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# O'CONNOR V. DONALDSON: ONE FLEW OUT OF THE CUCKOO'S NEST

Stephen D. Roberts

## I. INTRODUCTION

May the State fence in the harmless mentally ill solely to save its citizens from exposure to those whose ways are different? One might well as ask if the State, to avoid public unease, could incarcerate all who are physically unattractive or socially eccentric. Mere public intolerance or animosity cannot constitutionally justify the deprivation of a person's physical liberty . . . a State cannot constitutionally confine without more a nondangerous individual who is capable of surviving safely in freedom by himself or with the help of willing and responsible family members or friends.<sup>1</sup>

In deciding that mental illness alone, without the existence of dangerousness to oneself or others, is not a constitutionally justifiable basis for continued involuntary civil confinement of an individual in a state mental hospital, the United States Supreme Court in *O'Connor v. Donaldson* provided guidelines both as to the civil rights of the mentally ill, and as to the valid state interests that might be incorporated into state laws governing the release of mentally ill patients from state hospitals.

*O'Connor v. Donaldson* involved neither initial commitment to mental hospitals,<sup>2</sup> nor the rights of patients in mental hospitals to treatment for their illnesses,<sup>3</sup> and these issues will not be discussed in this note. The Supreme Court in *O'Connor* concerned itself solely with the issue of the right of a mental patient, involuntarily civilly committed, to release from a state mental hospital. It is the purpose of this note to discuss both the developments which preceded the *O'Connor* decision, and the impact of the decision on state mental health laws, so as to determine if the release provisions in Montana's recently enacted law for treatment of the seriously mentally ill meet the requirements that those federal cases set forth.

## II. BACKGROUND

Historically, two distinct state interests have justified the state's continued detention of its citizens in state mental hospitals, at the expense of the individual's interest in physical liberty. The

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1. *O'Connor v. Donaldson*, 95 S. Ct. 2486, 2494 (1975).  
2. *Id.* at 2489, 2500 n. 9.  
3. *Id.* at 2493 n. 10.

first, *parens patriae*, relates solely to the individual himself, and has its basis in the belief that the state, as protector of its citizens, has the duty to care for the mental patient when he hasn't the capacity to care for his own health or safety (this is the *O'Connor* criterion of "dangerous to self"). Secondly, the state, to protect citizens other than the mental patient, may refuse to release one who is likely to be a danger to the health or safety of others ("dangerous to others"): this is an exercise of the state's police power, as guardian of the public welfare.<sup>4</sup>

Until recently, the recognition of patients' rights to be released when they were not a danger to either their own or to others' safety, was subordinated to a paternalistic view that the state had ultimate knowledge as to the patient's best interests. In 1959, only five states used "dangerousness" due to mental illness as the sole prerequisite for involuntary civil commitment and continued detention in mental hospitals: by 1971, this figure had risen to nine.<sup>5</sup> That the civil rights of mental patients seeking release were at times completely ignored by the courts was demonstrated by the Connecticut supreme court. In *Roberts v. Paine*,<sup>6</sup> a case of first impression, the issue was whether the officers of a mental hospital had a duty to inform one who had voluntarily committed himself to the hospital as to the method by which he might legally be released. The patient had expressed to the officers his desire to leave, and the officers refused to inform him that simply by signing a release form the law would allow him to go free. The court said that:

[A] proper regard for the purposes to be served by such an institution as the retreat and the character of the patients it receives, who come to it to be cured of mental ills and who no doubt are often not in a condition to appreciate what is in their own best interests or what their real desires are, would require that it should be held that it is not the duty of the institution every time a patient expresses a desire for release to inform him that he can secure it on written application.<sup>7</sup>

Recent federal court decisions, however, laid the ideological and legal foundation for *O'Connor v. Donaldson*. In striking down a Wisconsin involuntary commitment statute as an unconstitutional deprivation of the liberty of mental patients without due process of law, the district court in *Lessard v. Schmidt* required that the state prove an extreme likelihood that the patient do immediate

4. See generally, Note, *Civil Commitment of the Mentally Ill*, 87 HARV. L. REV. 1190 (1974).

5. THE MENTALLY DISABLED AND THE LAW, ABF STUDY, 36 (1971).

6. *Roberts v. Paine*, 124 Conn. 170, 199 A. 112 (1938).

