Donaldson Revisited: Is Dangerousness a Constitutional Requirement for Civil Commitment?

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The Supreme Court decision *O'Connor v. Donaldson* (1975) has been widely interpreted to assert that dangerousness is a constitutional requirement for civil commitment. This interpretation is a misreading of the decision, which actually addressed the conditions disallowing indefinite, involuntary custodial confinement and not the requirements for an initial commitment. An excessive reliance on dangerousness narrowly construed as a restrictive requirement for civil commitment has distorted the commitment process by emphasizing the state's police power in protecting the public at the expense of its *parens patriae* responsibility to provide care and treatment for the severely mentally ill. In reality, the Court has been remarkably cautious in addressing the justifications for civil commitment and has allowed room for a broader interpretation of legitimate justifications that would permit greater latitude in the treatment of the severely mentally ill.

Two decades ago, when long term custodial care of the mentally ill was still a common practice, Justice Stewart, in his majority opinion for the Supreme Court in *O'Connor v. Donaldson* (1975)[1] stated: "A finding of 'mental illness' alone cannot justify a State's locking a person up against his will and keeping him indefinitely in simple custodial confinement." "[T]here is... no constitutional basis for confining such persons involuntarily if they are dangerous to no one and can live safely in freedom."[2] Legal advocates of the view that dangerousness is the primary, if not the exclusive, justification for civil commitment thereupon declared that *Donaldson* made dangerousness a constitutional requirement for civil commitment. That view—aimed at curtailing civil commitments—has prevailed for two decades.

At present, shaped by the dictates of managed care for brief, cost-paring treatment, the circumstances faced by the mentally ill who may be committed are altogether different. With rapid discharges and barriers to admission, attention to the rights of the mentally ill has shifted from the deprivation of liberty to

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the deprivation of treatment. In this context, dangerousness narrowly construed as a requirement for civil commitment has been used to deprive patients of needed care.

Dangerousness has also been expropriated by a more conservative Supreme Court, ironically, to extend the reach of civil commitment. The definition of civil commitment has been stretched to rationalize extending the confinement of some persons who have committed criminal acts. In so doing, the Supreme Court has lowered the due process standards required for such commitments below those required for ordinary civil commitments. The most recent example of this expanded application of civil commitment is *Kansas v. Hendricks* (1997),[3] in which the Court upheld the constitutionality of the Kansas Sexually Violent Predator Act that established a process for civilly committing "sexually violent predators" after they had already served their full criminal sentences.

The view that dangerousness is the critical justification for civil commitment has thus marginalized a central purpose of civil commitment—to provide care and treatment for the severely mentally ill. Emphasizing dangerousness has tended to criminalize such commitments by skewing the rationale in favor of the state's police power at the expense of its *parens patriae* responsibility.

The mischief created by this view and the citing of *Donaldson* as a judicial foundation for it prompt a reexamination of this decision. Does *Donaldson* in fact assert what the civil libertarian interpretation would have it assert? This article will review the original opinion and interpretations of the opinion in subsequent decisions by the Supreme Court and in legal commentaries in an effort to clarify what conclusions about justifications for civil commitment may be legitimately inferred from this judicial record.

O'Connor v. Donaldson

Kenneth Donaldson was civilly committed to a Florida state hospital where he was confined against his will for nearly 15 years. "Throughout his confinement Donaldson repeatedly, but unsuccessfully, demanded his release."[4] "The testimony at the trial demonstrated, without contradiction, that Donaldson had posed no danger to others during his long confinement, or indeed at any point in his life."[5] "Furthermore, Donaldson's frequent requests for release had been supported by responsible persons willing to provide him any care he might need on release."[6] "The evidence showed that Donaldson's confinement was a simple regime of enforced custodial care, not a program designed to alleviate or cure his supposed illness."[7]

In his lawsuit, Donaldson charged Dr. O'Connor, the hospital superintendant, and other members of the hospital staff with having intentionally and maliciously deprived him of his constitutional right to liberty. The jury returned a verdict for Donaldson. The verdict was affirmed by the Court of Appeals in an opinion that supported "a right to treatment to persons involuntarily committed to state mental hospitals."[8] The appellate court's decision was further seen to imply that a state may "confine a mentally ill person

against his will to treat his illness, regardless of whether his illness renders him dangerous to himself or others."[9]

