisocial personality, a condition that is not a mental disease and is untreatable; that he had been involved in several altercations at the institution; and that, accordingly, the doctor would not "feel comfortable in certifying that he would not be a danger to himself or to other people." The State Court of Appeals refused supervisory writs, and the State Supreme Court affirmed, holding, among other things, that Jones v United States, 463 US 354, 77 L Ed 2d 694, 103 S Ct 3043, did not require Foucha's release and that the Due Process Clause of the Fourteenth Amendment was not violated by the statutory provision permitting confinement of an insanity acquittee based on dangerousness alone.

Held: The judgment is reversed.

563 So 2d 1138, reversed.

Justice White delivered the opinion of the Court with respect to Parts I and II, concluding that the Louisiana statute violates the Due Process Clause because it allows an insanity acquittee to be committed to a mental institution until he is able to demonstrate that he is not dangerous to himself and others, even though he does not suffer from any mental illness. Although Jones, supra, acknowledged that an insanity acquittee could be committed, the Court also held, as a matter of due process, that he is entitled to release when he has recovered his sanity or is no longer dangerous, id., at 368, 77 L Ed 2d 694, 103 S Ct 3043, i. e., he may be held as long as he is both mentally ill and dangerous, but no longer. Here, since the State does not contend that Foucha was mentally ill at the time of the trial court's hearing, the basis for holding him in a psychiatric facility as an insanity acquittee has disappeared, and the State is no longer entitled to hold him on that basis. There are at least three difficulties with the State's attempt to perpetuate his confinement on the basis of his antisocial personality. First, even if his

continued confinement were constitutionally permissible, keeping him against his will in a mental institution is improper absent a determination in civil commitment proceedings of current mental illness and dangerousness. Vitek v Jones, 445 US 480, 492, 63 L Ed 2d 552, 100 S Ct 1254. Due process requires that the nature of commitment bear some reasonable relation to the purpose for which the individual is committed. See, e.g., Jones v United States, supra, at 368, 77 L Ed 2d 694, 103 S Ct 3043. Second, if he can no longer be held as an insanity acquittee in a mental hospital, he is entitled to constitutionally adequate procedures to establish the grounds for his confinement. Jackson v Indiana, 406 US 715, 32 L Ed 2d 435, 92 S Ct 1845. Third, the substantive component of the Due Process Clause bars certain arbitrary, wrongful government actions regardless of the fairness of the procedures used to implement them. Zinermon v Burch, 494 US 113, 125, 108 L Ed 2d 100, 110 S Ct 975. Although a State may imprison convicted criminals for the purposes of deterrence and retribution, Louisiana has no such interest here, since Foucha was not convicted and may not be punished. Jones, 463 US, at 369, 77 L Ed 2d 694, 103 S Ct 3043. Moreover, although the State may confine a person if it shows by clear and convincing evidence that he is mentally ill and dangerous, id., at 362, 77 L Ed 2d 694, 103 S Ct 3043, Louisiana has not carried that burden here. Furthermore, United States v Salerno, 481 US 739, 95 L Ed 2d 697, 107 S Ct 2095—which held that in certain narrow circumstances pretrial detainees who pose a danger to others or the community may be subject to limited confinement—does not save the state statute. Unlike the sharply focused statutory scheme at issue in Salerno, the Louisiana scheme is not carefully limited.

White, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I and II, in which Blackmun, Stevens, O'Connor, and Souter, JJ., joined, and an opinion with respect to Part III, in which Blackmun, Stevens, and Souter, JJ., joined. O'Connor, J., filed an opinion concurring in part and concurring in the judgment. Kennedy, J., filed a dissenting opinion, in which Rehnquist, C. J., joined. Thomas, J., filed a dissenting opinion, in which Rehnquist, C. J., and Scalia, J., joined.

APPEARANCES OF COUNSEL

James P. Manasseh argued the cause for petitioner.
Pamela S. Moran argued the cause for respondent.

OPINION OF THE COURT

Justice **White** delivered the opinion of the Court, except as to Part III.

[1a] When a defendant in a criminal case pending in Louisiana is found not guilty by reason of insanity, he is committed to a psychiatric hospital unless he proves that he is not dangerous. This is so whether or not he is then insane. After commitment, if the acquittee or the superintendent begins release proceedings, a review panel at the hospital makes a written report on the patient's mental condition and whether he can be released without danger to himself

or others. If release is recommended, the court must hold a hearing to determine dangerousness; the acquittee has the burden of proving that he is not dangerous. If found to be dangerous, the acquittee may be returned to the mental institution whether or not he is then mentally ill. Petitioner contends that this scheme denies him due process and equal protection because it allows a person acquitted by reason of insanity to be committed to a mental institution until he is able to demonstrate that he is not dangerous to himself and others, even though he does not suffer from any mental illness.

I

Petitioner Terry Foucha was charged by Louisiana authorities with aggravated burglary and illegal discharge of a firearm. Two medical doctors were appointed to conduct a pretrial examination of Foucha. The doctors initially reported, and the trial court initially found, that Foucha lacked mental capacity to proceed, App 8-9, but four months later the trial court found Foucha competent to stand trial. Id., at 4-5. The doctors reported that Foucha was unable to distinguish right from wrong and was insane at the time of the offense.[1] On October 12, 1984, the trial court ruled that Foucha was not guilty by reason of insanity, finding that he "is unable to appreciate the usual, natural and probable consequences of his acts; that he is unable to distinguish right from wrong; that he is a menace to himself and others; and that he was insane at the time of the commission of the above crimes and that he is presently insane." Id., at 6. He was committed to the East Feliciana Forensic Facility until such time as doctors recommend that he be released, and until further order of the court. In 1988, the superintendent of Feliciana recommended that Foucha be discharged or released. A three-member panel was convened at the institution to determine Foucha's current condition and whether he could be released or placed on probation without being a danger to others or himself. On March 21, 1988, the panel reported that there had been no evidence of mental illness since admission and recommended that Foucha be conditionally discharged.[2] The trial judge appointed a two-member sanity commission made up of the same two doctors who had conducted the pretrial examination. Their written report stated that Foucha "is presently in remission from mental illness [but] [w]e cannot certify that he would not constitute a menace to himself or others if released." Id., at 12. One of

1. Louisiana law provides: "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." La Rev Stat Ann § 14:14 (West 1986). Justice Kennedy disregards the fact that the State makes no claim that Foucha was criminally responsible or that it is entitled to punish Foucha as a criminal.

2. The panel unanimously recommended that petitioner be conditionally discharged with recommendations that he (1) be placed on probation; (2) remain free from intoxicating and mind-altering substances; (3) attend a Substance Abuse clinic on a regular basis; (4) submit to regular and random urine drug screening; and (5) be actively employed or seeking employment. (App 10-11.)

Although the panel recited that it was charged with determining dangerousness, its report did not expressly make a finding in that regard.

the doctors testified at a hearing that upon commitment Foucha probably suffered from a drug induced psychosis but that he had recovered from that temporary condition; that he evidenced no signs of psychosis or neurosis and was in "good shape" mentally; that he has, however, an antisocial personality, a condition that is not a mental disease and that is untreatable. The doctor also testified that Foucha had been involved in several altercations at Feliciana and that he, the doctor, would not "feel comfortable in certifying that [Foucha] would not be a danger to himself or to other people." Id., at 18.

After it was stipulated that the other doctor, if he were present, would give essentially the same testimony, the court ruled that Foucha was dangerous to himself and others and ordered him returned to the mental institution. The Court of Appeals refused supervisory writs, and the State Supreme Court affirmed, holding that Foucha had not carried the burden placed upon him by statute to prove that he was not dangerous, that our decision in Jones v United States, 463 US 354, 77 L Ed 2d 694, 103 S Ct 3043 (1983), did not require Foucha's release, and that neither the Due Process Clause nor the Equal Protection Clause was violated by the statutory provision permitting confinement of an insanity acquittee based on dangerousness alone.

Because the case presents an important issue and was decided by the court below in a manner arguably at odds with prior decisions of this Court, we granted certiorari. 499 US ——, 113 L Ed 2d 465, 111 S Ct 1412 (1991).

II

[2a, 3a, 4a] Addington v Texas, 441 US 418, 60 L Ed 2d 323, 99 S Ct 1804 (1979), held that to commit an individual to a mental institution in a civil proceeding, the State is required by the Due Process Clause to prove by clear and convincing evidence the two statutory preconditions to commitment: that the person sought to be committed is mentally ill and that he requires hospitalization for his own welfare and protection of others. Proof beyond reasonable doubt was not required, but proof by preponderance of the evidence fell short of satisfying due process.[3]

[2b, 5a] When a person charged with having committed a crime is found not guilty by reason of insanity, however, a State may commit

3. **[3b, 4b]** Justice Thomas in dissent complains that Foucha should not be released based on psychiatric opinion that he is not mentally ill because such opinion is not sufficiently precise—because psychiatry is not an exact science and psychiatrists widely disagree on what constitutes a mental illness. That may be true, but such opinion is reliable enough to permit the courts to base civil commitments on clear and convincing medical evidence that a person is mentally ill and dangerous and to base release decisions on qualified testimony that the committee is no longer mentally ill or dangerous. It is also reliable enough for the State not to punish a person who by a preponderance of the evidence is found to have been insane at the time he committed a criminal act, to say nothing of not trying a person who is at the time found incompetent to understand the proceedings. And more to the point, medical predictions of dangerousness seem to be reliable enough for the dissent to permit the State to continue to hold Foucha in a mental institution, even where the psychiatrist would say no more than that he would hesitate to certify that Foucha would not be dangerous to himself or others.

that person without satisfying the Addington burden with respect to mental illness and dangerousness. Jones v United States, supra. Such a verdict, we observed in Jones, "establishes two facts: (i) the defendant committed an act that constitutes a criminal offense, and (ii) he committed the act because of mental illness," id., at 363, 77 L Ed 2d 694, 103 S Ct 3043, an illness that the defendant adequately proved in this context by a preponderance of the evidence. From these two facts, it could be properly inferred that at the time of the verdict, the defendant was still mentally ill and dangerous and hence could be committed.[4]

[1b] We held, however, that "(t)he committed acquittee is entitled to release when he has recovered his sanity or is no longer dangerous," id., at 368, 77 L Ed 2d 694, 103 S Ct 3043; i. e. the acquittee may be held as long as he is both mentally ill and dangerous, but no longer. We relied on O'Connor v Donaldson, 422 US 563, 45 L Ed 2d 396, 95 S Ct 2486 (1975), which held as a matter of due process that it was unconstitutional for a State to continue to confine a harmless, mentally ill person. Even if the initial commitment was permissible, "it could not constitutionally continue after that basis no longer existed." Id., at 575, 45 L Ed 2d 396, 95 S Ct 2486. In the summary of our holdings in our opinion we stated that "the Constitution permits the Government, on the basis of the insanity judgment, to confine him to a mental institution until such time as he has regained his sanity or is no longer a danger to himself or society." Jones, 463 US, at 368, 370, 77 L Ed 2d 694, 103 S Ct 3043.[5] The court below was in error

4. [2c] Justice Kennedy's assertion that we overrule the holding of Jones described in the above paragraph is fanciful at best. As that paragraph plainly shows, we do not question and fully accept that insanity acquittees may be initially held without complying with the procedures applicable to civil committees. As is evident from the ensuing paragraph of the text, we are also true to the further holding of Jones that both Justice Thomas and Justice Kennedy reject: that the period of time during which an insanity acquittee may be held in a mental institution is not measured by the length of a sentence that might have been imposed had he ~~been convicted; rather,~~ the acquittee may be held until he is either not mentally ill or not dangerous. Both Justices would permit the indefinite detention of the acquittee, although the State concedes that he is not mentally ill and although the doctors at the mental institution recommend his release, for no reason other than that a psychiatrist hesitates to certify that the acquittee would not be dangerous to himself or others.

Justice Kennedy asserts that we should not entertain the proposition that a verdict of not guilty by reason of insanity differs from a conviction. Post, at ——, 118 L Ed 2d, at 460-461. Jones, however, involved a case where the accused had been "found, beyond a reasonable doubt, to have committed a criminal act." 463 US, at 364, 77 L Ed 2d 694, 103 S Ct 3043. We did not find this sufficient to negate any difference between a conviction and an insanity acquittal. Rather, we observed that a person convicted of crime may of course be punished. But "[d]ifferent considerations underlie commitment of an insanity acquittee. As he was not convicted, he may not be punished." Id., at 369, 77 L Ed 2d 694, 103 S Ct 3043.

[5b] Justice Kennedy observes that proof beyond reasonable doubt of the commission of a ~~criminal act permits a State to~~ incarcerate and hold the ~~offender on any reasonable~~ basis. There is no doubt that the States have wide discretion in determining punishment for convicted offenders, but the Eighth Amendment insures that discretion is not unlimited. The Justice cites no authority, but surely would have if it existed, for the proposition that a defendant convicted of a crime and sentenced to a term of years, may nevertheless be held indefinitely because of the likelihood that he will commit other crimes.

5. Justice Thomas, dissenting, suggests that there was no issue of the standards for re-

in characterizing the above language from Jones as merely an interpretation of the pertinent statutory law in the District of Columbia and as having no constitutional significance. In this case, Louisiana does not contend that Foucha was mentally ill at the time of the trial court's hearing. Thus, the basis for holding Foucha in a psychiatric facility as an insanity acquittee has disappeared, and the State is no longer entitled to hold him on that basis. O'Connor, supra, at 574-575, 45 L Ed 2d 396, 95 S Ct 2486.

[1c, 6a] The State, however, seeks to perpetuate Foucha's confinement at Feliciana on the basis of his antisocial personality which, as evidenced by his conduct at the facility, the court found rendered him a danger to himself or others. There are at least three difficulties with this position. First, even if his continued confinement were constitutionally permissible, keeping Foucha against his will in a mental institution is improper absent a determination in civil commitment proceedings of current mental illness and dangerousness. In Vitek v Jones, 445 US 480, 63 L Ed 2d 552, 100 S Ct 1254 (1980), we held that a convicted felon serving his sentence has a liberty interest, not extinguished by his confinement as a criminal, in not being transferred to a mental institution and hence classified as mentally ill without appropriate procedures to prove that he was mentally ill. "The loss of liberty produced by an involuntary commitment is more than a loss of freedom from confinement." Id. at 492, 63 L Ed 2d 552, 100 S Ct 1254. Due process requires that the nature of commitment bear some reasonable relation to the purpose for which the individual is committed. Jones, supra, at 368, 77 L Ed 2d 694, 103 S Ct 3043; Jackson v Indiana, 406 US 715, 738, 32 L Ed 2d 435, 92 S Ct 1845 (1972). Here, according to the testimony given at the hearing in the trial court, Foucha is not suffering from a mental disease or illness. If he is to be held, he should not be held as a mentally ill person. See Jones, supra, at 368, 77 L Ed 2d 694, 103 S Ct 3043; Jackson, supra, at 738, 32 L Ed 2d 435, 92 S Ct 1845. Cf. United States v Salerno, 481 US 739, 747-748, 95 L Ed 2d 697, 107 S Ct 2095 (1987); Schall v Martin, 467 US 253, 270, 81 L Ed 2d 207, 104 S Ct 2403 (1984).