7. *Id.* at 115.

harm to himself or others.<sup>8</sup> Without the presence of dangerousness, the court felt that the massive curtailment of liberty, the stigma associated with incarceration in a mental institution, and the lack of a satisfactory or uniform definition of the elusive term "mental illness", made the requisites of involuntary confinement in a mental institution uncertain and violative of the fourteenth amendment's due process guarantees.

The following year, the District of Columbia Court of Appeals expanded and expounded upon the *Lessard* opinion. John Ballay, the petitioner, was a blue collar laborer from New York City who a few years previously had emigrated from Eastern Europe. Ballay traveled to Washington and, representing himself as the senator from Illinois and the husband of Tricia Nixon (he was neither), requested audiences with President Nixon. His involuntary civil commitment to a mental institution was appealed. Ballay was characterized by those testifying at his trial as cooperative and helpful rather than dangerous. It could not be shown that he had committed either a crime or an act of violence at any time in his life. The court of appeals held that both mental illness and dangerousness must be shown—with the standard of proof being "beyond a reasonable doubt"—for a state to involuntarily confine one in a state mental institution. Proof by mere preponderance of the evidence was deemed a deprivation of liberty without due process of the law.<sup>9</sup>

*In re Ballay* also contained the principle previously set forth by both federal circuit courts<sup>10</sup> and federal district courts,<sup>11</sup> and later enunciated by the Supreme Court in *O'Connor*,<sup>12</sup> that mere eccentricity, or public discomfort and unease with the behavior of an individual cannot, in the absence of a showing of dangerousness, be used to justify his involuntary detention in a mental institution.

### III. O'CONNOR V. DONALDSON

#### A. *The Facts of the Case*

The *O'Connor* case came to the Supreme Court on a petition for certiorari from the Court of Appeals for the Fifth Circuit.<sup>13</sup> Donaldson had been civilly committed to a Florida state mental hospital in 1957, and had been kept there against his will for nearly fifteen years. Donaldson's demands for release were repeatedly denied by

8. *Lessard v. Schmidt*, 349 F. Supp. 1078, 1093 (E.D. Wis. 1972), vacated and remanded on other grounds, 94 S. Ct. 713 (1974).

9. *In re Ballay*, 482 F.2d 648, 650 (D.C. Cir. 1973).

10. *Miller v. Cameron*, 373 F.2d 468, 471 (D.C. Cir. 1966).

11. *Davy v. Sullivan*, 354 F. Supp. 1320, 1330 (N.D. Ala. 1973).

12. *O'Connor v. Donaldson*, *supra* note 1 at 2493.

13. *Donaldson v. O'Connor*, 493 F.2d 507 (5th Cir. 1974).

O'Connor, the hospital superintendent. Uncontradicted testimony showed that Donaldson had not posed a danger to others at any time during his life, nor was there any evidence to show that Donaldson had ever been likely to inflict injury upon himself.<sup>14</sup>

The requests of Donaldson for release were backed by both friends and charitable organizations willing to provide him with any help he might need upon release. O'Connor, however, refused to release Donaldson, applying his own rule that Donaldson could be released only to his parents. At the time of the Supreme Court decision, Donaldson was sixty-seven years old; O'Connor knew that Donaldson's parents were too elderly and infirm to care for him.<sup>15</sup>

### B. The Opinion

The Court, without dissent,<sup>16</sup> held that the finding of "mental illness" alone is not justification for continued confinement in a mental institution. Without the necessary prerequisite of "dangerousness", a mentally ill person has the same right as a physically ill person to decide whether he wishes to remain hospitalized or be released from a hospital.