The Supreme Court explicitly chose not to address these issues of a right to treatment nor whether a state may compulsorily confine a nondangerous, mentally ill person for the purpose of treatment: "We need not decide whether. . . a mentally ill person may be confined. . . on any of the grounds. . . advanced to justify involuntary confinement."[10] The Court chose rather to restrict its attention to the question of whether a "finding of 'mental illness' alone [may] justify a State's locking a person up against his will *and keeping him indefinitely in simple custodial confinement* [emphasis added]."[11] The Court concluded: "[T]here is . . . no constitutional basis for confining such persons involuntarily if they are dangerous to no one and can live safely in freedom."[12]

Justice Stewart could hardly have been more clear in delineating the restricted purview of the Court's decision. "[T]his case," he stated, "involves no challenge to the initial commitment, but is focused, instead, upon the nearly 15 years of confinement that followed."[13] In other words, *Donaldson* was not about defining the justifications for civil commitment; it was about the "constitutional right to liberty"[14] of a nondangerous man who had been involuntarily hospitalized for an indefinite period in simple custodial confinement. The thrust of *Donaldson* was clearly aimed at curtailing indefinite confinement of persons "who are dangerous to no one and can live safely in freedom"—not at forbidding commitment of the nondangerous *per se*.

Although the meaning of the phrase "can live safely in freedom" was not spelled out in detail, Justice Stewart did observe that "even if there is no foreseeable risk of self-injury or suicide, a person is literally 'dangerous to himself' if for physical or other reasons he is helpless to avoid the hazards of freedom either through his own efforts or with the aid of willing family members or friends."[15] Those who cannot "live safely in freedom" might well refer to those persons who are at risk because of impaired judgment or severe suffering—the "gravely disabled."[16] As such, it allowed room for a broadened interpretation of dangerousness.

Other Supreme Court Cases Citing *Donaldson*

Despite Justice Stewart's cautious approach in treating dangerousness as a consideration in assessing the legitimacy of involuntary civil confinement, the Supreme Court has subsequently ruled on several cases dealing with civil commitment in which *Donaldson* has been interpreted as supporting the view that dangerousness is the determining consideration in such commitments.

Jones The first such case, *Jones v. U.S.* (1983),[17] explored the complexities of using dangerousness as a defining feature of civil commitment. A precursor to *Hendricks, Jones* pioneered the appropriation of dangerousness to extend the confinement of persons having committed criminal acts through the civil commitment process.

Michael Jones was arrested for attempting to steal a jacket from a department store—a misdemeanor punishable by a maximum sentence of one year. He was initially committed to a psychiatric hospital, St. Elizabeths (Washington, DC), on a court order for a determination of competency to stand trial, and was found to be suffering from paranoid schizophrenia. After nearly six months, he was found competent to stand trial; whereupon he pled and was found not guilty by reason of insanity and was recommitted to St. Elizabeths. A release hearing was held 17 months after the initial commitment. Inasmuch as he had been confined longer than the maximum period he could have spent in jail had he been convicted, he demanded either to be released or recommitted under ordinary civil commitment procedures.

The Supreme Court upheld the finding of the lower courts that Jones could be detained beyond the maximum criminal sentence for the attempted theft based on a lower standard of proof —preponderance of evidence—than that required for an ordinary civil commitment. In support of this finding, Justice Powell, in his majority opinion, held that "important differences [exist] between the class of potential civil-commitment candidates and the class of insanity acquittees that justify differing standards of proof."[18] He emphasized the importance of dangerousness in justifying this extension of confinement for insanity acquittees: "The fact that a person has been found, beyond a reasonable doubt, to have committed a criminal act certainly indicates dangerousness. . . . Indeed, this concrete evidence generally may be at least as persuasive as any predictions about dangerousness that might be made in a civil-commitment proceeding."[19] He argued further that dangerousness is not restricted to violence against persons but applies as well to the violation of property rights. "We do not agree with petitioner's suggestion that the requisite dangerousness is not established by proof that a person committed a nonviolent crime against property."[20]

Justice Powell enlisted dangerousness to extend the confinement of insanity acquittees in a quasi-criminal application of "civil" commitment. The decision marked a turning away from the civil libertarian approach to civil commitment that had shaped earlier decisions by the Court.