[1d] Second, if Foucha can no longer be held as an insanity acquittee in a mental hospital, he is entitled to constitutionally adequate procedures to establish the grounds for his confinement. Jackson v Indiana, supra, indicates as much. There, a person under criminal charges was found incompetent to stand trial and was committed until he regained his sanity. It was later determined that nothing could be done to cure the detainee, who was a deaf mute. The

lease before us in Jones. The issue in that case, however, was whether an insanity acquittee "must be released because he has been hospitalized for a period longer than he might have served in prison had he been convicted," Jones, 463 US, at 356, 77 L Ed 2d 694, 103 S Ct 3043; and in the course of deciding that issue in the negative, we said that the detainee could be held until he was no longer mentally ill or no longer dangerous, regardless of how long a prison sentence might have been. We noted in footnote 11 that Jones had not sought a release based on nonillness or nondangerousness, but as indicated in the text, we twice announced the outside limits on the detention of insanity acquittees. The Justice would "wish" away this aspect of Jones, but that case merely reflected the essence of our prior decisions.

state courts refused to order his release. We reversed, holding that the State was entitled to hold a person for being incompetent to stand trial only long enough to determine if he could be cured and become competent. If he was to be held longer, the State was required to afford the protections constitutionally required in a civil commitment proceeding. We noted, relying on Baxstrom v Herold, 383 US 107, 15 L Ed 2d 620, 86 S Ct 760 (1966), that a convicted criminal who allegedly was mentally ill was entitled to release at the end of his term unless the State committed him in a civil proceeding. " '[T]here is no conceivable basis for distinguishing the commitment of a person who is nearing the end of a penal term from all other civil commitments.' " Jackson v Indiana, supra, at 724, 32 L Ed 2d 435, 92 S Ct 1845, quoting Baxstrom, supra, at 111-112, 15 L Ed 2d 620, 86 S Ct 760.

[6b, 7] Third, "the Due Process Clause contains a substantive component that bars certain arbitrary, wrongful government actions 'regardless of the fairness of the procedures used to implement them.' " Zinermon v Burch, 494 US 113, 125, 108 L Ed 2d 100, 110 S Ct 975 (1990). See also Salerno, supra, at 746, 95 L Ed 2d 697, 107 S Ct 2095; Daniels v Williams, 474 US 327, 331, 88 L Ed 2d 662, 106 S Ct 662 (1986). Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action. Youngberg v Romeo, 457 US 307, 316, 73 L Ed 2d 28, 102 S Ct 2452 (1982). "It is clear that commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection." Jones, supra, at 361, 77 L Ed 2d 694, 103 S Ct 3043 (internal quotation marks omitted.) We have always been careful not to "minimize the importance and fundamental nature" of the individual's right to liberty. Salerno, supra, at 750, 95 L Ed 2d 697, 107 S Ct 2095.

[1e, 8, 9] A State, pursuant to its police power, may of course imprison convicted criminals for the purposes of deterrence and retribution. But there are constitutional limitations on the conduct that a State may criminalize. See, e.g., Brandenburg v Ohio, 395 US 444, 23 L Ed 2d 430, 89 S Ct 1827 (1969); Robinson v California, 370 US 660, 8 L Ed 2d 758, 82 S Ct 1417 (1962). Here, the State has no such punitive interest. As Foucha was not convicted, he may not be punished. Jones, supra, at 369, 77 L Ed 2d 694, 103 S Ct 3043. Here, Louisiana has by reason of his acquittal exempted Foucha from criminal responsibility as La Rev Stat Ann § 14:14 (West 1986) requires. See n 1, supra.

[2d] The State may also confine a mentally ill person if it shows "by clear and convincing evidence that the individual is mentally ill and dangerous," Jones, 463 US, at 362, 77 L Ed 2d 694, 103 S Ct 3043. Here, the State has not carried that burden; indeed, the State does not claim that Foucha is now mentally ill.

We have also held that in certain narrow circumstances persons who pose a danger to others or to the community may be subject to limited confinement and it is on these cases, particularly United States v Salerno, supra, that the State relies in this case.

Salerno, unlike this case, involved pretrial detention. We observed in Salerno that the "government's in-

terest in preventing crime by arrestees is both legitimate and compelling," id., at 749, 95 L Ed 2d 697, 107 S Ct 2095, and that the statute involved there was a constitutional implementation of that interest. The statute carefully limited the circumstances under which detention could be sought to those involving the most serious of crimes (crimes of violence, offenses punishable by life imprisonment or death, serious drug offenses, or certain repeat offenders), id., at 747, 95 L Ed 2d 697, 107 S Ct 2095, and was narrowly focused on a particularly acute problem in which the government interests are overwhelming. Id., at 750, 95 L Ed 2d 697, 107 S Ct 2095. In addition to first demonstrating probable cause, the government was required, in a "full-blown adversary hearing," to convince a neutral decisionmaker by clear and convincing evidence that no conditions of release can reasonably assure the safety of the community or any person, i. e., that the "arrestee presents an identified and articulable threat to an individual or the community." Id., at 751, 95 L Ed 2d 697, 107 S Ct 2095. Furthermore, the duration of confinement under the Act was strictly limited. The arrestee was entitled to a prompt detention hearing and the maximum length of pretrial detention was limited by the "stringent time limitations of the Speedy Trial Act." Id., at 747, 95 L Ed 2d 697, 107 S Ct 2095. If the arrestee were convicted, he would be confined as a criminal proved guilty; if he were acquitted, he would go free. Moreover, the Act required that detainees be housed, to the extent practicable, in a facility separate from persons awaiting or serving sentences or awaiting appeal. Id., at 747-748, 95 L Ed 2d 697, 107 S Ct 2095.

[1f] Salerno does not save Louisiana's detention of insanity acquittees who are no longer mentally ill. Unlike the sharply focused scheme at issue in Salerno, the Louisiana scheme of confinement is not carefully limited. Under the state statute, Foucha is not now entitled to an adversary hearing at which the State must prove by clear and convincing evidence that he is demonstrably dangerous to the community. Indeed, the State need prove nothing to justify continued detention, for the statute places the burden on the detainee to prove that he is not dangerous. At the hearing which ended with Foucha's recommittal, no doctor or any other person testified positively that in his opinion Foucha would be a danger to the community, let alone gave the basis for such an opinion. There was only a description of Foucha's behavior at Feliciana and his antisocial personality, along with a refusal to certify that he would not be dangerous. When directly asked whether Foucha would be dangerous, Dr. Ritter said only "I don't think I would feel comfortable in certifying that he would not be a danger to himself or to other people." App 18. This, under the Louisiana statute, was enough to defeat Foucha's interest in physical liberty. It is not enough to defeat Foucha's liberty interest under the Constitution in being freed from indefinite confinement in a mental facility.

Furthermore, if Foucha committed criminal acts while at Feliciana, such as assault, the State does not explain why its interest would not be vindicated by the ordinary criminal processes involving charge and conviction, the use of enhanced sentences for recidivists, and other per-

missible ways of dealing with patterns of criminal conduct. These are the normal means of dealing with persistent criminal conduct. Had they been employed against Foucha when he assaulted other inmates, there is little doubt that if then sane he could have been convicted and incarcerated in the usual way.

It was emphasized in Salerno that the detention we found constitutionally permissible was strictly limited in duration. 481 US, at 747, 95 L Ed 2d 697, 107 S Ct 2095; see also Schall, 467 US, at 269, 81 L Ed 2d 207, 104 S Ct 2403. Here, in contrast, the State asserts that because Foucha once committed a criminal act and now has an antisocial personality that sometimes leads to aggressive conduct, a disorder for which there is no effective treatment, he may be held indefinitely. This rationale would permit the State to hold indefinitely any other insanity acquittee not mentally ill who could be shown to have a personality disorder that may lead to criminal conduct. The same would be true of any convicted criminal, even though he has completed his prison term. It would also be only a step away from substituting confinements for dangerousness for our present system which, with only narrow exceptions and aside from permissible confinements for mental illness, incarcerates only those who are proved beyond reasonable doubt to have violated a criminal law.

[1g, 10, 11a] "In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." United States v Salerno, supra, at 755, 95 L Ed 2d 697, 107 S Ct 2095. The narrowly focused pretrial detention of arrestees permitted by the Bail Reform Act was found to be one of those carefully limited exceptions permitted by the Due Process Clause. We decline to take a similar view of a law like Louisiana's, which permits the indefinite detention of insanity acquittees who are not mentally ill but who do not prove they would not be dangerous to others.[6]

6. **[11b]** Justice Thomas' dissent firmly embraces the view that the State may indefinitely hold an insanity acquittee who is found by a court to have been cured of his mental illness and who is unable to prove that he would not be dangerous. This would be so even though, as in this case, the court's finding of dangerousness is based solely on the detainee's antisocial personality that apparently has caused him to engage in altercations from time to time. The dissent, however, does not challenge the holding of our cases that a convicted criminal may not be held as a mentally ill person without following the requirements for civil commitment, which would not permit further detention based on dangerousness alone. Yet it is surely strange to release sane but very likely dangerous persons who have committed a crime knowing precisely what they were doing but continue to hold indefinitely an insanity detainee who committed a criminal act at a time when, as found by a court, he did not know right from wrong. The dissent's rationale for continuing to hold the insanity acquittee would surely justify treating the convicted felon in the same way, and if put to it, it appears that the dissent would permit it. But as indicated in the text, this is not consistent with our present system of justice.

Justice Thomas relies heavily on the American Law Institute's (ALI) Model Penal Code and Commentary. However, his reliance on the Model Code is misplaced and his quotation from the Commentary is importantly incomplete. Justice Thomas argues that the Louisiana statute follows "the current provisions" of the Model Penal Code, but he fails to mention that § 4.08 is "current" only in the sense that the Model Code has not been amended since its approval in 1962, and therefore fails to incorporate or reflect substantial developments in the relevant decisional law during the intervening three decades. Thus, although this is nowhere noted in the dissent, the Explanatory Notes ex-

III

It should be apparent from what has been said earlier in this opinion that the Louisiana statute also discriminates against Foucha in violation of the Equal Protection Clause of the Fourteenth Amendment. Jones established that insanity acquittees may be treated differently in some respects from those persons subject to civil commitment, but Foucha, who is not now thought to be insane, can no longer be so classified. The State nonetheless insists on holding him indefinitely because he at one time committed a criminal act and does not now prove he is not dangerous. Louisiana law, however, does not provide for similar confinement for other classes of persons who have committed criminal acts and who cannot later prove they would not be dangerous. Criminals who have completed their prison terms, or are about to do so, are an obvious and large category of such

pressly concede that related and similarly "current" provisions of Article 4 are unconstitutional. See, e.g., ALI, Model Penal Code, § 4.06(2) Explanatory Note, (1985)(noting that § 4.06(2), permitting indefinite commitment of a mentally incompetent defendant without the finding required for civil commitment, is unconstitutional in light of Jackson v Indiana, 406 US 715, 32 L Ed 2d 435, 92 S Ct 1845 (1972), and other decisions of this Court). Nor indeed does Justice Thomas advert to the 1985 Explanatory Note to § 4.08 itself, even though that Note directly questions the constitutionality of the provision that he so heavily relies on; it acknowledges, as Justice Thomas does not, that "it is now questionable whether a state may use the single criterion of dangerousness to grant discharge if it employs a different standard for release of persons civilly committed." Justice Thomas also recites from the Commentary regarding § 4.08. However, the introductory passage that Justice Thomas quotes prefaces a more important passage that he omits. After explaining the rationale for the questionable provision, the Commentary states: "Constitutional doubts . . . exist about the criterion of dangerousness. If a person committed civilly must be released when he is no longer suffering mental illness, it is questionable whether a person acquitted on grounds of mental disease or defect excluding responsibility can be kept in custody solely on the ground that he continues to be dangerous." Id., § 4.08, Comment 3, p 260. Thus, while Justice Thomas argues that the Louisiana statute is not a relic of a bygone age, his principal support for this assertion is a 30-year-old provision of the Model Penal Code whose constitutionality has since been openly questioned by the ALI Reporters themselves.

Similarly unpersuasive is Justice Thomas' claim regarding the number of States that allow confinement based on dangerousness alone. First, this assertion carries with it an obvious but unacknowledged corollary—the vast majority of States do not allow confinement based on dangerousness alone. Second, Justice Thomas' description of these state statutes also is importantly incomplete. Even as he argues that a scheme of confinement based on dangerousness alone is not a relic of a bygone age, Justice Thomas neglects to mention that two of the statutes he relies on have been amended, as Justice O'Connor notes. Nor does Justice Thomas acknowledge that at least two of the other statutes he lists as permitting confinement based on dangerousness alone have been given a contrary construction by highest state courts, which have found that the interpretation for which Justice Thomas cites them would be impermissible. See State v Fields, 77 NJ 282, 390 A2d 574 (1978); In re Lewis, 403 A2d 1115, 1121 (Del 1979), quoting Mills v State, 256 A2d 752, 757, n 4 (Del 1969) ("By necessary implication, the danger referred to must be construed to relate to mental illness for the reason that dangerousness without mental illness could not be a valid basis for indeterminate confinement in the State hospital."). See also ALI, Model Penal Code, supra, at 260 (although provisions may on their face allow for confinement based on dangerousness alone, in virtually all actual cases the questions of dangerousness and continued mental disease are likely to be closely linked). As the widespread rejection of the standard for confinement that Justice Thomas and Justice Kennedy argue for demonstrates, States are able to protect both the safety of the public and the rights of the accused without challenging foundational principles of American criminal justice and constitutional law.

persons. Many of them will likely suffer from the same sort of personality disorder that Foucha exhibits. However, state law does not allow for their continuing confinement based merely on dangerousness. Instead, the State controls the behavior of these similarly situated citizens by relying on other means, such as punishment, deterrence, and supervised release. Freedom from physical restraint being a fundamental right, the State must have a particularly convincing reason, which it has not put forward, for such discrimination against insanity acquittees who are no longer mentally ill.

