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# Coercion, Consent, Compassion

John D. King\*

Law, fundamentally, is about people. Everything a lawyer does, every case a judge decides, every piece of scholarship a legal academic writes, has the capacity to increase or to decrease human suffering. I want to thank the *Law Review* for inviting me to comment on Claire Hagan's excellent Note, *Sheltering Psychiatric Patients from the DeShaney Storm: A Proposed Analysis for Determining Affirmative Duties to Voluntary Patients*.<sup>1</sup> I also want to thank Ms. Hagan for taking on such an important and complex set of issues. President Clarke kicked off this Notes Colloquium by saying that good legal scholarship covers topics that matter to people. That *should* seem obvious, of course, but those of you who have spent the last few months up in the *Law Review* office sifting through articles may wish that more of the legal academy took that advice to heart. Ms. Hagan's effort to explore the limits of protection offered to those who are "voluntarily" committed to psychiatric facilities is a critical topic that matters greatly to a lot of people.

Attempts to distinguish "voluntary" actions and valid "consent" to an action in the legal sense often fail to comport with the average citizen's understanding of these terms. In the world I inhabit, criminal law, issues of voluntariness and consent play crucial roles in a defendant's journey through the justice system. The smooth operation of the criminal justice system is only achieved by the willingness of the vast majority of defendants to give up their constitutional rights. One context in which the

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1. Claire M. Hagan, *Sheltering Psychiatric Patients from the DeShaney Storm: A Proposed Analysis for Determining Affirmative Duties to Voluntary Patients*, 70 WASH. & LEE L. REV. 725 (2013).

issues of voluntariness and consent are particularly important is the waiver of the right to trial.<sup>2</sup> Popular culture celebrates the criminal trial, the apex of our system, in which the truth is supposed to spring full grown from the structured clash of two well-armed adversaries. As we know, however, fewer than 5% of criminal cases ever reach that point.<sup>3</sup> The other 95% of cases are resolved through plea bargaining and depend on an individual's consensual and voluntary waiver of her right to trial.<sup>4</sup> To enter into a plea bargain, of course, the accused must voluntarily consent to a conviction.<sup>5</sup> This raises complex issues concerning the meaning of voluntariness within a particular set of constraints.

Another familiar criminal context is the circumstance surrounding interrogations and the right to remain silent. We all know that a statement made while in state custody is only admissible in court if it is voluntarily made.<sup>6</sup> This designation of "voluntary" turns on whether the police gave *Miranda* warnings and whether the individual then voluntarily waived her right to remain silent.<sup>7</sup> It is an unfortunate truth that the police can obtain this consent by any manner of intimidation, trickery, isolation, or any number of levels of coercion up to a point.<sup>8</sup> And courts consistently uphold confessions given under coercive

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2. See FED. R. CRIM. P. 11(b) (requiring federal courts to ensure that a defendant entering a guilty plea understands the nature and consequences of the plea, and that the defendant is voluntarily choosing to plead guilty).

3. See *United States v. Booker*, 543 U.S. 220, 273 (2005) (Stevens, J., dissenting) ("[O]ver 95% of all federal criminal prosecutions are terminated by plea bargain.").

4. *Id.*; see also *Brady v. United States*, 397 U.S. 742, 747 (1970) ("[G]uilty pleas are valid if both 'voluntary' and 'intelligent.'" (citation omitted)).

5. See *Brady*, 397 U.S. at 749–55 (discussing the standard for a voluntary plea and determining that a state's use of coercive pressures to obtain a guilty plea does not negate voluntariness); FED. R. CRIM. P. 11(b)(2) (requiring the court, before accepting a guilty plea, to "address the defendant personally in open court and determine that the plea is voluntary and did not result from force, threats, or promises (other than promises in a plea agreement)").

6. *Miranda v. Arizona*, 384 U.S. 436, 444–45 (1966).

7. *Id.*

8. For an interesting look at how police manuals actually encourage coercive interrogation techniques, see Charles D. Weisselberg, *Mourning Miranda*, 96 CAL. L. REV. 1519, 1521–90 (2008) (evaluating *Miranda*'s premises by examining several police training manuals' instructions for interrogation).

circumstances, as long as these waivers meet certain formalistic requirements of *Miranda*.<sup>9</sup> To a large extent, the formalism of the “*Miranda* warnings” has swallowed the true meaning of what it means to voluntarily consent to waive a right.<sup>10</sup>