As a staunch defender of the civil libertarian view, Justice Brennan, in his dissent, took strong exception to this formulation. He argued that dangerousness for the purposes of civil commitment cannot be presumed to persist indefinitely simply by virtue of a finding that a criminal act had been committed; and that the same standard of proof that applies to ordinary civil commitments—clear and convincing evidence—should obtain in the *Jones* circumstances. "An acquittal by reason of insanity of a single, nonviolent misdemeanor is not a constitutionally adequate substitute for the due process protections of *Addington* and [*Donaldson*], i.e., proof by clear and convincing evidence of present mental illness or dangerousness, with the government bearing the burden of persuasion."[21]

Donaldson, he argued, "held that a

mentally ill individual has a 'right to liberty' that a State may not abridge by confining him to a mental institution, even for the purpose of treating his illness, unless in addition to being mentally ill he is likely to harm himself or others if released."[22] Furthermore, *Donaldson*, he declared, "requires that a person be proved dangerous, not merely 'unacceptable,' before he may be subjected to the massive curtailment of individual freedom that indefinite commitment entails."[23]

Although Justice Brennan reached the opposite conclusion from Justice Powell, he based his argument on the same principle—dangerousness. He cited *Donaldson* as if it made dangerousness a constitutional requirement for civil commitment. He omitted the other *Donaldson* condition for releasing civil committees—that such persons "can live safely in freedom"; and made no mention of the restricted application of *Donaldson* to long term custodial confinement. By relying on dangerousness as the defining justification for civil commitment, Justice Brennan permitted Justice Powell to hoist him on his own petard.

By framing the debate as a question of how best to determine dangerousness, the *Jones* Court promoted a view of civil commitment as an application of the State's police power. In emphasizing dangerousness at the expense of the State's *parens patriae* responsibility, *Jones* displayed the contradictory consequences of relying too heavily on dangerousness as the defining justification for civil commitment. Dangerousness was alternately employed as the rationale for extending quasicriminal commitments and for restricting civil commitments.

Burch It has been in this latter application of dangerousness as a constitutional sieve restricting the justification for an initial commitment that *Donaldson* has been characteristically misread. Such was the case in *Zinermon v. Burch* (1990)[24] in which the issue of what constituted informed consent to a psychiatric admission was addressed.

Darrell Burch, while injured, disoriented, confused, and psychotic, signed admission forms to a Florida state mental hospital in apparent compliance with state statutory requirements for voluntary admissions. After discharge five months later, he sued the hospital for depriving him of liberty without due process of law, claiming that he had been incompetent to give informed consent and that his "voluntary" admission effectively circumvented the involuntary commitment procedure and thereby deprived him of constitutionally guaranteed procedural safeguards.

In the majority opinion, Justice Blackmun upheld Burch's right to sue for deprivation of due process. "Persons who are mentally ill and incapable of giving informed consent to admission," he argued, "would not necessarily meet the statutory standard for involuntary placement. . . The involuntary placement process serves to guard against the confinement of a person who, though mentally ill, is harmless and can live safely outside an institution. Confinement of such a person. . . is unconstitutional. *O'Connor v. Donaldson* [p. 575]."[25]

In this citation, Justice Blackmun rep-

resented the *Donaldson* conditions for release from involuntary confinement as requirements for the initial commitment. In contrast to Justice Brennan's dissent in *Jones*, Justice Blackmun included the condition of being able to "live safely in freedom." But he nonetheless conflated the concepts of initial commitment and indefinite, involuntary confinement, so carefully distinguished by Justice Stewart, and thereby derived a constitutional prerogative from *Donaldson* not contained in Justice Stewart's opinion. *Burch* was concerned with procedural safeguards against unjustified initial commitments—not, as in *Donaldson*, with constitutional protection against unjustifiably extended confinement.