Furthermore, in civil commitment proceedings the State must establish the grounds of insanity and dangerousness permitting confinement by clear and convincing evidence. Addington, 441 US, at 425-433, 60 L Ed 2d 323, 99 S Ct 1804. Similarly, the State must establish insanity and dangerousness by clear and convincing evidence in order to confine an insane convict beyond his criminal sentence, when the basis for his original confinement no longer exists. See Jackson, 406 US, at 724, 32 L Ed 2d 435, 92 S Ct 1845; Baxstrom, 383 US, at 111-112, 15 L Ed 2d 620, 86 S Ct 760. Cf. Humphrey v Cady, 405 US 504, 510-511, 31 L Ed 2d 394, 92 S Ct 1048 (1972). However, the State now claims that it may continue to confine Foucha, who is not now considered to be mentally ill, solely because he is deemed dangerous, but without assuming the burden of proving even this ground for confinement by clear and convincing evidence. The court below gave no convincing reason why the procedural safeguards against unwarranted confinement which are guaranteed to insane persons and those who have been convicted may be denied to a sane acquittee, and the State has done no better in this Court.

For the foregoing reasons the judgment of the Louisiana Supreme Court is reversed.

So ordered.

SEPARATE OPINIONS

Justice **O'Connor,** concurring in part and concurring in the judgment.

Louisiana asserts that it may indefinitely confine Terry Foucha in a mental facility because, although not mentally ill, he might be dangerous to himself or to others if released. For the reasons given in Part II of the Court's opinion, this contention should be rejected. I write separately, however, to emphasize that the Court's opinion addresses only the specific statutory scheme before us, which broadly permits indefinite confinement of sane insanity acquittees in psychiatric facilities. This case does not require us to pass judgment on more narrowly drawn laws that provide for detention of insanity acquittees, or on statutes that provide for punishment of persons who commit crimes while mentally ill.

I do not understand the Court to hold that Louisiana may never confine dangerous insanity acquittees after they regain mental health. Under Louisiana law, defendants who carry the burden of proving insanity by a preponderance of the evidence will "escape punishment," but this

affirmative defense becomes relevant only after the prosecution establishes beyond a reasonable doubt that the defendant committed criminal acts with the required level of criminal intent. State v Marmillion, 339 So 2d 788, 796 (La 1976). Although insanity acquittees may not be incarcerated as criminals or penalized for asserting the insanity defense, see Jones v United States, 463 US 354, 368-369, and n 18, 77 L Ed 2d 694, 103 S Ct 3043 (1983), this finding of criminal conduct sets them apart from ordinary citizens.

We noted in Jones that a judicial determination of criminal conduct provides "concrete evidence" of dangerousness. Id., at 364, 77 L Ed 2d 694, 103 S Ct 3043. By contrast, " '[t]he only certain thing that can be said about the present state of knowledge and therapy regarding mental disease is that science has not reached finality of judgment . . . .' " Id., at 365, 77 L Ed 2d 694, 103 S Ct 3043, n 13 (quoting Greenwood v United States, 350 US 366, 375, 100 L Ed 412, 76 S Ct 410 (1956)). Given this uncertainty, "courts should pay particular deference to reasonable legislative judgments" about the relationship between dangerous behavior and mental illness. Jones, supra, at 365, n 13, 77 L Ed 2d 694, 103 S Ct 3043. Louisiana evidently has determined that the inference of dangerousness drawn from a verdict of not guilty by reason of insanity continues even after a clinical finding of sanity, and that judgment merits judicial deference.

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. See United States v Salerno, 481 US 739, 747-751, 95 L Ed 2d 697, 107 S Ct 2095 (1987); Schall v Martin, 467 US 253, 264-271, 81 L Ed 2d 207, 104 S Ct 2403 (1984); Jackson v Indiana, 406 US 715, 738, 32 L Ed 2d 435, 92 S Ct 1845 (1972). Although the dissenters apparently disagree, see post, at ——, 118 L Ed 2d, at 461-462 (Kennedy, J., dissenting); post, at ——, 118 L Ed 2d, at 477 (Thomas, J., dissenting), I think it clear that acquittees could not be confined as mental patients absent some medical justification for doing so; in such a case the necessary connection between the nature and purposes of confinement would be absent. See Vitek v Jones, 445 US 480, 491-494, 63 L Ed 2d 552, 100 S Ct 1254 (1980) (discussing infringements upon liberty unique to commitment to a mental hospital); Jones, supra, at 384-385, 77 L Ed 2d 694, 103 S Ct 3043 (Brennan, J., dissenting) (same). Nor would it be permissible to treat all acquittees alike, without regard for their particular crimes. For example, the strong interest in liberty of a person acquitted by reason of insanity but later found sane might well outweigh the governmental interest in detention where the only evidence of dangerousness is that the acquittee committed a non-violent or relatively minor crime. Cf. Salerno, supra, at 750, 95 L Ed 2d 697, 107 S Ct 2095 (interest in pretrial detention is "overwhelming" where only individuals arrested for "a specific category of extremely serious offenses" are detained and "Congress specifically found that these individuals are far more likely to be responsible for

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

The second point to be made about the Court's holding is that it places no new restriction on the States' freedom to determine whether and to what extent mental illness should excuse criminal behavior. The Court does not indicate that States must make the insanity defense available. See Idaho Code § 18-207(a) (1987) (mental condition not a defense to criminal charges); Mont. Code Ann. § 46-14-102 (1991) (evidence of mental illness admissible to prove absence of state of mind that is an element of the offense). It likewise casts no doubt on laws providing for prison terms after verdicts of "guilty but mentally ill." See, e. g., Del Code Ann, Tit 11, § 408(b) (1987); Ill Rev Stat, ch 38, ¶ 1005-2-6 (1989); Ind Code § 35-36-2-5 (Supp 1991). If a State concludes that mental illness is best considered in the context of criminal sentencing, the holding of this case erects no bar to implementing that judgment.

Finally, it should be noted that the great majority of States have adopted policies consistent with the Court's holding. Justice Thomas claims that 11 States have laws comparable to Louisiana's, see post, at ——— —, n 9, 118 L Ed 2d, at 469, but even this number overstates the case. Two of the States Justice Thomas mentions have already amended their laws to provide for the release of acquittees who do not suffer from mental illness but may be dangerous. See Cal Penal Code Ann § 1026.2 (West Supp 1992) (effective Jan. 1, 1994); Va Code § 19.2-182.5 (Supp 1991) (effective July 1, 1992). Three others limit the maximum duration of criminal commitment to reflect the acquittee's specific crimes and hold acquittees in facilities appropriate to their mental condition. See NJ Stat Ann §§ 2C:4-8(b)(3) (West 1982), 30:4-24.2 (West 1981); Wash Rev Code §§ 10.77.020(3), 10.77.110(1) (1990); Wis Stat §§ 971.17(1), (3)(c) (Supp 1991). I do not understand the Court's opinion to render such laws necessarily invalid.

Of the remaining six States, two do not condition commitment upon proof of every element of a crime. Kan Stat Ann § 22-3428(1) (Supp 1990) ("A finding of not guilty by reason of insanity shall constitute a finding that the acquitted person committed an act constituting the offense charged . . ., except that the person did not possess the requisite criminal intent"); Mont Code Ann § 46-14-301(1) (1991) (allowing commitment of persons "found not guilty for the reason that due to a mental disease or defect the defendant could not have a particular state of mind that is an essential element of the offense charged"). Such laws might well fail even under the dissenters' theories. See post, at ——— —, 118 L Ed 2d, at 455–457 (Kennedy, J., dissenting); post, at ——, 118 L Ed 2d, at 463 (Thomas, J., dissenting).

Today's holding follows directly from our precedents and leaves the States appropriate latitude to care

for insanity acquittees in a way consistent with public welfare. Accordingly, I concur in Parts I and II of the Court's opinion and in the judgment of the Court.

Justice **Kennedy**, with whom The **Chief Justice** joins, dissenting.

As incarceration of persons is the most common and one of the most feared instruments of state oppression and state indifference, we ought to acknowledge at the outset that freedom from this restraint is essential to the basic definition of liberty in the Fifth and Fourteenth Amendments of the Constitution. I agree with the Court's reaffirmation of this first premise. But I submit with all respect that the majority errs in its failure to recognize that the conditions for incarceration imposed by the State in this case are in accord with legitimate and traditional state interests, vindicated after full and fair procedures. The error results from the majority's primary reliance on cases, such as O'Connor v Donaldson, 422 US 563, 45 L Ed 2d 396, 95 S Ct 2486 (1975), and Addington v Texas, 441 US 418, 60 L Ed 2d 323, 99 S Ct 1804 (1979), which define the due process limits for involuntary civil commitment. The majority relies on these civil cases while overruling without mention one of the holdings of our most recent and significant precedent from the criminal context, Jones v United States, 463 US 354, 77 L Ed 2d 694, 103 S Ct 3043 (1983).

This is a criminal case. It began one day when petitioner, brandishing a .357 revolver, entered the home of a married couple, intending to steal. Brief for Respondent 1. He chased them out of their home and fired on police officers who confronted him as he fled. Id., at 1-2. Petitioner was apprehended and charged with aggravated burglary and the illegal use of a weapon in violation of La Rev Stat Ann §§ 14:60 and 14:94 (West 1986). 563 So 2d 1138, 1138-1139 (La 1990). There is no question that petitioner committed the criminal acts charged. Petitioner's response was to deny criminal responsibility based on his mental illness when he committed the acts. He contended his mental illness prevented him from distinguishing between right and wrong with regard to the conduct in question.

Mental illness may bear upon criminal responsibility, as a general rule, in either of two ways: First, it may preclude the formation of mens rea, if the disturbance is so profound that it prevents the defendant from forming the requisite intent as defined by state law; second, it may support an affirmative plea of legal insanity. See W. LaFave & A. Scott, Jr., 1 Substantive Criminal Law § 4.1(b), pp 429-430 (1986) (hereinafter LaFave & Scott). Depending on the content of state law, the first possibility may implicate the State's initial burden, under In re Winship, 397 US 358, 364, 25 L Ed 2d 368, 90 S Ct 1068 (1970), to prove every element of the offense beyond a reasonable doubt, while the second possibility does not. Patterson v New York, 432 US 197, 206, 53 L Ed 2d 281, 97 S Ct 2319 (1977); Leland v Oregon, 343 US 790, 795-796, 96 L Ed 1302, 72 S Ct 1002 (1952).

The power of the States to determine the existence of criminal insanity following the establishment of the underlying offense is well estab-

lished. In Leland v Oregon, we upheld a state law that required the defendant to prove insanity beyond a reasonable doubt, observing that this burden had no effect on the State's initial burden to prove every element of the underlying criminal offense.

> "[T]he burden of proof of guilt, and of all the necessary elements of guilt, was placed squarely upon the State. As the jury was told, this burden did not shift, but rested upon the State throughout the trial, just as, according to the instructions, appellant was presumed to be innocent until the jury was convinced beyond a reasonable doubt that he was guilty. The jurors were to consider separately the issue of legal sanity per se—an issue set apart from the crime charged, to be introduced by a special plea and decided by a special verdict." Id., at 795-796, 96 L Ed 1302, 72 S Ct 1002 (footnotes omitted).

As then-Justice Rehnquist explained the reasoning of Leland, "the existence or nonexistence of legal insanity bears no necessary relationship to the existence or nonexistence of the required mental elements of the crime." Mullaney v Wilbur, 421 US 684, 706, 44 L Ed 2d 508, 95 S Ct 1881 (1975) (concurring opinion); see also Patterson v New York, supra, at 206, 53 L Ed 2d 281, 97 S Ct 2319 (defense of insanity considered only after the facts constituting the crime have been proved beyond a reasonable doubt); Rivera v Delaware, 429 US 877, 50 L Ed 2d 160, 97 S Ct 226 (1976) (dismissing challenge to a Leland instruction for want of a substantial federal question).

Louisiana law follows the pattern in Leland with clarity and precision. Pursuant to La Code Crim Proc Ann, Art 552 (West 1981), the petitioner entered a dual plea of not guilty and not guilty by reason of insanity. The dual plea, which the majority does not discuss or even mention, ensures that the Winship burden remains on the State to prove all the elements of the crime. The Louisiana Supreme Court confirms this in a recent case approving the following jury instruction on the defense of insanity:

> " 'In this case the accused has entered a dual plea of not guilty and not guilty by reason of insanity. As a consequence of such a plea, you must first determine whether or not the accused committed a crime [on which you have been instructed]. If you are convinced beyond a reasonable doubt that the accused did commit any of these crimes, any one of these crimes, then you must proceed to a determination of whether he was sane at the time the crime was committed and thereby criminally responsible for committing it.' " State v Marmillion, 339 So 2d 788, 796 (La 1976).

The State's burden is unaffected by an adjudication without trial, such as occurred here, because state law requires the trial court to determine, before accepting the plea, that there is a factual basis for it. La Code Crim Proc Ann, Art 558.1 (West Supp 1992). There is no dispute that the trial court complied with state law and made the requisite findings.

Compliance with the standard of proof beyond a reasonable doubt is the defining, central feature in criminal adjudication, unique to the criminal law. Addington, 441 US, at

428, 60 L Ed 2d 323, 99 S Ct 1804. Its effect is at once both symbolic and practical, as a statement of values about respect and confidence in the criminal law, Winship, 397 US, at 364, 25 L Ed 2d 368, 90 S Ct 1068, and an apportionment of risk in favor of the accused, id., at 369-372, 25 L Ed 2d 368, 90 S Ct 1068 (Harlan, J., concurring). We have often subjected to heightened due process scrutiny, with regard to both purpose and duration, deprivations of physical liberty imposed before a judgment is rendered under this standard. See, e.g., United States v Salerno, 481 US 739, 750-751, 95 L Ed 2d 697, 107 S Ct 2095 (1987); Jackson v Indiana, 406 US 715, 738, 32 L Ed 2d 435, 92 S Ct 1845 (1972); cf. Jones v United States, 463 US, at 363-364, and n 12, 77 L Ed 2d 694, 103 S Ct 3043 ("The proof beyond a reasonable doubt that the acquittee committed a criminal act distinguishes this case from Jackson v Indiana, 406 US 715, 32 L Ed 2d 435, 92 S Ct 1845 (1972) . . . . In Jackson there never was any affirmative proof that the accused had committed criminal acts . . ."). The same heightened due process scrutiny does not obtain, though, once the State has met its burden of proof and obtained an adjudication. It is well settled that upon compliance with In re Winship, the State may incarcerate on any reasonable basis. Chapman v United States, 500 US ——, ——, 114 L Ed 2d 524, 111 S Ct 1919 (1991); Williams v Illinois, 399 US 235, 243, 26 L Ed 2d 586, 90 S Ct 2018 (1970).

As Justice Thomas observes in his dissent, the majority errs by attaching "talismanic significance" to the fact that petitioner has been adjudicated "not guilty by reason of insanity." Post, at ——, n 13, 118 L Ed 2d, at 473. A verdict of not guilty by reason of insanity is neither equivalent nor comparable to a verdict of not guilty standing alone. We would not allow a State to evade its burden of proof by replacing its criminal law with a civil system in which there is no presumption of innocence and the defendant has the burden of proof. Nor should we entertain the proposition that this case differs from a conviction of guilty because petitioner has been adjudged "not guilty by reason of insanity," rather than "guilty but insane." Petitioner has suggested no grounds on which to distinguish the liberty interests involved or procedural protections afforded as a consequence of the State's ultimate choice of nomenclature. The due process implications ought not to vary under these circumstances. This is a criminal case in which the State has complied with the rigorous demands of In re Winship.