As in the criminal law context, voluntariness and consent play an important role in the mental-health law issue of civil commitment.<sup>11</sup> As Ms. Hagan explains in her Note, individuals committed to state mental hospitals have traditionally been labeled either “voluntary” or “involuntary” upon entrance into the hospital system.<sup>12</sup> This label then dictates, for the most part, the state’s relationship to the patient and the duty of care the state owes, if any, to the patient should harm befall the patient during her hospitalization.<sup>13</sup> Ms. Hagan quite correctly points out the two major flaws in such a framework: (1) that the labels “voluntary” and “involuntary” may be misleading when the

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9. For example, the Supreme Court has found that a suspect who invoked his right to remain silent, then later asked a police officer, “Well, what is going to happen to me now?” had effectively waived his right. *Oregon v. Bradshaw*, 462 U.S. 1039, 1042, 1046 (1983). Subsequent statements were considered a voluntary confession. *Id.* at 1043–46.

10. See, e.g., Nirej Sekhon, *Willing Suspects and Docile Defendants: The Contradictory Role of Consent in Criminal Procedure*, 46 HARV. C.R.-C.L. L. REV. 103, 124–26 (2011) (arguing that, after *Miranda*, courts generally do not ask whether a confession was voluntary, but generally admit confessions if *Miranda* warnings were properly administered, even though *Miranda* warnings probably do not alleviate coercive forces); Robert E. Toone, *The Incoherence of Defendant Autonomy*, 83 N.C. L. REV. 621, 646 (2005) (discussing how bureaucratization, professionalism, and an increased focus on efficiency altered the conception of due process protections).

11. See generally Dora W. Klein, *When Coercion Lacks Care: Competency to Make Medical Treatment Decisions and Parens Patriae Civil Commitments*, 45 U. MICH. J.L. REFORM 561 (2012); Robert D. Miller, *The Continuum of Coercion: Constitutional and Clinical Considerations in the Treatment of Mentally Disordered Persons*, 74 DENV. U. L. REV. 1169 (1997); Allison D. Redlich, *Voluntary, But Knowing and Intelligent?*, 11 PSYCHOL. PUB. POL’Y & L. 605 (2005); Bruce J. Winick, *Coercion and Mental Health Treatment*, 74 DENV. U. L. REV. 1145 (1997).

12. Hagan, *supra* note 1, at Part III.A.

13. See *id.* at Parts III–IV (discussing the significance of voluntary/involuntary status for determining patients’ statutory and constitutional rights); see also Donald H. Stone, *The Benefits of Voluntary Inpatient Psychiatric Hospitalization: Myth or Reality?*, 9 B.U. PUB. INT. L.J. 25, 26–29 (1999) (exploring various consequences of being a voluntary versus an involuntary patient).

patient's individual circumstances are considered; and (2) that such a distinction may prevent courts from finding that a state has an affirmative duty to a voluntary patient, even when the patient fits within the existing functional custody or state-created danger exceptions.<sup>14</sup> Ms. Hagan's willingness to point out the legal fiction that underlies the formal distinction between "voluntary" and "involuntary" psychiatric patients has broad ramifications beyond the mental health context into a broader understanding of voluntariness and consent.

Limiting courts to a formalistic approach to patients' rights and a rigid definition of voluntariness and consent is problematic. Ms. Hagan describes the term voluntary as "an artificial signifier,"<sup>15</sup> and she is right to underscore the importance of allowing courts the discretion to delve into the background of each case in order to determine whether true, meaningful, and voluntary consent was given. She notes the importance of questioning whether a voluntarily committed patient was even competent to give informed consent and questioning whether consent was "tainted by coercion."<sup>16</sup> She poses questions with troubling answers in this same vein, such as "What if state law allows a facility to hold a voluntary patient for seventy-two hours after the patient decides he wants to leave?" and "What if the hospital is aware that a particular patient is at high risk of being harmed by another patient?"<sup>17</sup> What is truly compelling, however, is the manner in which Ms. Hagan connects each of these problems within the current system not just to a case, but to the compelling story behind the case.

In his wonderful Article *Storytelling for Oppositionists and Others*, Richard Delgado years ago described the power of storytelling in legal scholarship:

Stories, parables, and narratives are powerful means for destroying mindset—the bundle of presuppositions, received wisdoms, and shared understandings against a background of which legal and political discourse takes place . . . Ideology—

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14. Hagan, *supra* note 1, at Part V.

15. *Id.* at 780.

16. *Id.* at 785.