Cooper Similarly, in *Cooper v. Oklahoma* (1996),[26] *Donaldson* was again interpreted to have established directly the basis of a State's authority to civilly commit. The central question addressed in *Cooper* was the standard of proof necessary to establish incompetence to stand trial. In a unanimous decision, Justice Stevens held that "Oklahoma law presuming [a] defendant is competent to stand trial unless he proves incompetence by clear and convincing evidence violates due process,"[27] that such a demanding standard of proof places an unfairly onerous burden on the accused, and that the applicable standard should be "more likely than not." The Court rejected Oklahoma's suggestion that the standard of proof in a competency proceeding should be the same as in a civil commitment proceeding, asserting that "commitment and competency proceedings address entirely different substantive issues."[28]

In this context, *Donaldson* was cited as establishing minimum criteria for civil commitment: "Although we have not had the opportunity to consider the outer limits of a State's authority to civilly commit an unwilling individual, our decision in *Donaldson* makes clear that due process requires at a minimum a showing that the person is mentally ill and either poses a danger to himself or others or is incapable of 'surviving safely in freedom.' "[29] As did Justice Blackmun in *Zinermon v. Burch*, Justice Stevens recognized the importance of "surviving safely in freedom"; but also like Blackmun, he interpreted *Donaldson* as establishing criteria for the initial commitment.

Although the Court has not invariably reworked the *Donaldson* decision to conform to civil libertarian standards,* an impression has been created by the citations discussed that indefinite confinement is indistinguishable from initial commitment and that therefore the same justifications apply to both.

Revisionist Commentators

In view of the Court's susceptibility to interpret *Donaldson* as if it established constitutional requirements for the initial commitment and the Court's emphasis on dangerousness as a specific requirement, it is hardly surprising that some commen-

* For example, *Foucha v. Louisiana*, 504 U.S. 71, 77 (1991): "We relied on *O'Connor v. Donaldson*. . . which held as a matter of due process that it was unconsitutional for a state 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.'" *Donaldson* was cited in this instance by Justice Thomas to support the argument that an insanity acquittee is entitled to release when he has recovered his sanity or is no longer dangerous.

tators have picked up on this judicial practice and joined in a revisionist interpretation of *Donaldson*. Such an interpretation is stated succinctly by Parry and Beck: "*Donaldson v. O'Connor,* and more recently, *Zinermon v. Burch*, make it clear that involuntary hospitalization is inappropriate for individuals with mental illnesses who are not dangerous to themselves or others and can live safely outside an institution."[30] "The primary legal question in commitment," they concluded, "is whether civil commitment is necessary to protect the public or the individual, not whether treatment will remediate the individual's mental illness."[31]

More recently, Parry has restated this conclusion even more unequivocally. "The first Supreme Court decision to address dangerousness," he said, "was *O'Connor v. Donaldson*, which introduced the notion that dangerousness is a major justification for civil commitment. Later, in *Zinermon v. Burch*, a majority of the justices agreed that dangerousness is a constitutional requirement for civil commitment." "If dangerousness is not an absolute requirement for civil commitment," he concluded, "it is very nearly so, for under the *Zinermon* formulation persons cannot be civilly committed unless they are dangerous or cannot safely live in the community."[32] Here he is following the footprints of Justice Blackmun.

Parry is not alone in this misreading of *Donaldson*.[†]

Supreme Court Avoidance of Justifications

Despite such efforts to extract from *Donaldson* and its offspring a restrictive pronouncement that dangerousness is a constitutionally required justification for civil commitment, the Supreme Court in reality has been remarkably cautious in addressing such justifications. *Donaldson* itself addressed only the restricted issue of the justifications for indefinite custodial confinement, not for commitments *per se*. Even if *Donaldson* were to be construed to address justifications for the initial commitment, the decision included the ability to "live safely in freedom" as a justification that allowed for a broadened interpretation of the relevant criteria.

