"I Vote. I Count": Mental Disability and the Right to Vote

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The right to vote is one of the most highly valued prerogatives of a free people. During much of American history, however, significant segments of the population have been denied the right to exercise their franchise. One of the last groups still subject to systematic restrictions on access to the ballot is people with mental disabilities, both mental illnesses and mental retardation. The fairness of such restrictions is now forcefully being called into question.

Although today we take for granted the right of nearly every U.S. citizen to vote, this was not always the case. The Constitution reserves to the states the authority to determine the qualifications of voters, and the states have used that power at one time or another to impose various limits on ballot access. In the federal period, for example, soon after the Constitution was adopted, would-be voters in many states had to be property owners and had to pass tests of religious affiliation. Slaves were excluded from voting until their emancipation in the wake of the Civil War, and they and their descendants faced other forms of discrimination aimed at reducing their opportunities to influence the outcome of elections for more than a century. These measures included poll taxes, literacy tests, and acts of outright intimidation. And, of course, for almost a century and a half after the country was founded, suffrage was extended only to men.

Happily, our national history has been characterized by a progressive extension of voting rights to ever-increasing portions of the population. The post–Civil War amendments to the Constitution were aimed, in part, at securing voting rights for the newly freed slaves. Although the amendments failed to have that effect in much of the country, their promise was redeemed in 1965 with the passage of the Voting Rights Act. Among other provisions, the act eliminated literacy tests, which had been applied selectively to African Americans. With the adoption of the 19th Amendment in 1920, women acquired the right to vote, and the 24th Amendment, ratified in 1964, made poll taxes illegal. The 26th Amendment in 1971 extended the franchise to persons 18 years of age or older.

Persons with mental disabilities, though, are one of the few groups still singled out for special treatment at the polls. As of 1997, 44 states had language in their constitutions, statutes, or case law barring voting by some subgroups of persons with mental illness or mental retardation (1). The terminology used in many of these provisions reveals their archaic provenance. Fifteen states restrict voting by "idiots," the "insane," or "lunatics." More modern provisions seen in 32 states do the same for persons found to be suffering from mental incompetence or incapacity. Eleven states exclude from their franchise persons who have been placed under guardianship or conservatorship (1). As late as the early 1980s, two states retained statutes– once widespread – disenfranchising all persons committed to psychiatric facilities (2).

Restrictive laws and state constitutional provisions have been criticized on a number of grounds. Use of outdated terms such as "idiot" or "insane" leads to a profound– and arguably unconstitutional– vagueness about whom they are intended to exclude from the voting booth. In practice, discretion is conferred on local registrars, who may act more on the basis of prejudice than of a careful evaluation of the prospective voter. More fundamentally, "statutes that take away the franchise because of a condition or status that describes some form of mental impairment or institutional confinement are too broad since many, or at least some, of the individuals included by the label are fully capable of voting" (3). Even people under guardianship or conservatorship may not need to be deprived of their voting rights, since these determinations often occur because of focal impairments in functioning– for example, inability to handle one's finances– that are unrelated to the capacity to vote.

The underlying question, of course, is what it means to be competent to vote. Case law on the voting rights of the mentally disabled is sparse and appears not to have addressed this foundational issue at all. Moreover, some of the possible answers have already been rejected by lawmakers. It might be thought, for example, that voting requires the ability to read, since ballots must be deciphered before a vote can be cast. In addition, much of the information regarding candidates' positions, on which a reasoned choice should be predicated, is also circulated in written form. But, as noted above, the Voting Rights Act barred the use of literacy tests, at least in part because of their discrim-

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inatory application. Thus there is no doubt that people who are unable to read are permitted to vote. Many such voters rely on the guidance of mock-up ballots, on which favored candidates are marked, once they are in the voting booth.