The majority's failure to recognize the criminal character of these proceedings and its concomitant standards of proof leads it to conflate the standards for civil and criminal commitment in a manner not permitted by our precedents. O'Connor v Donaldson, 422 US 563, 45 L Ed 2d 396, 95 S Ct 2486 (1975), and Addington v Texas, supra, define the due process limits of involuntary civil commitment. Together they stand for the proposition that in civil proceedings the Due Process Clause requires the State to prove both insanity and dangerousness by clear and convincing evidence. See O'Connor, supra, at 575, 45 L Ed 2d 396, 95 S Ct 2486; Addington, supra, at 433, 60 L Ed 2d 323, 99 S Ct 1804. Their precedential value in the civil context is beyond

question. But it is an error to apply these precedents, as the majority does today, to criminal proceedings. By treating this criminal case as a civil one, the majority overrules a principal holding in Jones v United States, 463 US, at 354, 77 L Ed 2d 694, 103 S Ct 3043.

In Jones we considered the system of criminal commitment enacted by Congress for the District of Columbia. Id., at 356-358, 77 L Ed 2d 694, 103 S Ct 3043. Congress provided for acquittal by reason of insanity only after the Government had shown, beyond a reasonable doubt, that the defendant had committed the crimes charged. Id., at 363-364, and n 12, 77 L Ed 2d 694, 103 S Ct 3043. In cases of acquittal by reason of insanity, District law provided for automatic commitment followed by periodic hearings, where the insanity acquittee was given the opportunity to prove that he was no longer insane or dangerous. Id., at 357-358, and n 3, 77 L Ed 2d 694, 103 S Ct 3043. Petitioner in Jones contended that Addington and O'Connor applied to criminal proceedings as well as civil, requiring the Government to prove insanity and dangerousness by clear and convincing evidence before commitment. We rejected that contention. In Jones we distinguished criminal from civil commitment, holding that the Due Process Clause permits automatic incarceration after a criminal adjudication and without further process. Id., at 366, 77 L Ed 2d 694, 103 S Ct 3043. The majority today in effect overrules that holding. It holds that "keeping Foucha against his will in a mental institution is improper absent a determination in civil commitment proceedings of current mental illness and dangerousness." Ante, at ——, 118 L Ed 2d, at 447; see also ante, at ——–——, ——–——, 118 L Ed 2d, at 448, 451–452. Our holding in Jones was clear and to the contrary. We should not so disregard controlling precedent.

Our respect for the Court's opinion in Jones should be informed by the recognition that its distinction between civil and criminal commitment is both sound and consistent with long-established precedent. First, as described above, the procedural protections afforded in a criminal commitment surpass those in a civil commitment; indeed, these procedural protections are the most stringent known to our law. Second, proof of criminal conduct in accordance with In re Winship eliminates the risk of incarceration "for mere 'idiosyncratic behavior,' [because a] criminal act by definition is not 'within a range of conduct that is generally acceptable.' " Jones, supra, at 367, 77 L Ed 2d 694, 103 S Ct 3043, quoting Addington, supra, at 426-427, 60 L Ed 2d 323, 99 S Ct 1804. The criminal law defines a discrete category of conduct for which society has reserved its greatest opprobrium and strictest sanctions; past or future dangerousness, as ascertained or predicted in civil proceedings, is different in kind. Third, the State presents distinct rationales for these differing forms of commitment: In the civil context, the State acts in large part on the basis of its parens patriae power to protect and provide for an ill individual, while in the criminal context, the State acts to ensure the public safety. See Addington, 441 US, at 426, 60 L Ed 2d 323, 99 S Ct 1804; S. Brakel, J. Parry, & B. Weiner, The Mentally Disabled and the Law 24-25 (3d ed 1985). A dis-

missive footnote, see ante, at ——, n 4, 118 L Ed 2d, at 446, cannot overcome these fundamental defects in the majority's opinion.

The majority's opinion is troubling at a further level, because it fails to recognize or account for profound differences between clinical insanity and state-law definitions of criminal insanity. It is by now well established that insanity as defined by the criminal law has no direct analog in medicine or science. "[T]he divergence between law and psychiatry is caused in part by the legal fiction represented by the words 'insanity' or 'insane,' which are a kind of lawyer's catchall and have no clinical meaning." J. Biggs, The Guilty Mind 117 (1955); see also 2 J. Bouvier, Law Dictionary 1590 (8th ed 1914) ("The legal and the medical ideas of insanity are essentially different, and the difference is one of substance"). Consistent with the general rule that the definition of both crimes and defenses is a matter of state law, see Patterson v New York, supra, at 210, 53 L Ed 2d 281, 97 S Ct 2319, the States are free to recognize and define the insanity defense as they see fit.

> "Nothing could be less fruitful than for this Court to be impelled into defining some sort of insanity test in constitutional terms. . . . It is simply not yet the time to write into the Constitution formulas cast in terms whose meaning, let alone relevance, is not yet clear either to doctors or to lawyers." Powell v Texas, 392 US 514, 536-537, 20 L Ed 2d 1254, 88 S Ct 2145 (1968) (Marshall, J., plurality opinion); see also id., at 545, 20 L Ed 2d 1254, 88 S Ct 2145 (the Constitution does not impose on the States any particular test of criminal responsibility) (Black, J., concurring).

As provided by Louisiana law, and consistent with both federal criminal law and the law of a majority of the States, petitioner was found not guilty by reason of insanity under the traditional M'Naghten test. See La Rev Stat Ann § 14:14 (West 1986); 18 USC § 17 [18 USCS § 17]; M'Naghten's Case, 10 Cl & Fin 200, 8 Eng Rep 718 (1843); 1 LaFave & Scott § 4.2, at 436. Louisiana law provides a traditional statement of this 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." La Rev Stat Ann § 14:14 (West 1986).

Because the M'Naghten test for insanity turns on a finding of criminal irresponsibility at the time of the offense, it is quite wrong to place reliance on the fact, as the majority does, that Louisiana does not contend that petitioner is now insane. See ante, at ——, 118 L Ed 2d, at 447. This circumstance should come as no surprise, since petitioner was competent at the time of his plea, 563 So 2d, at 1139, and indeed could not have entered a plea otherwise, see Drope v Missouri, 420 US 162, 171, 43 L Ed 2d 103, 95 S Ct 896 (1975). Present sanity would have relevance if petitioner had been committed as a consequence of civil proceedings, in which dangerous conduct in the past was used to predict similar conduct in the future. It has no relevance here, however. Petitioner has not been confined based on predictions about future behavior

but rather for past criminal conduct. Unlike civil commitment proceedings, which attempt to divine the future from the past, in a criminal trial whose outcome turns on M'Naghten, findings of past insanity and past criminal conduct possess intrinsic and ultimate significance.

The system here described is not employed in all jurisdictions. Some have supplemented the traditional M'Naghten test with the so-called "irresistible impulse" test, see 1 LaFave & Scott § 4.1, at 427-428; others have adopted a test proposed as part of the Model Penal Code, see ibid.; and still others have abolished the defense altogether, see Idaho Code § 18-207(a) (1987); Mont Code Ann § 46-14-102 (1992). Since it is well accepted that the States may define their own crimes and defenses, see supra, at ——, 118 L Ed 2d, at 459, the point would not warrant further mention, but for the fact that the majority loses sight of it. In describing our decision in Jones, the majority relies on our statement that a verdict of not guilty by reason of insanity establishes that the defendant "'committed the act because of mental illness.'" Ante, at ——— ——, 118 L Ed 2d, at 446, quoting Jones, 463 US, at 363, 77 L Ed 2d 694, 103 S Ct 3043. That was an accurate statement in Jones but not here. The defendant in Jones was acquitted under the Durham test for insanity, which excludes from punishment criminal conduct that is the product of a mental disease or defect. See Bethea v United States, 365 A2d 64, 69, n 11 (1976); see also Durham v United States, 94 US App DC 228, 240-241, 214 F2d 862, 874-875 (1954). In a Durham jurisdiction, it would be fair to say, as the Court did in Jones, that a defendant acquitted by reason of insanity "committed the act because of mental illness." Jones, supra, at 363, 77 L Ed 2d 694, 103 S Ct 3043. The same cannot be said here, where insanity under M'Naghten proves only that the defendant could not have distinguished between right and wrong. It is no small irony that the aspect of Jones on which the majority places greatest reliance, and indeed cites as an example of its adherence to Jones, has no bearing on the Louisiana statute at issue here. See ante, at ——— ——, 118 L Ed 2d, at 446, and n 4.

The establishment of a criminal act and of insanity under the M'Naghten regime provides a legitimate basis for confinement. Although Louisiana has chosen not to punish insanity acquittees, the State has not surrendered its interest in incapacitative incarceration. The Constitution does not require any particular model for criminal confinement, Harmelin v Michigan, 501 US ——, ——, 115 L Ed 2d 836, 111 S Ct 2680 (1991) (Kennedy, J., concurring in judgment) ("The federal and state criminal systems have accorded different weights at different times to the penological goals of retribution, deterrence, incapacitation, and rehabilitation"); Williams v New York, 337 US 241, 246, 93 L Ed 1337, 69 S Ct 1079 (1949), and upon compliance with In re Winship, the State may incarcerate on any reasonable basis, see supra, at ——, 118 L Ed 2d, at 457. Incapacitation for the protection of society is not an unusual ground for incarceration. "[I]solation of the dangerous has always been considered an important function of the criminal law," Powell v Texas, 392 US, at 539, 20 L Ed 2d 1254, 88 S Ct 2145 (Black, J., concur-

ring), and insanity acquittees are a special class of offenders proved dangerous beyond their own ability to comprehend. The wisdom of incarceration under these circumstances is demonstrated by its high level of acceptance. Every State provides for discretionary or mandatory incarceration of insanity acquittees, 1 LaFave & Scott § 4.6(a), at 510, and as Justice Thomas observes in his dissent, provisions like those in Louisiana, predicated on dangerousness alone, have been endorsed by the Model Penal Code and adopted by the legislatures of no fewer than 11 other States. See post, at ——, 118 L Ed 2d, at 468–469, and nn 8 and 9.

It remains to be seen whether the majority, by questioning the legitimacy of incapacitative incarceration, puts in doubt the confinement of persons other than insanity acquittees. Parole release provisions often place the burden of proof on the prisoner to prove his lack of dangerousness. To use a familiar example, under the federal parole system in place until the enactment of the Sentencing Guidelines, an inmate could not be released on parole unless he established that his "release would not jeopardize the public welfare." 18 USC § 4206(a)(2) (1982 ed) [18 USCS § 4206(a)(2)], repealed 98 Stat 2027; see also 28 CFR § 2.18 (1991). This requirement reflected "the incapacitative aspect of the use of imprisonment which has the effect of denying the opportunity for future criminality, at least for a time." U. S. Dept. of Justice, United States Parole Commission Rules and Procedures Manual 69 (July 24, 1989). This purpose is consistent with the parole release provisions of Alabama, Colorado, Hawaii, Massachusetts, Michigan, New York, and the District of Columbia, to name just a few. See N. Cohen & J. Gobert, Law of Probation and Parole § 3.05, p 109, and n 103 (1983). It is difficult for me to reconcile the rationale of incapacitative incarceration, which underlies these regimes, with the opinion of the majority, which discounts its legitimacy.

I also have difficulty with the majority's emphasis on the conditions of petitioner's confinement. In line with Justice O'Connor's concurring opinion, see ante, at ——, 118 L Ed 2d, at 453, the majority emphasizes the fact that petitioner has been confined in a mental institution, see ante, at ——, ——, ——, 118 L Ed 2d, at 447, 449, suggesting that his incarceration might not be unconstitutional if undertaken elsewhere. The majority offers no authority for its suggestion, while Justice O'Connor relies on a reading of Vitek v Jones, 445 US 480, 63 L Ed 2d 552, 100 S Ct 1254 (1980), which was rejected by the Court in Jones v United States. See ante, at ——, 118 L Ed 2d, at 453, citing Jones v United States, supra, at 384-385, 77 L Ed 2d 694, 103 S Ct 3043 (Brennan, J., dissenting). The petitioner did not rely on this argument at any point in the proceedings, and we have not the authority to make the assumption, as a matter of law, that the conditions of petitioner's confinement are in any way infirm. Ours is not a case, as in Vitek v Jones, where the State has stigmatized petitioner by placing him in a mental institution when he should have been placed elsewhere. Jones v United States is explicit on this point: "A criminal defendant who successfully raises the insanity defense necessarily is stigmatized by the verdict itself, and thus the com-

mitment causes little additional harm in this respect." 463 US, at 367, n 16, 77 L Ed 2d 694, 103 S Ct 3043. Nor is this a case, as in Washington v Harper, 494 US 210, 108 L Ed 2d 178, 110 S Ct 1028 (1990), in which petitioner has suffered some further deprivation of liberty to which independent due process protections might attach. Both the fact and conditions of confinement here are attributable to petitioner's criminal conduct and subsequent decision to plead insanity. To the extent the majority relies on the conditions of petitioner's confinement, its decision is without authority, and most of its opinion is nothing more than confusing dicta.

I submit that today's decision is unwarranted and unwise. I share the Court's concerns about the risks inherent in requiring a committed person to prove what can often be imprecise, but as Justice Thomas observes in his dissent, this is not a case in which the period of confinement exceeds the gravity of the offense or in which there are reasons to believe the release proceedings are pointless or a sham. Post, at ——, n 10, 118 L Ed 2d, at 470. Petitioner has been incarcerated for less than one-third the statutory maximum for the offenses proved by the State. See La Rev Stat Ann §§ 14:60 (aggravated burglary) and 14:94 (illegal use of a weapon) (West 1986). In light of these facts, the majority's repeated reference to "indefinite detention," with apparent reference to the potential duration of confinement, and not its lack of a fixed end point, has no bearing on this case. See ante, at ——, n 4, ——, 118 L Ed 2d, at 446, 450, and n 6; cf. ante, at ——, n 4, 118 L Ed 2d, at 446 (curious suggestion that confinement has been extended beyond an initial term of years). It is also significant to observe that this is not a case in which the incarcerated subject has demonstrated his nondangerousness. Within the two months before his release hearing, petitioner had been sent to a maximum security section of the Feliciana Forensic Facility because of altercations with another patient. 563 So 2d, at 1141. Further, there is evidence in the record which suggests that petitioner's initial claim of insanity may have been feigned. The medical panel that reviewed petitioner's request for release stated that "there is no evidence of mental illness," and indeed that there was "never any evidence of mental illness or disease since admission." App 10. In sum, it would be difficult to conceive of a less compelling situation for the imposition of sweeping new constitutional commands such as the majority imposes today.