Assuming that the term can be given a reasonably precise content and that the "mentally ill" can be identified with reasonable accuracy, there is still no constitutional basis for confining such persons involuntarily if they are dangerous to no one and can live safely in freedom . . . the mere presence of mental illness does not disqualify a person from preferring his home to the comforts of an institution.<sup>17</sup>

The definition of "dangerous to oneself" used by the Court includes both a foreseeable risk of self-injury and a helplessness of the individual to avoid the hazards of daily life outside the confines of a mental hospital.<sup>18</sup>

## IV. PATIENTS' RIGHT TO RELEASE UNDER MONTANA LAW

### A. Previous Law

Under former Montana law, the discharge of an involuntarily, civilly committed patient from the state mental hospital was left to the discretion of the hospital medical staff.<sup>19</sup> The Montana supreme

14. O'Connor v. Donaldson, *supra* note 1 at 2490.

15. *Id.*

16. Justice Burger wrote a concurring opinion; Justice Douglas took no part in the consideration or determination of the case.

17. O'Connor v. Donaldson, *supra* note 1 at 2493.

18. *Id.* at 2493 n. 9.

19. REVISED CODES OF MONTANA, (1947) [hereinafter cited as R.C.M. 1947], § 38-109.

court held that the statute should be read literally, and that the written opinion of the hospital medical staff that the patient was in "satisfactory mental condition" was the sole criterion on which such a patient could be released.<sup>20</sup> The element of danger to self or others was not a prerequisite for either involuntary commitment or continued detention.

### B. Habeas Corpus

A patient in a Montana mental institution, in addition to rights granted under both old and new mental health laws,<sup>21</sup> has the right to "prosecute a writ of habeas corpus to inquire into the cause of such imprisonment or restraint, and if illegal to be delivered therefrom."<sup>22</sup> The issue of whether the writ may be used only to contest the legality of the original commitment, or whether the writ may also be brought to test the legality of continued confinement of a patient, has not been litigated in Montana. Because habeas corpus is a remedy rarely invoked by mental hospital patients,<sup>23</sup> attention shall be focused on judicial and administrative release procedures in the Montana mental health act.

### C. Current Law

In 1975, the Montana legislature repealed substantially all of the state's mental health laws and replaced them with the current Montana act for "Treatment of the Seriously Mentally Ill"<sup>24</sup> (hereinafter referred to as "the act", the "Montana act", or the "Montana mental health act").

With the passage of the Montana mental health act, Montana mental patients have received not only the constitutional protections that the *O'Connor* case demands, but also other rights which recent federal cases guarantee to those who have been involuntarily civilly committed to mental institutions. In this note the author will examine those sections of the act which relate to the standard and burden of proof of the dangerousness necessary for continued involuntary confinement of a mental patient, and to those sections which guarantee to the patient the procedural safeguards of notice and right to psychiatrist and legal counsel in release hearings. The var-

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§ 38-401(1) specifically allowed for the admission to the state mental hospital of one who was deemed not dangerous to either "health, person, or property." Both statutes were repealed by Laws of Montana (1975), ch. 466, § 38.

20. Petition of Smith, 145 Mont. 567, 403 P.2d 604, 605 (1965).

21. See *Robertson v. Cameron*, 224 F. Supp. 60, 62 (D.C. 1963).

22. R.C.M. 1947, § 95-2701.

23. *Civil Commitment of the Mentally Ill*, *supra* note 4 at 1382.

24. R.C.M. 1947, §§ 38-1301 to 38-1331.

ious administrative and judicial methods provided for in the act by which a patient may gain release from a mental hospital will also be discussed.

The present Montana mental health act, which became effective on July 1, 1975, provides that if a person, upon trial, is deemed seriously mentally ill, he may be involuntarily civilly committed to the state mental hospital or other hospital or mental health center approved by the Montana Department of Institutions. Initial involuntary commitment may be for a period of time not to exceed three months.<sup>25</sup>

There are several methods by which the patient may be discharged. Administratively, the professional person in charge of the patient's care may sign a written order discharging the patient, or he may simply decline to petition the state district court for an extension of the patient's original three month commitment.<sup>26</sup> In either case, the patient shall be discharged.