In the cases cited, the primary issues addressed by the Court were due process questions about standards of proof and procedural safeguards, not justifications *per se*. As Justice Thomas has observed, "[T]his Court has *never* applied strict scrutiny to the substance of state laws involving involuntary confinement of the mentally ill."[33] "To the contrary," he continued, "until today we have subjected the substance of such laws only to very def-

[†] See, e.g., Marilyn Hammond, Predictions of dangerousness in Texas: psychotherapists' conflicting duties, their potential liability, and possible solutions. 12 St. Mary's L.J.141, 148–9 (1980): "The United States Supreme Court in *O'Connor v. Donaldson* held a state cannot constitutionally confine a non-dangerous person capable of safely surviving in society. Such confinement violates a patient's constitutional right to freedom. The Court made the determination of dangerousness crucial for commitment of the mentally ill. Involuntary commitment, when no treatment is offered, must be based on a determination of dangerousness." See also, Erika F. King: Outpatient civil commitment in North Carolina: constitutional and policy concerns. 5 Law & Contemp Probs 251–4 (1995): ". . . the U.S. Supreme Court decided *O'Connor v. Donaldson*, which is usually cited for the proposition that inpatient civil commitment of an adult requires a showing of mental illness and dangerousness. . . . As the *O'Connor* decision has been interpreted, the State may not commit such individuals until they become dangerous."

erential review." "[I]n *O'Connor v. Donaldson*," he concluded, "we held that 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."[34]

Similar conclusions about the limited scope of *Donaldson* in defining the justifications for civil commitment of the mentally ill have been reached by a number of commentators.[‡]

So why, one might ask, has the Court subjected the substance of state laws involving involuntary confinement of the mentally ill to such "deferential review"? Justice Powell has suggested a possible answer. "We have observed before," he concluded in *Jones*, "that '[when] Congress undertakes to act in areas fraught with medical and scientific uncertainties, legislative options must be especially broad and courts should be cautious not to rewrite legislation. . .' *Marshall v. United States*, 414 U.S., at 427."[35] In a similar vein, another commentator, referring to *Donaldson* and other cases involving substantive due process claims, has observed: "[T]he Court has relaxed its ordinarily strict scrutiny of alleged violations of fundamental rights when the governmental action has involved complex issues that the Court recognizes it is ill-suited to resolve."[36] Civil commitments fall in a gray area involving medical and legal considerations; and it may well be that the Court has concluded that discretion is the better part of valor in not imposing its opinions too restrictively on this complex decision-making process.

Conclusions

Whatever its reasons, the Court's restraint in not dictating the justifications for civil commitment appears particularly prescient in light of changes in the inpatient treatment of the mentally ill. While limiting the justification of civil commitment to dangerousness may have served as an effective antidote to overextended custodial care, such a restrictive justification does not address effectively the current need of the severely mentally ill for adequate treatment in a time of parsimonious services shaped by managed care. The Court's reticence in defining justifications for civil commitment in *O'Connor v. Donaldson* does not support a restrictive, civil libertarian view of dangerousness as a limiting justification, leaving open the debate as to how best to resolve this thorny question.

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[‡] See, e.g., George E. Dix: Major current issues concerning civil commitment criteria. 45 Law & Contemp Probs 138–9 (1982): "[*O'Connor v. Donaldson*] provides no hint as to the Court's view of the extent to which 'nondangerous' mentally ill persons can be confined if treatment is provided; of what constitutes 'treatment' that will support such confinement; or of what constitutes 'dangerousness' for purposes of this analysis." See also, David W. Burgett, Comments, Substantive due process limits on the duration of civil commitment for the treatment of mental illness. 16 Harv C.R.-C.L. L. Rev. 205, 214 (1981): "[In *Donaldson*], The Court did not address the constitutionality of the *parens* rationale as a justification for an involuntary confinement."

References

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3. Kansas v. Hendricks, 117, S. Ct. 2072 (1997)
4. Donaldson, 422 U.S. at 565
5. Id. at 568
6. Id. at 566
7. Id. at 568
8. 493 F.2d at 504
9. Id. at 522–7, and Donaldson, 422 U.S. at 572–3
10. Donaldson, 422 U.S. at 573
11. Id. at 575
12. Id.
13. Id. at 567
14. Id. at 573
15. Id. at 574, fn. 9
16. *See* American Psychiatric Association: Guidelines for Legislation on the Psychiatric Hospitalization of Adults (Washington, DC: APA, 1982) for discussion of "gravely disabled."
17. 463 U.S. 354 (1983)
18. Id. at 367
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