Is an intelligent understanding of the issues at stake a prerequisite to being able to vote? Tennessee, in defending its one-year residency requirement for statewide elections, argued that it was. Newcomers, the state maintained, simply could not grasp the issues well enough to cast a meaningful ballot. But in *Dunn v. Blumstein,* the U.S. Supreme Court rejected this approach, noting that "the criterion of 'intelligent' voting is an elusive one, and susceptible of abuse" (4). As one advocate pointed out, "During the 1992 presidential campaign, 86 percent of the American people knew that George Bush's dog's name was Millie, but only 15 percent were aware that both he and Bill Clinton supported the death penalty" (5). Thus, at the very least, a requirement that voters be able to act intelligently in the voting booth would be difficult to apply.

Drawing a reasonable line between those who are and are not capable of voting is not an easy task. An American Bar Association (ABA) project on the rights of disabled persons suggested the following standard: "Any person who is able to provide the information, whether orally, in writing, through an interpreter or interpretive device or otherwise, which is reasonably required of all persons seeking to register to vote, shall be considered a qualified voter" (2). The project envisaged the involvement of minimal data such as name, age, address, and proof of citizenship. Persons with moderate to severe dementia, severe mental retardation, and profound psychosis would be likely to have difficulty with even this minimal a test, but most persons with mental disorders and many mentally retarded persons should be able to accomplish these tasks.

Very little information exists on the effects of extending voting rights to persons with mental disabilities, but the few studies that have been performed are suggestive in their implications. When patients at a New York state hospital in the early days of deinstitutionalization were asked to cast mock ballots for a mayoral contest on election day, the results closely resembled the outcome in the district surrounding the hospital (6). A larger-scale study from three Maryland state hospitals in a presidential election year similarly showed that patients' choices mapped those made in the state's urban areas, from which most of the patient population was drawn (7). Thus it seems unlikely that extending the franchise more broadly to persons with mental disabilities would alter the outcome of many elections.

Why, then, has it been so hard to eliminate provisions in state laws that appear to discriminate against the mentally disabled? In the years when state hospitals housed thousands of patients each, there was great– and perhaps understandable– concern on the part of local communities that patients who were registered to vote would control the outcome of local elections (8). With most patients living in smaller residences in the community, however, that should no longer be a focus of concern. Nonetheless, resistance remains. For example, an effort in 1997 to eliminate Maine's constitutional ban on voting by persons under guardianship was defeated at the polls (5,9). It seems likely that popular attitudes toward the mentally disabled– seeing them as intrinsically irrational and incapable of participating in civic functions– play an important role.

Persons with mental disabilities, though, have strong interests in overcoming these obstacles. Deprivation of the right to vote sends a message to mentally ill and retarded citizens that they are not like other people and are not wanted as part of the broader polity (5). Conversely, encouraging patients to vote can be a "therapeutic and normalizing experience" (8). More concrete benefits may ensue as well. The sustained neglect of the needs of persons with mental disabilities– reflected in a paucity of institutional and community-based services and in discriminatory health insurance benefits– is the result, in part, of their lack of political clout. With patients and their families registered and voting, their needs are likely to be taken more seriously in the political process.

Toward that end, this year the New Hampshire branch of the National Alliance for the Mentally Ill (NAMI) sponsored a voter registration drive (10). In a state without restrictions on enrollment of persons with mental disabilities on the voting lists, NAMI adopted the motto "I vote. I count." The organization has hopes of replicating the effort around the country.

Most reasonable observers would agree that some limitation on access to the ballot box is needed to protect the integrity of the process, and there seems little question that a properly crafted standard would pass constitutional muster (3). However, making such determinations on the basis of a person's status– for example, involuntarily committed, under guardianship, "insane"– flies in the face of modern understandings of the assessment of decisional capacities (11). Persons' abilities to make the decision at hand, not their status, should be the focus of the inquiry.

Moreover, our society's commitment to maximizing access to the political process suggests that any functional test adopted should establish a threshold that almost everyone would be able to meet. The ABA's minimal requirement that would-be voters be capable of providing basic identifying information, or something similar to it, is probably the fairest way of determining voting eligibility. But a good deal of entrenched prejudice against the mentally disabled will have to be overcome before that goal is reached. ♦

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