17. *Id.* at 729.

the received wisdom—makes current social arrangements seem fair and natural. Those in power sleep well at night—their conduct does not seem to them like oppression.<sup>18</sup>

“The cure,” Delgado said, “is storytelling . . . . [S]tories can shatter complacency and challenge the status quo. . . . They can help us understand when it is time to reallocate power.”<sup>19</sup> One of the great accomplishments of Ms. Hagan’s Note is the way that she delves into the stories behind judicial decisions to point out the problems with the current two-dimensional approach used by courts. She argues that “[a] patient’s relationship with the state is more complicated than his voluntary status,”<sup>20</sup> and the stories in her Note thoroughly back up this proposition.<sup>21</sup> It is by telling stories about some of the most vulnerable members of our society that Ms. Hagan truly makes clear the urgency and importance of adopting a framework that will be able to take an individual’s treatment by the state into consideration when deciding whether patients are owed affirmative duties.

The story at the heart of the problem Ms. Hagan addresses in her Note is that of Joshua DeShaney.<sup>22</sup> Mr. DeShaney today is thirty-three years old and he lives in an assisted-living facility outside of Oshkosh, Wisconsin.<sup>23</sup> He is partially paralyzed; he lives with profound mental retardation, and severe and irreversible brain damage.<sup>24</sup> He was born to very young parents in Cheyenne, Wyoming.<sup>25</sup> His father left him and the family before Joshua was one year old.<sup>26</sup> When Joshua was fourteen

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18. Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2413–14 (1989).

19. *Id.* at 2414–15.

20. Hagan, *supra* note 1, at 791.

21. *See id.* at Parts II.B, IV.A–B (summarizing the case histories—the stories—behind the leading Supreme Court and circuit court cases addressing affirmative duties to institutionalized people).

22. *See id.* at Part II.B.2 (detailing the *DeShaney* case); *DeShaney v. Winnebago Cnty. Dep’t of Soc. Servs.*, 489 U.S. 189 (1989).

23. Lynda G. Dodd, *DeShaney v. Winnebago County and the “Blessings of Liberty,”* in CIVIL RIGHTS STORIES 185, 191 (Myriam Gilles & Risa Goluboff eds., 2007).

24. *Id.*

25. LYNNE CURRY, THE *DESHANEY* CASE 13 (2007).

26. *Id.*

months old, his mother decided that she was unable to take care of Joshua.<sup>27</sup> When later asked her reasons, her response was poignant: she felt herself “too young, too alone, and too poor.”<sup>28</sup> And so she sent him back to live with his father.<sup>29</sup> When she was asked later, after all of this happened, why she did that, she said, she wanted for him to have a “nice kid life” that she could not give him.<sup>30</sup>

The next couple of years of Joshua’s life were unspeakably sad. It was marked by repeated visits to the emergency room, repeated calls to the police, and officers and state officials of various stripes coming to the house.<sup>31</sup> The first time Joshua went to the emergency room, when he was just two years old, he had injuries on his face, scalp, spine, buttocks, thighs, penis, ankle, and heel.<sup>32</sup> The Wisconsin Department of Social Services opened a file on him that remained open, in some way or the other, for the rest of his childhood.<sup>33</sup> A social worker was assigned to visit the house once a month, and she did.<sup>34</sup> During the last four months prior to the final injury at the hands of his father, that social worker never laid eyes on Joshua.<sup>35</sup> She went to the house one month and was told he was asleep.<sup>36</sup> She took no action to try to see him.<sup>37</sup> She went the next month and nobody was home and she didn’t go back.<sup>38</sup> She went the month after that, March 7th of 1983, and was told again that he was asleep.<sup>39</sup> That time she didn’t try to wake him up, didn’t ask to see him, but stayed in the kitchen with his father decorating a birthday cake for another

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27. *Id.* at 14.

28. *Id.*

29. *Id.*

30. *Id.*

31. *See* Dodd, *supra* note 23, at 186–91 (providing detailed information about the state’s involvement with Joshua while he was living in his father’s house).

32. *Id.* at 186.

33. *Id.* at 186–89.

34. *Id.* at 187.

35. *Id.* at 187–88.

36. *Id.* at 188.

37. *Id.*

38. *Id.*

39. *Id.*

child.<sup>40</sup> The next day Joshua showed up at the hospital, in a coma, with irreversible brain damage.<sup>41</sup> Joshua's mother claims that the social worker later said, "I knew one day the phone would ring and Joshua would be dead."<sup>42</sup> Despite the extensive files that were kept on Joshua DeShaney, and despite the mindboggling and infuriating negligence with which the state handled this, the Supreme Court denied relief because of its conclusion that the state had no constitutional duty to protect Joshua.<sup>43</sup>

The *DeShaney*<sup>44</sup> case was about many issues, but an important part of what it was about was competing visions of society and what duties the state owes to the vulnerable among us.<sup>45</sup> As Ms. Hagan aptly discusses in her Note, it was not an easy case. Thoughtful critics of *DeShaney* who are sympathetic to a broader reading of state liability recognize that there could be a detrimental, real-world impact of allowing these suits to go forward and that it can be difficult to determine where the slippery slope would end.<sup>46</sup> But the majority opinion in *DeShaney*, which Ms. Hagan criticizes rightly as "unrelentingly formal,"<sup>47</sup> seemed almost to revel in the tragic facts of that case, and to celebrate the Court's unwillingness to yield to the impulse of

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40. CURRY, *supra* note 25, at 32.