Should the professional person file a petition for extension of the patient's detention, the district court must give notice to the patient, his known next of kin, the patient's legal counsel, and his "responsible person" (friend, relative, or charitable organization, appointed by the court to assume responsibility for the welfare of the seriously mentally ill person). Upon requests from any of those so notified of the petition for extension, the district court must conduct a hearing to determine the need for continued detention.<sup>27</sup>

### 1. *The O'Connor Requirement of Dangerousness*

After petition for a hearing has been filed, the only legal basis for continued detention in a mental hospital in Montana is a finding by the court that the patient is seriously mentally ill. If the district court finds that the patient is not seriously mentally ill within the meaning of the act, the patient must be discharged and the petition dismissed.<sup>28</sup> "Seriously mentally ill" is defined as "suffering from a mental disorder which has resulted in self inflicted injury or injury to others, or the immediate threat thereof; or which has deprived the person afflicted of the ability to protect his life or health."<sup>29</sup>

The act thus requires that the traditional criterion of mental illness be coupled with a showing of dangerousness to oneself or to

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25. R.C.M. 1947, § 38-1306(5)(a). He may be committed to Warm Springs only if that is the least restrictive alternative necessary to protect the patient and the public and to permit effective treatment.

26. R.C.M. 1947, § 38-1306(5)(d).

27. R.C.M. 1947, § 38-1306(6).

28. R.C.M. 1947, § 38-1306(6).

29. R.C.M. 1947, § 38-1302(13).

others; neither mental illness nor dangerousness alone is sufficient to justify continued confinement. The proposition that danger to oneself can include either intentional infliction of physical injury or unintentional harm caused by an inability to care for one's daily needs, is in accord with the previously stated definition advanced in *O'Connor*.

## 2. *Procedural Safeguards*

Because there are substantial and fundamental individual interests involved, namely deprivation of liberty within the meaning of the due process clause of the Fourteenth Amendment, federal courts have required various procedural safeguards in commitment and discharge hearings. The procedures listed below must be followed before an individual's right to liberty is subordinated to the compelling state interest in detention.

The Sixth Amendment to the United States Constitution states that notice to the accused of the nature and cause of the accusation is essential to due process in criminal cases, since one may be involuntarily deprived of his liberty if convicted at trial.<sup>30</sup> The loss of personal liberty is no less absolute when a person is involuntarily confined in a mental institution following a civil commitment hearing than when he is involuntarily confined in a penal institution following a criminal trial. For this reason, the notice requirement has been extended to those facing the prospect of court ordered involuntary confinement in a mental hospital.<sup>31</sup> The Montana act provides that, upon the filing of a petition for an extension of the patient's involuntary hospitalization, the district court must give written notice of the petition to the patient as well as to the patient's legal counsel, responsible person, and known next of kin. If adjudged seriously mentally ill upon a hearing, the original three month confinement can be extended for an additional six months,<sup>32</sup> and thereafter for consecutive one year periods; each additional one year extension requires a petition from a professional person for continued detention, and in each instance the patient, his legal counsel, responsible person, and known next of kin must be given notice of the petition, and of his right to a hearing to contest the petition.<sup>33</sup>

The right of an individual to legal counsel in involuntary commitment hearings has been recognized by both federal district

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30. U.S. CONST. amend. VI. "In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation."

31. *Lessard v. Schmidt*, *supra* note 8 at 1092.