Because the majority conflates the standards for civil and criminal commitment, treating this criminal case as though it were civil, it upsets a careful balance relied upon by the States, not only in determining the conditions for continuing confinement, but also in defining the defenses permitted for mental incapacity at the time of the crime in question. In my view, having adopted a traditional and well-accepted test for determining criminal insanity, and having complied with the rigorous demands of In re Winship, the State possesses the constitutional authority to incarcerate petitioner for the protection of society. I submit my respectful dissent.

Justice **Thomas,** with whom The **Chief Justice** and Justice **Scalia** join, dissenting.

The Louisiana statutory scheme the Court strikes down today is not some quirky relic of a bygone age, but a codification of the current provisions of the American Law Institute's Model Penal Code. Invalidating this quite reasonable scheme is bad enough; even worse is the Court's failure to explain precisely what is wrong with it. In parts of its opinion, the Court suggests that the scheme is unconstitutional because it provides for the continued confinement of insanity acquittees who, although still dangerous, have "recovered" their sanity. Ante, at ——, 118 L Ed 2d, at 446 ("[T]he committed acquittee is *entitled to release* when he has recovered his sanity *or* is no longer dangerous") (emphasis added; internal quotation omitted). In other parts of the opinion, the Court suggests—and the concurrence states explicitly—that the constitutional flaw with this scheme is *not* that it provides for the confinement of sane insanity acquittees, but that it (allegedly) provides for their "indefinite" confinement in a mental facility. Ante, at ——, 118 L Ed 2d, at 449; ante, at ——, 118 L Ed 2d, at 452 (O'Connor, J., concurring in part and concurring in judgment). Nothing in the Constitution, this Court's precedents, or our society's traditions authorizes the Court to invalidate the Louisiana scheme on either of these grounds. I would therefore affirm the judgment of the Louisiana Supreme Court.

I

The Court errs, in large part, because it fails to examine in detail the challenged statutory scheme and its application in this case. Under Louisiana law, a verdict of "not guilty by reason of insanity" differs significantly from a verdict of "not guilty." A simple verdict of not guilty following a trial means that the State has failed to prove all of the elements of the charged crime beyond a reasonable doubt. See, e. g., State v Messiah, 538 So 2d 175, 180 (La 1988) (citing In re Winship, 397 US 358, 25 L Ed 2d 368, 90 S Ct 1068 (1970)); cf. La Code Crim Proc Ann, Art 804(A)(1) (West 1969). A verdict of not guilty by reason of insanity, in contrast, means that the defendant *committed the crime,* but established that he was "incapable of distinguishing between right and wrong" with respect to his criminal conduct. La Rev Stat Ann § 14.14 (West 1986). Insanity, in other words, is an affirmative defense that does not negate the State's proof, but merely "exempt[s the defendant] from criminal responsibility." Ibid. As the Louisiana Supreme Court has summarized: "The State's traditional burden of proof is to establish beyond a reasonable doubt all necessary elements of the offense. *Once this rigorous burden of proof has been met,* it having been shown that defendant *has committed a crime,* the defendant . . . bear[s] the burden of establishing his defense of insanity in order to escape punishment." State v Marmillion, 339 So 2d 788, 796 (La 1976) (emphasis added). See also State v Surrency, 88 So 240, 244 (La 1921).

Louisiana law provides a procedure for a judge to render a verdict of not guilty by reason of insanity upon a plea without a trial. See La Code Crim Proc Ann, Art 558.1 (West Supp 1991). The trial court apparently relied on this procedure when it committed Foucha. See 563

So 2d 1138, 1139, n 3 (La 1990).[1] After ordering two experts to examine Foucha, the trial court issued the following judgment:

> "After considering the law and the evidence adduced in this matter, the Court finds that the accused, Terry Foucha, is unable to appreciate the usual, natural and probable consequences of his acts; that he is unable to distinguish right from wrong; that he is a menace to himself and to others; and that he was insane at the time of the commission of the above crimes and that he is presently insane." App 6.

After adjudicating a defendant not guilty by reason of insanity, a trial court must hold a hearing on the issue of dangerousness. The law specifies that "[i]f the court determines that the defendant cannot be released without a danger to others or to himself, it shall order him committed to . . . [a] mental institution." La Code Crim Proc Ann, Art 654 (West Supp 1991).[2] " 'Dangerous to others' means the condition of a person whose behavior or significant threats support a *reasonable expectation* that there is a *substantial risk* that he will inflict physical harm upon another person *in the near future.*" La Rev Stat Ann § 28:2(3) (West 1986) (emphasis added). " 'Dangerous to self' means the condition of a person whose behavior, significant threats or inaction supports a reasonable expectation that there is a substantial risk that he will inflict physical or severe emotional harm upon his own person." § 28:2(4).

After holding the requisite hearings, the trial court in this case ordered Foucha committed to the Feliciana Forensic Facility. After his commitment, Foucha was entitled, upon request, to another hearing six months later and at yearly intervals after that. See La Code Crim Proc Ann, Art 655(B) (West Supp 1991).[3]

1. Under La Code Crim Proc Ann, Art 558.1 (West Supp 1991), a criminal defendant apparently concedes that he committed the crime, and advances his insanity as the sole ground on which to avoid conviction. Foucha does not challenge the procedures whereby he was adjudicated not guilty by reason of insanity; nor does he deny that he committed the crimes with which he was charged.

2. Art 654 provides in pertinent part:

"When a defendant is found not guilty by reason of insanity in any [noncapital] felony case, the court shall remand him to the parish jail or to a private mental institution approved by the court and shall promptly hold a contradictory hearing at which the defendant shall have the burden of proof, to determine whether the defendant can be discharged or can be released on probation, without danger to others or to himself. If the court determines that the defendant cannot be released without danger to others or to himself, it shall order him committed to a proper state mental institution or to a private mental institution approved by the court for custody, care, and treatment. If the court determines that the defendant can be discharged or released on probation without danger to others or to himself, the court shall either order his discharge, or order his release on probation subject to specified conditions for a fixed or an indeterminate period. The court shall assign written findings of fact and conclusions of law; however, the assignment of reasons shall not delay the implementation of judgment."

3. Article 655(B) provides:

"A person committed pursuant to Article 654 may make application to the review panel for discharge or for release on probation. Such application by a committed person may not be filed until the committed person has been confined for a period of at least six months after the original commitment. If the review panel recommends to the court that the person be discharged, conditionally or unconditionally, or placed on probation, the court shall conduct a hearing following notice

In addition, Louisiana law provides that a release hearing must be held upon recommendation by the superintendent of a mental institution. See Art 655(A).[4] In early 1988, Feliciana's superintendent recommended that Foucha be released, and a three-doctor panel met to review the case. On March 21, 1988, the panel issued a report pursuant to Art 656.[5] The panel concluded that "there is no evidence of mental illness." App 10. In fact, the panel stated that there was "*never* any evidence of mental illness or disease since admission." Ibid. (emphasis added). Although the panel did not discuss whether Foucha was dangerous, it recommended to the trial court that he be conditionally released.

As a result of these recommendations, the trial court scheduled a hearing to determine whether Foucha should be released. Under La Code Crim Proc Ann, Art 657 (West Supp 1991),[6] Foucha had the burden at this hearing to prove that he could be released without danger to others or to himself. The court appointed two experts (the same doctors who had examined Foucha at the time of his original commitment) to evaluate his dangerousness. These

to the district attorney. If the recommendation of the review panel or the court is adverse, the applicant shall not be permitted to file another application until one year has elapsed from the date of determination."

4. Article 655(A) provides:

"When the superintendent of a mental institution is of the opinion that a person committed pursuant to Article 654 can be discharged or can be released on probation, without danger to others or to himself, he shall recommend the discharge or release of the person in a report to a review panel comprised of the person's treating physician, the clinical director of the facility to which the person is committed, and a physician or psychologist who served on the sanity commission which recommended commitment of the person. If any member of the panel is unable to serve, a physician or a psychologist engaged in the practice of clinical or counseling psychology with at least three years' experience in the field of mental health shall be appointed by the remaining members. The panel shall review all reports received promptly. After review, the panel shall make a recommendation to the court by which the person was committed as to the person's mental condition and whether he can be discharged, conditionally or unconditionally, or placed on probation, without being a danger to others or himself. If the review panel recommends to the court that the person be discharged, conditionally or unconditionally, or placed on probation, the court shall conduct a contradictory hearing following notice to the district attorney."

5. Article 656 provides:

"A. Upon receipt of the superintendent's report, filed in conformity with Article 655, the review panel may examine the committed person and report, to the court promptly, whether he can be safely discharged, conditionally or unconditionally, or be safely released on probation, without danger to others or to himself.

"B. The committed person or the district attorney may also retain a physician to examine the committed person for the same purpose. The physician's report shall be filed with the court."

6. Article 657 provides:

"After considering the report or reports filed pursuant to Articles 655 and 656, the court may either continue the commitment or hold a contradictory hearing to determine whether the committed person can be discharged, or can be released on probation, without danger to others or to himself. At the hearing the burden shall be upon the committed person to prove that he can be discharged, or can be released on probation, without danger to others or to himself. After the hearing, and upon filing written findings of fact and conclusions of law, the court may order the committed person discharged, released on probation subject to specified conditions for a fixed or an indeterminate period, or recommitted to the state mental institution. Notice to the counsel for the committed person and the district attorney of the contradictory hearing shall be given at least thirty days prior to the hearing."

doctors concluded that Foucha "is presently in remission from mental illness," but said that they could not "certify that he would not constitute a menace to himself or to others if released." App 12. On November 29, 1988, the trial court held the hearing, at which Foucha was represented by counsel. The court concluded that Foucha "is a danger to himself, and to others," id., at 24, and ordered that he be returned to Feliciana.[7]

II

The Court today concludes that Louisiana has denied Foucha both procedural and substantive due process. In my view, each of these conclusions is wrong. I shall discuss them in turn.

A

What the Court styles a "procedural" due process analysis is in reality an equal protection analysis. The Court first asserts (contrary to state law) that Foucha cannot be held as an insanity acquittee once he "becomes" sane. Ante, at ——-——, 118 L Ed 2d, at 447. That being the case, he is entitled to the same treatment as civil committees. *"[I]f Foucha can no longer be held as an insanity acquittee,"* the Court says, "he is entitled to constitutionally adequate procedures [those afforded in civil commitment proceedings] to establish the grounds for his confinement." Ante, at ——, 118 L Ed 2d, at 447 (emphasis added). This, of course, is an equal protection argument (there being no rational distinction between A and B, the State must treat them the same); the Court does not even pretend to examine the fairness of the release procedures the State has provided.

I cannot agree with the Court's conclusion because I believe that there is a real and legitimate distinction between insanity acquittees and civil committees that justifies procedural disparities. Unlike civil committees, who have *not* been found to have harmed society, insanity acquittees have been found in a judicial proceeding to have committed a criminal act.

That distinction provided the ratio decidendi for our most relevant precedent, Jones v United States, 463 US 354, 77 L Ed 2d 694, 103 S Ct 3043 (1983). That case involved a man who had been *automatically* committed to a mental institution after being acquitted of a crime by reason of insanity in the District of Columbia (i. e., he had not been given the procedures afforded to civil committees). We rejected both of his procedural due process challenges to his commitment. First, we held that an insanity acquittal justified automatic commitment of the acquittee (even though he might *presently* be sane), because Congress was entitled to decide that the verdict provided a *reasonable basis* for inferring dangerousness and insanity at the time of commitment. Id., at 366, 77 L Ed 2d 694, 103 S Ct 3043. The Government's interest in avoiding a de novo commitment hearing following every insanity acquittal, we said, out-

7. The Louisiana Supreme Court concluded that the trial court did not abuse its discretion in finding that Foucha had failed to prove that he could be released without danger to others or to himself under La Code Crim Proc Ann, Art 657 (West Supp 1991). See 563 So 2d 1138, 1141 (1990). That issue is not now before us.

weighed the acquittee's interest in avoiding unjustified institutionalization. Ibid. Second, we held that the Constitution did not require, as a predicate for the indefinite commitment of insanity acquittees, proof of insanity by "clear and convincing" evidence, as required for civil committees by Addington v Texas, 441 US 418, 60 L Ed 2d 323, 99 S Ct 1804 (1979). There are, we recognized, "important differences between the class of potential civil-commitment candidates and the class of insanity acquittees that justify differing standards of proof." Jones, 463 US, at 367, 77 L Ed 2d 694, 103 S Ct 3043. In sharp contrast to a civil committee, an insanity acquittee is institutionalized only where "the *acquittee himself* advances insanity as a defense and proves that his criminal act was a product of his mental illness," and thus "there is good reason for diminished concern as to the risk of error." Ibid. (emphasis in original). "More important, the proof that he committed a criminal act . . . eliminates the risk that he is being committed for mere 'idiosyncratic behavior.'" Ibid. Thus, we concluded, the preponderance of the evidence standard comports with due process for commitment of insanity acquittees. Id., at 368, 77 L Ed 2d 694, 103 S Ct 3043. "[I]nsanity acquittees constitute a special class that should be treated differently from other candidates for commitment." Id., at 370, 77 L Ed 2d 694, 103 S Ct 3043.

The Court today attempts to circumvent Jones by declaring that a State's interest in treating insanity acquittees differently from civil committees evaporates the instant an acquittee "becomes sane." I do not agree. As an initial matter, I believe that it is unwise, given our present understanding of the human mind, to suggest that a determination that a person has "regained sanity" is precise. "Psychiatry is not . . . an exact science, and psychiatrists disagree widely and frequently on what constitutes mental illness." Ake v Oklahoma, 470 US 68, 81, 84 L Ed 2d 53, 105 S Ct 1087 (1985). Indeed,

> "[w]e have recognized repeatedly the 'uncertainty of diagnosis in this field and the tentativeness of professional judgment. The only certain thing that can be said about the present state of knowledge and therapy regarding mental disease is that science has not reached finality of judgment.' The lesson we have drawn is not that government may not act in the face of this uncertainty, but rather that courts should pay particular deference to reasonable legislative judgments." Jones, supra, at 365, n 13, 77 L Ed 2d 694, 103 S Ct 3043 (quoting Greenwood v United States, 350 US 366, 375, 100 L Ed 412, 76 S Ct 410 (1956); citations omitted).

In this very case, the panel that evaluated Foucha in 1988 concluded that there was "*never* any evidence of mental illness or disease since admission," App 10; the trial court, of course, concluded that Foucha was "presently insane," Id., at 6, at the time it accepted his plea and sent him to Feliciana.