41. *Id.* at 33, 35–36.

42. *Id.* at 38.

43. *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 202 (1989) ("Because . . . the State had no constitutional duty to protect Joshua against his father's violence, its failure to do so—though calamitous in hindsight—simply does not constitute a violation of the Due Process Clause.").

44. *Id.*

45. *Compare id.* at 196 (emphasizing the importance of protecting individuals against the state's interference and power), *with id.* at 208–10 (Brennan, J., dissenting) (emphasizing the state's systematic and inextricable role in protecting vulnerable citizens), *and id.* at 212–13 (Blackmun, J., dissenting) (emphasizing "fundamental justice" and compassion for vulnerable individuals).

46. *See, e.g.*, Barbara E. Armacost, *Affirmative Duties, Systemic Harms, and the Due Process Clause*, 94 MICH. L. REV. 982, 1003 (1996) ("Permitting individuals to bring failure-to-protect claims [like *DeShaney*] would require the courts to review resource-allocation decisions and permit judges to mandate a level of protection different from the level determined by the political branches.").

47. Hagan, *supra* note 1, at 790.



natural sympathy.<sup>48</sup> Instead, the Court focused on this illusory and arbitrary distinction between action and inaction,<sup>49</sup> and the Court created an incentive for agencies, such as Winnebago County DSS, *not* to act.<sup>50</sup> And not for nothing, as Ms. Hagan pointed out, *DeShaney* has very few supporters among those who have studied or written about it.<sup>51</sup>

Ms. Hagan also artfully navigates the tension between two well-meaning groups of people who address these issues,<sup>52</sup> one that I would characterize as rights-oriented, and the other that I would call treatment-oriented. That is a thicket in the mental health world, and one that Ms. Hagan does a nice job of navigating. She does not shy away from bold statements, and she proposes a realistic and nuanced analysis of how courts should analyze the duties that a state may owe a patient with a formal status of voluntary.<sup>53</sup> She takes seriously Justice Cardozo's advice, which she cites in a footnote, to resist the temptation "when the demon of formalism tempts the intellect with the lure of scientific order."<sup>54</sup>

The most famous part of *DeShaney* is Justice Blackmun's dissent, which is memorable for the language he uses, for the emotion he conveys, and for the frank manner in which he compares Chief Justice Rehnquist and the majority to those judges who decided *Dred Scott*<sup>55</sup> in the fugitive slave cases, for

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48. See, e.g., *DeShaney*, 489 U.S. at 202 (majority opinion) ("Judges and lawyers, like other humans, are moved by natural sympathy in a case like this . . .").

49. See *id.* at 200–01 (explaining that states' affirmative actions trigger corresponding duties); *id.* at 203 ("The most that can be said of the state functionaries in this case is that they stood by and did nothing when suspicious circumstances dictated a more active role for them.").

50. See, e.g., *id.* at 212 (Brennan, J., dissenting) (pointing out that the majority's strict action–inaction analysis incentivizes a state "at the critical moment, to shrug its shoulders and turn away" rather than take protective action, thereby avoiding any potential liability).

51. See Armacost, *supra* note 46, at Part I (summarizing the overwhelmingly negative reaction to *DeShaney*).

52. Hagan, *supra* note 1, at 753–54, 778–79.

53. *Id.* at Part VI.

54. BENJAMIN CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 66 (1921).

55. *Dred Scott v. Sandford*, 60 U.S. 393 (1857).

their exaltation of formalism over justice.<sup>56</sup> Blackmun memorably wrote: “Faced with a choice, I would adopt a ‘sympathetic’ reading, one which comports with dictates of fundamental justice, and recognizes that compassion need not be exiled from the province of judging.”<sup>57</sup> Ms. Hagan’s Note is not only well-researched, powerfully argued, and beautifully written, it is also, at its heart, a compassionate piece of scholarship that allows for interpretation of the law to affect lives for the better.

Ms. Hagan’s Note is timely and helpful in proposing an interpretive structure that would be more just and certainly more clear than the current caselaw. She is to be congratulated on a thoughtful and well-written Note.

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56. *DeShaney*, 489 U.S. at 212–13 (Blackmun, J., dissenting).

57. *Id.* at 213.