32. R.C.M. 1947, § 38-1306(6).

33. R.C.M. 1947, § 38-1306(7).

courts<sup>34</sup> and federal circuit courts.<sup>35</sup> In a provision which applies to both commitment and discharge hearings, the Montana act provides that the "patient shall be present and represented by counsel at all stages of the trial";<sup>36</sup> if the patient cannot afford counsel, the court must appoint an attorney and compensate him from the public funds.<sup>37</sup>

Federal court decisions are replete with indications of judicial skepticism toward the uncertainties inherent in the field of psychiatry.<sup>38</sup> Furthermore, the fact that a patient's request for release from a hospital is denied, is believed by some psychiatrists to be prima facie evidence of a conflict of interests between the patient and the hospital psychiatrist entrusted to evaluate his mental illness and dangerousness.<sup>39</sup> Perhaps for these reasons, it has been held that a patient has a right to independent psychiatric counsel even when psychiatric inquiry by the state manifests no risk of bias.<sup>40</sup> The Montana mental health act provides for both trial cross-examination of the professional person who requests further detention,<sup>41</sup> and for independent psychiatric testimony for the patient, which is to be funded by the state if the patient is indigent.<sup>42</sup>

### 3. *Burden of Proof*

Under previous Montana mental health laws, one who was adjudged mentally ill was faced with a rebuttable presumption that he remained mentally ill until he was discharged.<sup>43</sup> Under the existing law, however, mere mental illness is not sufficient, without the showing of dangerousness, to justify continued detention in a mental hospital. Both mental disorder and threat of injury to one's self or to others must be proved by the state to permit continued detention; both factors must be proved beyond a reasonable doubt.<sup>44</sup>

[T]he requirement of recommitment is derived from the proposition that the patient's status is likely to change . . . since recommitment presumes that the state must renew its authority to con-

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34. *Lessard v. Schmidt*, *supra* note 8 at 1097.

35. *Heryford v. Parker*, 396 F.2d 393 (10th Cir. 1968).

36. R.C.M. 1947, § 38-1306(4).

37. R.C.M. 1947, § 38-1309(1).

38. *Greenwood v. U.S.*, 350 U.S. 366, 375 (1956); *In re Ballay*, *supra* note 9 at 650; *People v. Del Guidice*, 345 N.Y.S.2d 341, 344 (1973).

39. T. SZASZ, *LAW, LIBERTY, AND PSYCHIATRY*, 48 (1963).

40. *Green v. U.S.*, 349 F.2d 203, 206 n.3 (D.C. Cir. 1965).

41. R.C.M. 1947, § 38-1306(4).

42. R.C.M. 1947, § 38-1309(2), (3).

43. *State v. Bucy*, 104 Mont. 416, 66 P.2d 1049, 1050 (1937), interpreting R.C.M. 1935, § 5685; *State v. Kitchens*, 129 Mont. 331, 286 P.2d 1079, 1084 (1955), interpreting R.C.M. 1947, § 64-112.

44. R.C.M. 1947, § 38-1306(4).

fine an individual, the standard of proof as well as the burden of proof should remain the same as they are at the initial commitment.<sup>45</sup>

## V. PRACTICAL LIMITATIONS

The grants of patients' rights found in the new Montana mental health act will prove meaningless unless those who can benefit from its guarantees are made aware of the act's existence and of its impact. At present, the state provides no attorney to explain the act to the patients.<sup>46</sup>

A crucial factor in determining the patient's continued need for hospitalization is the written report and evaluation of the patient's mental and physical condition that the doctor in charge of his care must submit when he petitions for extension of the patient's detention period. The report is to include tests and evaluations, and the present and future courses of individualized treatment planned by the doctor especially for that particular patient.<sup>47</sup> Warm Springs State Hospital currently has in excess of 840 patients, but has only six doctors to care for the patients' physical and psychological needs.<sup>48</sup> "Moreover, poorly staffed hospitals are often unable to take the necessary steps to discover those who have improved under institutional care and are perhaps ready for discharge."<sup>49</sup>

Another problem which must be overcome if the act is to be successfully implemented concerns the limited nursing home facilities in the state. Public and private nursing homes will be needed to care for many of the approximately 350 geriatric patients at Warm Springs who do not meet the act's definition of "seriously mentally ill", and who thus should be discharged. While legally the lack of outside placement for such people cannot justify continued hospitalization in a mental institution,<sup>50</sup> the "failure of the local community to equip itself to handle these patients, combined with an unwillingness or inability on the part of the immediate family to assume the financial and emotional burden of caring for the patient, means that the hospital, in many instances, is obliged to retain custody."<sup>51</sup> The addition of sixty new beds to the Center for

45. *Civil Commitment of the Mentally Ill*, *supra* note 4 at 1396.