The distinction between civil committees and insanity acquittees, after all, turns *not* on considerations of present sanity, but instead on the fact that the latter have "already unhappily manifested the reality of anti-social conduct," Dixon v Jacobs,

138 US App DC 319, 334, 427 F2d 589, 604 (1970) (Leventhal, J., concurring). "*[T]he prior anti-social conduct* of an insanity acquittee justifies treating such a person differently from ones otherwise civilly committed for purposes of deciding whether the patient should be released." Powell v Florida, 579 F2d 324, 333 (CA5 1978) (emphasis added); see also United States v Ecker, 177 US App DC 31, 50, 543 F2d 178, 197 (1976), cert denied, 429 US 1063, 50 L Ed 2d 779, 97 S Ct 788 (1977). While a State may renounce a punitive interest by offering an insanity defense, it does not follow that, once the acquittee's sanity is "restored," the State is required to ignore his criminal act, and to renounce all interest in protecting society from him. "The state has a substantial interest in avoiding premature release of insanity acquittees, who have committed acts constituting felonies and have been declared dangerous to society." Hickey v Morris, 722 F2d 543, 548 (CA9 1983).

Furthermore, the Federal Constitution does not require a State to "ignore the danger of 'calculated abuse of the insanity defense.'" Warren v Harvey, 632 F2d 925, 932 (CA2 1980) (quoting United States v Brown, 155 US App DC 402, 407, 478 F2d 606, 611 (1973)). A State that decides to offer its criminal defendants an insanity defense, which the defendant himself is given the choice of invoking, is surely allowed to attach to that defense certain consequences that prevent abuse. Cf. Lynch v Overholser, 369 US 705, 715, 8 L Ed 2d 211, 82 S Ct 1063 (1962) ("Congress might have considered it appropriate to provide compulsory commitment for those who successfully invoke an insanity defense in order to discourage false pleas of insanity").

> "In effect, the defendant, by raising the defense of insanity—and he alone can raise it—postpones a determination of his present mental health and acknowledges the right of the state, upon accepting his plea, to detain him for diagnosis, care, and custody in a mental institution until certain specified conditions are met. . . . [C]ommitment via the criminal process . . . thus is more akin to 'voluntary' than 'involuntary' civil commitment." Goldstein & Katz, Dangerousness and Mental Illness, Some Observations on the Decision to Release Persons Acquitted by Reason of Insanity, 70 Yale LJ 225, 230 (1960) (footnote omitted).

A State may reasonably decide that the integrity of an insanity-acquittal scheme requires the continued commitment of insanity acquittees who remain dangerous. Surely, the citizenry would not long tolerate the insanity defense if a serial killer who convinces a jury that he is not guilty by reason of insanity is returned to the streets immediately after trial by convincing a different factfinder that he is not in fact insane.

As the American Law Institute has explained:

> "It seemed preferable to the Institute to make dangerousness the criterion for continued custody, rather than to provide that the committed person may be discharged or released when restored to sanity as defined by the mental hygiene laws. Although his mental disease may have greatly improved, [an insanity acquittee] may still be dangerous because of factors in his personality and background other than mental dis-

ease. Also, such a standard provides a means for the control of the occasional defendant who may be quite dangerous but who successfully feigned mental disease to gain an acquittal." Model Penal Code § 4.08, Comment 3, pp 259-260 (1985).[8]

That this is a reasonable legislative judgment is underscored by the fact that it has been made by no fewer than 11 state legislatures, in addition to Louisiana's, which expressly provide that insanity acquittees shall not be released as long as they are dangerous, regardless of sanity.[9]

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8. The relevant provision of the Model Penal Code, strikingly similar to Article 657 of the Louisiana Code of Criminal Procedure, see supra, n 6, provides in part as follows:
"If the Court is satisfied by the report filed pursuant to Subsection (2) of this Section and such testimony of the reporting psychiatrists as the Court deems necessary that the committed person may be discharged or released on condition without danger to himself or others, the Court shall order his discharge or his release on such conditions as the Court determines to be necessary. If the Court is not so satisfied, it shall promptly order a hearing to determine whether such person may safely be discharged or released. Any such hearing shall be deemed a civil proceeding and the burden shall be upon the committed person to prove that he may safely be discharged or released." Model Penal Code § 4.08 (3) (Proposed Official Draft 1962).

9. See Cal Penal Code Ann § 1026.2(e) (West Supp 1992) (insanity acquittee not entitled to release until court determines that he "will not be a danger to the health and safety of others, including himself"); Del Code Ann, Tit 11, § 403(b) (1987) (insanity acquittee shall be kept institutionalized until court "is satisfied that the public safety will not be endangered by his release"); Haw Rev Stat § 704-415 (1985) (insanity acquittee not entitled to release until court satisfied that acquittee "may safely be discharged or released"); Iowa Rule Crim Proc 21.8(e) (insanity acquittee not entitled to release as long as "court finds that continued custody and treatment are necessary to protect the safety of the [acquittee's] self or others"); Kan Stat Ann § 22-3428(3) (Supp 1990) (insanity acquittee not entitled to release until "the court finds by clear and convincing evidence that [he] will not be likely to cause harm to self or others if released or discharged"); Mont Code Ann § 46-14-301(3) (1991) (insanity acquittee not entitled to release until he proves that he "may safely be released"); NJ Stat Ann § 2C:4-9 (West 1982) (insanity acquittee not entitled to release or discharge until court satisfied that he is not "danger to himself or others"); NC Gen Stat § 122C-268.1(i) (Supp 1991) (insanity acquittee not entitled to release until he "prove[s] by a preponderance of the evidence that he is no longer dangerous to others"); Va Code § 19.2-181(3) (1990) (insanity acquittee not entitled to release until he proves "that he is not insane or mentally retarded *and* that his discharge would not be dangerous to the public peace and safety or to himself" (emphasis added)); Wash Rev Code § 10.77.200(2) (1990) ("The burden of proof [at a release hearing] shall be upon the [insanity acquittee] to show by a preponderance of the evidence that [he] may be finally discharged without substantial danger to other persons, and without presenting a substantial likelihood of committing felonious acts jeopardizing public safety or security"); Wis Stat § 971.17(4) (Supp 1991) (insanity acquittee not entitled to release where court "finds by clear and convincing evidence that the [acquittee] would pose a significant risk of bodily harm to himself or herself or to others of serious property damage if conditionally released").

The Court and the concurrence dispute this list of statutes. Ante, at ——, n 6, 118 L Ed 2d, at 451; ante, at ——-——, 118 L Ed 2d, at 454 (O'Connor, J., concurring in part and concurring in judgment). They note that two of the States have enacted new laws, not yet effective, modifying their current absolute prohibitions on the release of dangerous insanity acquittees; that courts in two other States have apparently held that mental illness is a prerequisite to confinement; and that three of the States place caps of some sort on the duration of the confinement of insanity acquittees. Those criticisms miss my point. I cite the 11 state statutes above only to show that the legislative judgments underlying Louisiana's scheme are far from unique or freakish, and that there is no well-established practice in our society, either past or present, of automatically releasing sane-but-dangerous insanity acquittees.

The Court suggests an alternative "procedural" due process theory that is, if anything, even less persuasive than its principal theory. "[K]eeping Foucha against his will *in a mental institution* is improper absent a determination in civil commitment proceedings of current mental illness and dangerousness." Ante, at ——, 118 L Ed 2d, at 447 (emphasis added). The Court cites Vitek v Jones, 445 US 480, 63 L Ed 2d 552, 100 S Ct 1254 (1980), as support. There are two problems with this theory. First, it is illogical: Louisiana cannot possibly extend Foucha's incarceration by adding the procedures afforded to civil committees, since it is impossible to civilly commit someone who is not presently mentally ill. Second, the theory is not supported by Vitek. Stigmatization (our concern in Vitek) is simply not a relevant consideration where insanity acquittees are involved. As we explained in Jones: "A criminal defendant who successfully raises the insanity defense necessarily is stigmatized by the verdict itself, and thus the commitment causes little additional harm in this respect." 463 US, at 367, n 16, 77 L Ed 2d 694, 103 S Ct 3043; see also Warren v Harvey, 632 F2d, at 931-932. (This is in sharp contrast to situations involving civil committees. See Addington, 441 US, at 425-426, 60 L Ed 2d 323, 99 S Ct 1804; Vitek, supra, at 492-494, 63 L Ed 2d 552, 100 S Ct 1254.) It is implausible, in my view, that a person who chooses to plead not guilty by reason of insanity and then spends several years in a mental institution becomes unconstitutionally stigmatized by continued confinement in the institution after "regaining" sanity.

In my view, there was no procedural due process violation in this case. Articles 654, 655, and 657 of the Louisiana Code of Criminal Procedure, as noted above, afford insanity acquittees the opportunity to obtain release by demonstrating at regular intervals that they no longer pose a threat to society. These provisions also afford judicial review of such determinations. Pursuant to these procedures, and based upon testimony of experts, the Louisiana courts determined not to release Foucha at this time because the evidence did not show that he ceased to be dangerous. Throughout these proceedings, Foucha was represented by state-appointed counsel. I see no plausible argument that these procedures denied Foucha a fair hearing on the issue involved or that Foucha needed additional procedural protections.[10] See Mathews v Eldridge, 424 US 319, 47 L Ed 2d 18, 96 S Ct 893 (1976); Patterson v New York, 432 US 197, 53 L Ed 2d 281, 97 S Ct 2319 (1977); cf. Addington, supra, at 427-432, 60 L Ed 2d 323, 99 S Ct 1804; Jones, supra, at 363-368, 77 L Ed 2d 694, 103 S Ct 3043; Benham v Ledbetter, 785 F2d 1480, 1486-1488 (CA11 1986).[11]

10. Foucha has not argued that the State's procedures, *as applied*, are a sham. This would be a different case if Foucha had established that the statutory mechanisms for release were nothing more than window-dressing, and that the State in fact confined insanity acquittees indefinitely without meaningful opportunity for review and release.

11. As explained above, the Court's "procedural" due process analysis is essentially an equal-protection analysis: the Court first disregards the differences between "sane" insanity acquittees and civil committees, and then simply asserts that Louisiana cannot deny Foucha the procedures it gives civil committees. A plurality repeats this analysis in its

B

The Court next concludes that Louisiana's statutory scheme must fall because it violates Foucha's *substantive* due process rights. Ante, at ——-——, 118 L Ed 2d, at 448–450. I disagree. Until today, I had thought that the analytical framework for evaluating substantive due process claims was relatively straightforward. Certain substantive rights we have recognized as "fundamental"; legislation trenching upon these is subjected to "strict scrutiny," and generally will be invalidated unless the State demonstrates a compelling interest and narrow tailoring. Such searching judicial review of state legislation, however, is the exception, not the rule, in our democratic and federal system; we have consistently emphasized that "the Court has no license to invalidate legislation which it thinks merely arbitrary or unreasonable." Regents of University of Michigan v Ewing, 474 US 214, 226, 88 L Ed 2d 523, 106 S Ct 507 (1985) (internal quotation omitted). Except in the unusual case where a fundamental right is infringed, then, federal judicial scrutiny of the substance of state legislation under the Due Process Clause of the Fourteenth Amendment is not exacting. See, e.g., Bowers v Hardwick, 478 US 186, 191-196, 92 L Ed 2d 140, 106 S Ct 2841 (1986).

In striking down Louisiana's scheme as a violation of substantive rights guaranteed by the Due Process Clause, the Court today ignores this well-established analytical framework. First, the Court never explains if we are dealing here with a fundamental right, and, if so, what right. Second, the Court never discloses what standard of review applies. Indeed, the Court's opinion is contradictory on both these critical points.

As to the first point: the Court begins its substantive due process analysis by invoking the substantive right to "[f]reedom from bodily restraint." Ante, at ——, 118 L Ed 2d, at 448. Its discussion then proceeds as if the problem here is that Foucha, an insanity acquittee, continues to be *confined* after recovering his sanity, ante, at ——-——, 118 L Ed 2d, at 448–449; thus, the Court contrasts this case to United States v Salerno, 481 US 739, 95 L Ed 2d 697, 107 S Ct 2095 (1987), a case involving the confinement of pretrial detainees. But then, abruptly, the Court shifts liberty interests. The liberty interest at stake here, we are told, is *not* a liberty interest in being free "from bodily restraint," but instead the more specific (and heretofore unknown) "liberty interest under the Constitution *in being freed from [1] indefinite confinement [2] in a mental facility.*" Ante, at ——, 118 L Ed 2d, at 449 (emphasis added). See also ante, at ——, 118 L Ed 2d, at 452 (O'Connor, J., concurring in part and concurring in judgment). So the problem in this case is apparently *not* that Louisiana continues to confine insanity acquittees who have "become" sane (although earlier in the opinion the Court inter-

cumulative equal-protection section. See ante, at ——-——, 118 L Ed 2d, at 451–452. As explained above, I believe that there are legitimate differences between civil committees and insanity acquittees, even after the latter have "become" sane. Therefore, in my view, Louisiana has not denied Foucha equal protection of the laws. Cf. Jones v United States, 463 US 354, at 362, n 10, 77 L Ed 2d 694, 103 S Ct 3043 (1983).

prets our decision in Jones as having held that such confinement is unconstitutional, see ante, at ——, 118 L Ed 2d, at 446–447), but that under Louisiana law, "sane" insanity acquittees may be held "indefinitely" "in a mental facility."

As to the second point: "[a] dispute regarding the appropriate standard of review may strike some as a lawyers' quibble over words, but it is not." Metro Broadcasting, Inc. v FCC, 497 US ——, ——, 111 L Ed 2d 445, 110 S Ct 2997 (1990) (O'Connor, J., dissenting). The standard of review determines when the Due Process Clause of the Fourteenth Amendment will override a State's substantive policy choices, as reflected in its laws. The Court initially says that "[d]ue process requires that the nature of commitment bear some *reasonable relation* to the purpose for which the individual is committed." Ante, at ——, 118 L Ed 2d, at 447 (emphasis added). Later in its opinion, however, the Court states that the Louisiana scheme violates substantive due process *not* because it is not "reasonably related" to the State's purposes, but instead because its detention provisions are not "sharply focused" or "carefully limited," in contrast to the scheme we upheld in Salerno. Ante, at ——, 118 L Ed 2d, at 449. Does that mean that the same standard of review applies here that we applied in Salerno, and, if so, what is that standard? The Court quite pointedly avoids answering these questions. Similarly, Justice O'Connor does not reveal exactly what standard of review she believes applicable, but appears to advocate a heightened standard heretofore unknown in our caselaw. Ante, at ——, 118 L Ed 2d, at 453 ("It might therefore be permissible for Louisiana to confine an insanity acquittee who has regained sanity if . . . the nature and duration of detention were *tailored* to reflect *pressing* public safety concerns related to the acquittee's continuing dangerousness") (emphasis added).

To the extent the Court invalidates the Louisiana scheme on the ground that it violates some general substantive due process right to "freedom from bodily restraint" that triggers strict scrutiny, it is wrong—and dangerously so. To the extent the Court suggests that Louisiana has violated some more limited right to freedom from indefinite commitment in a mental facility (a right, by the way, never asserted by Foucha in this or any other court) that triggers some unknown standard of review, it is also wrong. I shall discuss these two possibilities in turn.

1

I fully agree with the Court, ante, at ——, 118 L Ed 2d, at 448, and with Justice Kennedy, ante, at ——, 118 L Ed 2d, at 455, that freedom from involuntary confinement is at the heart of the "liberty" protected by the Due Process Clause. But a liberty interest per se is not the same thing as a fundamental right. Whatever the exact scope of the fundamental right to "freedom from bodily restraint" recognized by our cases,[12] it certainly cannot be defined

12. The Court cites only Youngberg v Romeo, 457 US 307, 316, 73 L Ed 2d 28, 102 S Ct 2452 (1982), in support of its assertion that "[f]reedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action," ante, at ——, 118 L Ed 2d, at 448. What "freedom from bodily restraint"

at the exceedingly great level of generality the Court suggests today. There is simply no basis in our society's history or in the precedents of this Court to support the existence of a sweeping, general fundamental right to "freedom from bodily restraint" applicable to *all* persons in *all* contexts. If convicted prisoners could claim such a right, for example, we would subject all prison sentences to strict scrutiny. This we have consistently refused to do. See, e. g., Chapman v United States, 500 US ——, ——, 114 L Ed 2d 524, 111 S Ct 1919 (1991).[13]

The critical question here, then, is whether *insanity acquittees* have a fundamental right to "freedom from bodily restraint" that triggers strict scrutiny of their confinement. Neither Foucha nor the Court provides any evidence that our society has ever recognized any such right. To the contrary, historical evidence shows that many States have long provided for the continued institutionalization of insanity acquittees who remain dangerous. See, e. g., H. Weihofen, Insanity as a Defense in Criminal Law 294-332 (1933); A. Goldstein, The Insanity Defense 148-149 (1967).

Moreover, this Court has *never* applied strict scrutiny to the substance of state laws involving involuntary confinement of the mentally ill, much less to laws involving the confinement of insanity acquittees. To the contrary, until today we have subjected the substance of such laws only to very deferential review. Thus, in Jackson v Indiana, 406 US 715, 738, 32 L Ed 2d 435, 92 S Ct 1845 (1972), we held that Indiana's provisions for the indefinite institutionalization of incompetent defendants violated substantive due process because they did not bear any "reasonable" relation to the purpose for which the defendant was committed. Similarly, in O'Connor v Donaldson, 422 US 563, 45 L Ed 2d 396, 95 S Ct 2486 (1975), we held that the confinement of a nondangerous mentally-ill person was unconstitutional *not* because the State failed to show a compelling interest and narrow tailoring, but because the State had *no legitimate interest whatsoever* to justify such confinement. See id., at 575-576, 45 L Ed 2d 396, 95 S Ct 2486. See also id., at 580, 45 L Ed 2d 396, 95 S Ct 2486

meant in that case, however, is completely different from what the Court uses the phrase to mean here. Youngberg involved the substantive due process rights of an institutionalized, mentally-retarded patient who had been restrained *by shackles placed on his arms* for portions of each day. See 457 US, at 310, and n 4, 73 L Ed 2d 28, 102 S Ct 2452. What the Court meant by "freedom from bodily restraint," then, was quite literally freedom not to be physically strapped to a bed. That case in no way established the broad "freedom from bodily restraint"—apparently meaning freedom from *all* involuntary confinement—that the Court discusses today.

13. Unless the Court wishes to overturn this line of cases, its substantive due process analysis must rest entirely on the fact that an insanity acquittee has not been *convicted* of a crime. Conviction is, of course, a significant event. But I am not sure that it deserves talismanic significance. Once a State proves beyond a reasonable doubt that an individual has committed a crime, it is, at a minimum, not obviously a matter of Federal Constitutional concern whether the State proceeds to label that individual "guilty," "guilty but insane," or "not guilty by reason of insanity." A State may just as well decide to label its verdicts "A," "B," and "C." It is surely rather odd to have rules of Federal Constitutional law turn entirely upon the *label* chosen by a State. Cf. Railway Express Agency, Inc. v Virginia, 358 US 434, 441, 3 L Ed 2d 450, 79 S Ct 411 (1959) (constitutionality of state action should not turn on "magic words").

(Burger, C. J., concurring) ("Commitment must be justified on the basis of a *legitimate* state interest, and the reasons for committing a particular individual must be established in an appropriate proceeding. Equally important, confinement must cease when those reasons no longer exist.") (emphasis added).

Similarly, in Jones, we held (in addition to the procedural due process holdings described above) that there was no substantive due process bar to holding an insanity acquittee beyond the period for which he could have been incarcerated if convicted. We began by explaining the standard for our analysis: "The Due Process Clause 'requires that the nature and duration of commitment bear some *reasonable* relation to the purpose for which the individual is committed.' " 463 US, at 368, 77 L Ed 2d 694, 103 S Ct 3043 (emphasis added) (quoting Jackson, supra, at 738, 32 L Ed 2d 435, 92 S Ct 1845). We then held that *"[i]n light of the congressional purposes underlying commitment of insanity acquittees* [in the District of Columbia,]" which we identified as treatment of the insanity acquittee's mental illness and protection of the acquittee and society, "petitioner clearly errs in contending that an acquittee's hypothetical maximum sentence provides the constitutional limit for his commitment." 463 US, at 368, 77 L Ed 2d 694, 103 S Ct 3043 (emphasis added). Given that the commitment law was reasonably related to Congress' purposes, this Court had no basis for invalidating it as a matter of substantive due process.

It is simply wrong for the Court to assert today that we "held" in Jones that " 'the committed acquittee is entitled to release when he has recovered his sanity or is no longer dangerous.' " Ante, at ——, 118 L Ed 2d, at 446 (quoting Jones, 463 US, at 368, 77 L Ed 2d 694, 103 S Ct 3043).[14] We specifically noted in Jones that *no* issue regarding the standards for the release of insanity acquittees was before us. Id., at 363, n 11, 77 L Ed 2d 694, 103 S Ct 3043. The question we were answering in the part of Jones from which the Court quotes was whether it is permissible to hold an insanity acquittee for a period longer than he could have been incarcerated if convicted, *not* whether it is permissible to hold him once he becomes "sane." As noted above, our substantive due process analysis in Jones was straightforward: did the means chosen by Congress (commitment of insanity acquittees until they have recovered their sanity or are no longer dangerous) reasonably fit Congress' ends (treatment of the acquittee's mental illness and protection of society from his dangerousness)?[15]

14. If this were really a "holding" of Jones, then I am at a loss to understand Justice O'Connor's assertion that the Court today does *not* hold "that Louisiana may never confine dangerous insanity acquittees after they regain mental health." Ante, at ——, 118 L Ed 2d, at 452. Either it is true that, as a matter of substantive due process, an insanity acquittee is " 'entitled to release when he has recovered his sanity,' " ante, at ——, 118 L Ed 2d, at 446 (quoting Jones, 463 US, at 368, 77 L Ed 2d 694, 103 S Ct 3043), or it is not. The Court apparently cannot make up its mind.

15. As may be apparent from the discussion in text, we have not been entirely precise as to the appropriate standard of review of legislation in this area. Some of our cases (e.g., O'Connor) have used the language of rationality review; others (e.g., Jackson) have used the language of "reasonableness," which may imply a somewhat heightened standard; still

In its arguments before this Court, Louisiana chose to place primary reliance on our decision in United States v Salerno, 481 US 739, 95 L Ed 2d 697, 107 S Ct 2095 (1987), in which we upheld provisions of the Bail Reform Act of 1984 that allowed *limited* pretrial detention of criminal suspects. That case, as the Court notes, ante, at ——— – ———, 118 L Ed 2d, at 449–450, is readily distinguishable. Insanity acquittees, in sharp and obvious contrast to pretrial detainees, have *had* their day in court. Although they have not been convicted of crimes, neither have they been exonerated, as they would have been upon a determination of "not guilty" simpliciter. Insanity acquittees thus stand in a fundamentally different position from persons who have not been adjudicated to have committed criminal acts. That is what distinguishes this case (and what distinguished Jones) from Salerno and Jackson v Indiana, 406 US 715, 32 L Ed 2d 435, 92 S Ct 1845 (1972). In Jackson, as in Salerno, the State had not proven beyond a reasonable doubt that the accused had committed criminal acts or otherwise was dangerous. See Jones, supra, at 364, n 12, 77 L Ed 2d 694, 103 S Ct 3043. The Court disregards this critical distinction, and apparently deems applicable the same scrutiny to pretrial detainees as to persons determined in a judicial proceeding to have committed a criminal act.[16]

If the Court indeed means to suggest that *all* restrictions on "freedom from bodily restraint" are subject to strict scrutiny, it has (at a minimum) wrought a revolution in the treatment of the mentally ill. Civil commitment as we know it would almost certainly be unconstitutional; only in the rarest of circumstances will a State be able to show a "compelling interest," and one that can be served in no other way, in involuntarily institutionalizing a person. All procedures involving the confinement of insanity acquittees and civil committees would require revamping to meet strict scrutiny. Thus, to take one obvious example, the *automatic* commitment of insanity acquittees that we expressly upheld in Jones would be clearly unconstitutional, since it is inconceivable that such commitment of persons who may well *presently* be sane and

others (e.g., Jones) have used the language of both rationality and reasonableness. What *is* clear from our cases is that the appropriate scrutiny is highly deferential, not strict. We need not decide in this case which precise standard is applicable, since the laws under attack here are at the very least reasonable.

16. The Court asserts that the principles set forth in this dissent necessarily apply not only to insanity acquittees, but also to convicted prisoners. "The dissent's rationale for continuing to hold the insanity acquittee would surely justify treating the convicted felon in the same way, and if put to it, it appears that the dissent would permit it." Ante, at ——, n 6, 118 L Ed 2d, at 450. That is obviously not so. If Foucha had been convicted of the crimes with which he was charged and sentenced to the statutory maximum of 32 years in prison, the State would not be entitled to extend his sentence at the end of that period. To do so would obviously violate the prohibition on ex post facto laws set forth in Art I, § 10, cl 1. But Foucha was not sentenced to incarceration for any definite period of time; to the contrary, he pleaded not guilty by reason of insanity and was ordered institutionalized *until he was able to meet the conditions statutorily prescribed for his release*. To acknowledge, as I do, that it is constitutionally permissible for a State to provide for the continued confinement of an insanity acquittee who remains dangerous is obviously quite different than to assert that the State is allowed to confine *anyone* who is dangerous for as long as it wishes.

nondangerous could survive strict scrutiny. (In Jones, of course, we applied no such scrutiny; we upheld the practice not because it was justified by a compelling interest, but because it was based on reasonable legislative inferences about continuing insanity and dangerousness.)

2

As explained above, the Court's opinion is profoundly ambiguous on the central question in this case: Must the State of Louisiana release Terry Foucha now that he has "regained" his sanity? In other words, is the defect in Louisiana's statutory scheme that it provides for the confinement of insanity acquittees who have recovered their sanity, or instead that it allows the State to confine sane insanity acquittees (1) indefinitely (2) in a mental facility? To the extent the Court suggests the former, I have already explained why it is wrong. I turn now to the latter possibility, which also is mistaken.

To begin with, I think it is somewhat misleading to describe Louisiana's scheme as providing for the "indefinite" commitment of insanity acquittees. As explained above, insanity acquittees are entitled to a release hearing every year at their request, and at any time at the request of a facility superintendent. Like the District of Columbia statute at issue in Jones, then, Louisiana's statute provides for "indefinite" commitment only to the extent that an acquittee is unable to satisfy the substantive standards for release. If the Constitution did not require a cap on the acquittee's confinement in Jones, why does it require one here? The Court and Justice O'Connor have no basis for suggesting that either this Court or the society of which it is a part has recognized some general fundamental right to "freedom from indefinite commitment." If that were the case, of course, Jones would have involved strict scrutiny and is wrongly decided.

Furthermore, any concerns about "indefinite" commitment here are entirely hypothetical and speculative. Foucha has been confined for eight years. Had he been convicted of the crimes with which he was charged, he could have been incarcerated for 32 years. See La Rev Stat Ann §§ 14.60 & 14.94 (West 1986). Thus I find quite odd Justice O'Connor's suggestion, ante, at ——, 118 L Ed 2d, at 454, that this case might be different had Louisiana, like the State of Washington, limited confinement to the period for which a defendant might have been imprisoned if convicted. Foucha, of course, would be in precisely the same position today—and for the next 24 years—had the Louisiana statute included such a cap. Thus, the Court apparently finds fault with the Louisiana statute *not* because it has been applied to Foucha in an unconstitutional manner, but because the Court can imagine it being applied to *someone else* in an unconstitutional manner. That goes against the first principles of our jurisprudence. See, e. g., Salerno, 481 US, at 745, 95 L Ed 2d 697, 107 S Ct 2095 ("The fact that [a detention statute] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid, since we have not recognized an 'overbreadth' doctrine

outside the limited context of the First Amendment").[17]

Finally, I see no basis for holding that the Due Process Clause per se prohibits a State from continuing to confine in a "mental institution"—the federal constitutional definition of which remains unclear—an insanity acquittee who has recovered his sanity. As noted above, many States have long provided for the continued detention of insanity acquittees who remain dangerous. Neither Foucha nor the Court present any evidence that these States have traditionally transferred such persons from mental institutions to other detention facilities. Therefore, there is simply no basis for this Court to recognize a "fundamental right" for a sane insanity acquittee to be transferred out of a mental facility. "In an attempt to limit and guide interpretation of the [Due Process] Clause, we have insisted not merely that the interest denominated as a 'liberty' be 'fundamental' (a concept that, in isolation, is hard to objectify), but also that it be an interest traditionally protected by our society." Michael H. v Gerald D., 491 US 110, 122, 105 L Ed 2d 91, 109 S Ct 2333 (1989) (plurality opinion).