46. According to Mr. Nick Rotering, attorney for the Montana Department of Institutions, negotiations to obtain legal counsel for patients are being entered into by the state.

47. R.C.M. 1947, § 38-1306(6).

48. From a discussion with Dr. William Alexander, Clinical Director of Warm Springs State Hospital. (Of the six, three are psychiatrists, one has one year of psychiatric training, and two are M.D.'s. The hospital superintendent is also a psychiatrist, but his duties are mainly administrative).

49. *THE MENTALLY DISABLED AND THE LAW*, *supra* note 5 at 138.

50. See Application of Creedmore State Hospital, 310 N.Y.S.2d 22, 25 (1970).

51. *THE MENTALLY DISABLED AND THE LAW*, *supra* note 5 at 138.

the Aged in Lewistown, and the plans for new nursing homes in Glendive and Billings are efforts to ease this strain.<sup>52</sup>

Finally, a serious hurdle which must be surmounted for this act to be successful involves those who are deemed "mentally ill" by conventional community standards, but who pose no physical danger to anyone. Community acceptance of those deemed wierd or eccentric may be withheld; and the absence of a controlled environment or adequate mental health facilities in any but the largest cities of the state will only serve to exacerbate the psychological problems of these individuals. Such regional mental health centers as are mentioned in the Montana mental health act simply do not exist in many parts of this state.<sup>53</sup>

## VI. CONCLUSION

The new Montana act guaranteeing rights to the seriously mentally ill is a necessary response to the enumeration of the rights of the mentally ill set forth in recent federal court decisions. The act provides adequate and needed safeguards to the involuntarily committed mental patients; the mental hospital's facilities and expertise may be concentrated solely on treating the acutely mentally ill, with the community given the responsibility of caring for those whose psychological problems pose no physical danger.

On a practical basis, however, much must be done to give the laudable intent of the act a realistic meaning. Communities must be educated on the problems of mental illness so as to accept those whose behavior is unusual, though harmless. Rest homes for the elderly and senile, and mental health centers for the nondangerous mentally ill must be provided on a regional basis throughout the state. The overburdened hospital staff at Warm Springs must be increased, and independent psychiatric and legal counsel must be provided when requested by an involuntarily committed patient seeking release.

Providing for these measures necessarily will require the expenditure of rather large amounts of state revenue. The commitment to provide the means to successfully implement the law was formally set forth in the Revised Codes by the forty-third and forty-fourth legislatures.<sup>54</sup> The appropriations for such endeavors must be

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52. From a conversation with Mr. Nick Rotering, *supra* note 46.

53. From a conversation with Dr. William Alexander, *supra* note 48.

54. R.C.M. 1947, §§ 80-2413 to 80-2414 state the intent of the legislature that geriatric patients not in need of intensive psychiatric care be placed in community nursing homes. Private nursing homes may enter into contracts with the state for the care of former Warm Springs geriatric patients, and public state nursing homes may also be established.

R.C.M. 1947, § 80-2501 states that the primary function of the Montana Center for the

provided by the forty-fifth legislature if the act is to have a substantial beneficial effect.

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Aged in Lewistown shall be the care and treatment of geriatrics released from Warm Springs.

R.C.M. 1947, §§ 80-2801 to 80-2806 provide for establishment of state mental health regions and for the establishment and public subsidization of regional health centers.

R.C.M. 1947, §§ 80-2802(4) imposes on the Department of Institutions a limited duty to educate the public on mental health matters by requiring the Department to collect and disseminate mental health information.