Removing sane insanity acquittees from mental institutions may make eminent sense as a policy matter, but the Due Process Clause does not require the States to conform to the policy preferences of federal judges. "The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution." Bowers, 478 US, at 194, 92 L Ed 2d 140, 106 S Ct 2841. I have no idea what facilities the Court or Justice O'Connor believe the Due Process Clause mandates for the confinement of sane-but-dangerous insanity acquittees. Presumably prisons will not do, since imprisonment is generally regarded as "punishment." May a State designate a wing of a mental institution or prison for sane insanity acquittees? May a State mix them with other detainees? Neither the Constitution nor our society's traditions provides any answer to these questions.[18]

3

"So-called 'substantive due process' prevents the government from engaging in conduct that 'shocks the conscience,' Rochin v California, 342 US 165, 172 [96 L Ed 183, 72 S Ct 205, 25 ALR2d 1396] (1952), or interferes with rights 'implicit in the concept of ordered liberty,' Palko v Connecticut, 302 US 319, 325-326 [82 L

17. I fully agree with Justice O'Connor, ante, at ——, 118 L Ed 2d, at 454, that there would be a serious question of rationality had Louisiana sought to institutionalize a sane insanity acquittee for a period longer than he might have been imprisoned if convicted. But that is simply not the case here.

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

Ed 288, 58 S Ct 149] (1937)." Salerno, supra, at 746, 95 L Ed 2d 697, 107 S Ct 2095. The legislative scheme the Court invalidates today is, at the very least, substantively reasonable. With all due respect, I do not remotely think it can be said that the laws in question "offen[d] some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." Snyder v Massachusetts, 291 US 97, 105, 78 L Ed 674, 54 S Ct 330, 90 ALR 575 (1934). Therefore, in my view, this Court is not entitled, as a matter of substantive due process, to strike them down.

I respectfully dissent.

Session of 1993

SENATE BILL No. 10

By Special Committee on Judiciary

Re Proposal No. 25

12-18

AN ACT concerning criminal procedure; relating to commitment and release of persons acquitted because of insanity and persons committed after conviction but prior to sentence; requiring a finding of mental illness to continue commitment; amending K.S.A. 22-3431 and K.S.A. 1992 Supp. 22-3428 and 22-3428a and repealing the existing sections.

Be it enacted by the Legislature of the State of Kansas:

Section 1. K.S.A. 1992 Supp. 22-3428 is hereby amended to read as follows: 22-3428. (1) *(a)* When a ~~person~~ *defendant* is acquitted on the ground that the ~~person~~ *defendant* was insane at the time of the commission of the alleged crime, the verdict shall be not guilty because of insanity and the ~~person~~ *defendant* shall be committed to the state security hospital for safekeeping and treatment. A finding of not guilty by reason of insanity shall constitute a finding that the acquitted ~~person~~ *defendant* committed an act constituting the offense charged or an act constituting a lesser included crime, except that the ~~person~~ *defendant* did not possess the requisite criminal intent. A finding of not guilty because of insanity shall be prima facie evidence that the acquitted ~~person~~ *defendant* is presently likely to cause harm to self or others.

(b) Within 90 days of the defendant's admission, the chief medical officer of the state security hospital shall send to the court a written evaluation report. Upon receipt of the report, the court shall set a hearing to determine whether or not the defendant is currently a mentally ill person. The hearing shall be held within 30 days after the receipt by the court of the chief medical officer's report.

(c) The court shall give notice of the hearing to the chief medical officer of the state security hospital, the district or county attorney, the defendant and the defendant's attorney. The defendant shall remain at the state security hospital pending the hearing.

(d) At the hearing, the defendant shall have the right to present evidence and cross examine witnesses. At the conclusion of the hearing, if the court finds by clear and convincing evidence that the defendant is not currently a mentally ill person, the court shall dismiss the criminal proceeding and discharge the defendant. If the court finds by clear and convincing evidence that the defendant is currently a mentally ill person, then the court may commit the defendant to the state security hospital for treatment or may place the defendant on conditional release pursuant to subsection (4).

(2) Subject to the provisions of subsection (3):

(a) Whenever it appears to the chief medical officer of the state security hospital that a person committed under ~~this section~~ *subsection (1)(d)* is not ~~dangerous~~ *likely to cause harm* to other persons *in a less restrictive hospital environment*, the officer may transfer the person to any state hospital, subject to the provisions of subsection ~~(4)~~ *(3)*. At any time subsequent thereto during which such person is still committed to a state hospital, if the chief medical officer of that hospital finds that the person may ~~again be dangerous to other persons~~ *be likely to cause harm or has caused harm, to others*, such officer may transfer the person back to the state security hospital.

(b) Any person committed under ~~this section~~ *subsection (1)(d)* may be granted conditional release or discharge as an involuntary patient.

(3) Before transfer of a person from the state security hospital pursuant to subsection (2)(a) or conditional release or discharge of a person pursuant to subsection (2)(b), the chief medical officer of the state security hospital or the state hospital where the patient is under commitment shall give notice to the district court of the county from which the person was committed that transfer of the patient is proposed or that the patient is ready for ~~such~~ proposed *conditional* release or discharge. Such notice shall include, but not be limited to: (a) Identification of the patient; (b) the course of treatment; (c) a current assessment of ~~whether the patient is likely to cause harm to self or others if released or discharged~~ *the defendant's mental illness*; (d) recommendations for future treatment, if any; and (e) recommendations regarding conditional release or discharge, if any. Upon receiving ~~such~~ notice, the district court shall order that a hearing be held on the proposed transfer, *conditional* release or discharge. The court shall give notice of the hearing to the state hospital or state security hospital

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where the patient is under commitment and to the district or county attorney ~~and sheriff~~ of the county from which the person was originally ordered committed and shall order the involuntary patient to undergo a mental evaluation by a person designated by the court. A copy of all orders of the court shall be sent to the involuntary patient and the patient's attorney. The report of the court ordered mental evaluation shall be given to the district or county attorney, the involuntary patient and the patient's attorney at least five days prior to the hearing. The hearing shall be held within 30 days after the receipt by the court of the chief medical officer's notice. The involuntary patient shall remain in the state hospital or state security hospital where the patient is under commitment until the hearing on the proposed transfer, *conditional* release or discharge is to be held. At the hearing, the court shall receive all relevant evidence, including the written findings and recommendations of the chief medical officer of the state security hospital or the state hospital where the patient is under commitment, and shall determine whether the patient ~~will be likely to cause harm to self or others if transferred,~~ *shall be transferred to a less restrictive hospital environment or whether the patient shall be conditionally* released or discharged. The patient shall have the right to present evidence at such hearing and to cross-examine any witnesses called by the district or county attorney. At the conclusion of the hearing, if the court finds by clear and convincing evidence that the patient will not be likely to cause harm to self or others if transferred~~, released or discharged~~ *to a less restrictive hospital environment*, the court shall order the patient transferred~~, discharged or conditionally released, otherwise~~. *If the court finds by clear and convincing evidence that the patient is not currently a mentally ill person, the court shall order the patient discharged or conditionally released. If the court finds by clear and convincing evidence the patient continues to be a mentally ill person,* the court shall order the patient to remain in the state security hospital or state hospital where the patient is under commitment. ~~If conditional release or discharge of the patient is proposed and the court finds by clear and convincing evidence presented at the hearing that upon release or discharge the patient will not be likely to cause harm to self or others if the patient continues to take prescribed medication or to receive periodic psychiatric or psychological treatment, the court may order the patient conditionally released in accordance with subsection (4).~~ If the court orders the conditional release of the patient *in accordance with subsection (4)*, the court may order as an additional condition to the release that the patient continue to take prescribed medication and report as directed to a person licensed to practice medicine and surgery to determine whether or not the patient is taking the medication or that the patient continue to receive periodic psychiatric or psychological treatment.

(4) In order to insure the safety and welfare of a patient who is to be conditionally released and the citizenry of the state, the court may allow the patient to remain in custody at a facility under the supervision of the secretary of social and rehabilitation services for a period of time not to exceed 30 days in order to permit sufficient time for the secretary to prepare recommendations to the court for a suitable reentry program for the patient. The reentry program shall be specifically designed to facilitate the return of the patient to the community as a functioning, self-supporting citizen, and may include appropriate supportive provisions for assistance in establishing residency, securing gainful employment, undergoing needed vocational rehabilitation, receiving marital and family counseling, and such other outpatient services that appear beneficial. If a patient who is to be conditionally released will be residing in a county other than the county where the district court that ordered the conditional release is located, the court shall transfer venue of the case to the district court of the other county and send a copy of all of the court's records of the proceedings to the other court. In all cases of conditional release the court shall: (a) Order that the patient be placed under the temporary supervision of state parole and probation services, district court probation and parole services, *community treatment facility* or any appropriate private agency; and (b) require as a condition precedent to the release that the patient agree in writing to waive extradition in the event a warrant is issued pursuant to K.S.A. 22-3428b and amendments thereto.

(5) At any time during the conditional release period, a conditionally released patient, through the patient's attorney, or the county or district attorney of the county in which the district court having venue is located may file a motion for modification of the conditions of release, and the court shall hold an evidentiary hearing on the motion within 15 days of its filing. The court shall give notice of the time for the hearing to the patient and the county or district attorney. If the court finds from the evidence at the hearing that the conditional provisions of release should be modified or vacated, it shall so order. If at any time during the transitional period the designated medical officer or supervisory personnel or the treatment facility informs the court that the patient is not satisfactorily complying with the provisions of the conditional release, the court, after a hearing for which notice has been given to the county or district attorney and the patient, may make orders: (a) For additional conditions of release designed to effect the ends of the reentry program, (b) requiring the county or district attorney to file an application to determine whether the patient is a mentally ill person as provided in K.S.A. 59-2913 and amendments thereto, or (c) requiring that the patient be committed to the state security

hospital or any state hospital. In cases where an application is ordered to be filed, the court shall proceed to hear and determine the application pursuant to the treatment act for mentally ill persons and that act shall apply to all subsequent proceedings. The costs of all proceedings, the mental evaluation and the reentry program authorized by this section shall be paid by the county from which the person was committed.

(6) In any case in which the defense of insanity is relied on, the court shall instruct the jury on the substance of this section.

(7) As used in this section and K.S.A. 22-3428a and amendments thereto, "likely to cause harm to self or others" ~~has~~, " *"mentally ill persons" and "treatment facility" have* the meaning provided by K.S.A. 59-2902 and amendments thereto.

Sec. 2. K.S.A. 1992 Supp. 22-3428a is hereby amended to read as follows: 22-3428a. (1) Any person found not guilty because of insanity who remains in the state security hospital or a state hospital for over one year pursuant to a commitment under K.S.A. 22-3428 and amendments thereto shall be entitled annually to request a hearing to determine whether or not the person ~~will be likely to cause harm to self or others if discharged~~ *continues to be a mentally ill person*. The request shall be made in writing to the district court of the county where the person is hospitalized and shall be signed by the committed person or the person's counsel. When the request is filed, the court shall give notice of the request to: (a) The county or district attorney of the county in which the person was originally ordered committed, and (b) the chief medical officer of the state security hospital or state hospital where the person is committed. The chief medical officer receiving the notice, or the officer's designee, shall conduct a mental examination of the person and shall send to the district court of the county where the person is hospitalized and to the county or district attorney of the county in which the person was originally ordered committed a report of the examination within 20 days from the date when notice from the court was received. Within ~~five~~ *10* days after receiving the report of the examination, the county or district attorney receiving it may file a motion with the district court that gave the notice, requesting the court to change the venue of the hearing to the district court of the county in which the person was originally committed, or the court that gave the notice on its own motion may change the venue of the hearing to the district court of the county in which the person was originally committed. Upon receipt of that motion and the report of the mental examination or upon the court's own motion, the court shall transfer the hearing to the district court specified in the motion and send a copy of the court's records of the proceedings to that court.

(2) After the time in which a change of venue may be requested has elapsed, the court having venue shall set a date for the hearing, giving notice thereof to the county or district attorney of the county, the committed person and the person's counsel. If there is no counsel of record, the court shall appoint a counsel for the committed person. The committed person shall have the right to procure, at the person's own expense, a mental examination by a physician or licensed psychologist of the person's own choosing. If a committed person is financially unable to procure such an examination, the aid to indigent defendants provisions of article 45 of chapter 22 of the Kansas Statutes Annotated shall be applicable to that person. A committed person requesting a mental examination pursuant to K.S.A. 22-4508 and amendments thereto may request a physician or licensed psychologist of the person's own choosing and the court shall request the physician or licensed psychologist to provide an estimate of the cost of the examination. If the physician or licensed psychologist agrees to accept compensation in an amount in accordance with the compensation standards set by the board of supervisors of panels to aid indigent defendants, the judge shall appoint the requested physician or licensed psychologist; otherwise, the court shall designate a physician or licensed psychologist to conduct the examination. Copies of each mental examination of the committed person shall be filed with the court at least five days prior to the hearing and shall be supplied to the county or district attorney receiving notice pursuant to this section and the committed person's counsel.

(3) At the hearing the committed person shall have the right to present evidence and cross-examine the witnesses. The court shall receive all relevant evidence, including the written findings and recommendations of the chief medical officer of the state security hospital or state hospital where the person is under commitment, and shall determine whether the committed person ~~will be likely to cause harm to self or others if discharged~~ *continues to be a mentally ill person*. At the hearing the court may make any order that a court is empowered to make pursuant to subsections (3), (4) and (5) of K.S.A. 22-3428 and amendments thereto. If the court finds by clear and convincing evidence the committed person ~~will not be likely to cause harm to self or others if discharged~~ *is not a mentally ill person*, the court shall order the person discharged; otherwise, the person shall remain committed or be conditionally released.

(4) Costs of a hearing held pursuant to this section shall be assessed against and paid by the county in which the person was originally ordered committed.

Sec. 3. K.S.A. 22-3431 is hereby amended to read as follows: 22-3431. *(1)* Whenever it appears to the chief

medical officer of the institution to which a ~~person~~ *defendant* has been committed under K.S.A. 22-3430 and amendments thereto, that ~~such person is not dangerous to self or others and that such person~~ *the defendant* will not be improved by further detention in such institution, ~~such person shall be returned to the court where convicted and~~ *the chief medical officer shall give written notice thereof to the district court where the defendant was convicted. Such notice shall include, but not be limited to: (a) Identification of the patient; (b) the course of treatment; (c) a current assessment of the defendant's psychiatric condition; (d) recommendations for future treatment, if any; and (e) recommendations regarding discharge, if any.*

(2) Upon receiving such notice, the district court shall order that a hearing be held. The court shall give notice of the hearing to: (a) The state hospital or state security hospital where the defendant is under commitment; (b) the district or county attorney of the county from which the defendant was originally committed; (c) the defendant; and (d) the defendant's attorney. The hearing shall be held within 30 days after the receipt by the court of the chief medical officer's notice.

(3) At the hearing, the defendant shall be sentenced, committed, granted probation, assigned to a community correctional services program or discharged as the court deems best under the circumstance. The time spent in a state or county institution pursuant to a commitment under K.S.A. 22-3430 and amendments thereto shall be credited against any sentence, confinement or imprisonment imposed on the defendant.

Sec. 4. K.S.A. 22-3431 and K.S.A. 1992 Supp. 22-3428 and 22-3428a are hereby repealed.

Sec. 5. This act shall take effect and be in force from and after its publication in the Kansas register.