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## Introduction

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## **Facilitating Voting as People Age: Implications of Cognitive Impairment**

### **Introduction**

Charles P. Sabatino\* and Edward D. Spurgeon\*\*

With so many obstacles facing election officials nationwide in making voting procedures for the general public fair, accessible, and accurate, why focus on an issue that previously has been in the shadows—that of voting by aging citizens who face some level of cognitive impairment or other brain impairment? The answer to that question lies in the numbers, both small and large.

Four sets of statistics are driving this issue out of the shadows and into the light of day. First, we know, especially from the 2000 presidential election dispute, that very important elections are often won by a perilously small number of votes. In 2000, George W. Bush officially won the Florida contest over Al Gore by a margin of 930 votes (out of six million), a virtual statistical tie.<sup>1</sup> “Because the counting of millions of ballots by any method is liable to error, a razor-thin margin of victory,” such as occurred in the 2000 election, continues to foment concern about the accuracy and legitimacy of every vote cast.<sup>2</sup>

Second, we know that older Americans vote in larger numbers than other age groups. In the 2004 presidential election, 71.8 percent of citizens ages fifty-five and older reported voting—the highest percentage of any age group.<sup>3</sup> The second highest rate reported was from citizens ages forty-five to fifty-four years old (68.7 percent),<sup>4</sup> closely followed by the oldest age category tracked (age seventy-five and older), 68.5 percent of whom reported voting.<sup>5</sup>

Third, the numbers of people we call older Americans are growing at a rate unprecedented in history. Between the years 2000 and 2030, the U.S. population aged sixty-five or older is projected to more than double from 35 million to 71.5 million, with the cohort of persons aged eighty-five and over increasing at the highest rate.<sup>6</sup>

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1. See Richard A. Posner, *The 2000 Presidential Election: A Statistical And Legal Analysis*, 12 SUP. CT. ECON. REV. 1, 2 (2004).

2. *Id.* at 2.

3. U.S. CENSUS BUREAU, VOTING AND REGISTRATION IN THE ELECTION OF NOVEMBER 2004: POPULATION CHARACTERISTICS 4 tbl.B (2006), <http://www.census.gov/prod/2006pubs/p20-556.pdf> (on file with the *McGeorge Law Review*).

4. *Id.* at 4 tbl.B.

5. *Id.*

6. ADMIN. ON AGING, U.S. DEP'T OF HEALTH AND HUMAN SERVS., A PROFILE OF OLDER AMERICANS:

Finally, we know that there are increasingly larger numbers of Americans with dementia and other cognitive impairments that may make them incapable of voting. However, in the case of Alzheimer's disease and other dementias, the incapacity to vote may occur years after the onset of the disease. The total number of people with dementia in the United States is not known with certainty, but in 2000, researchers estimated 4.5 million people ages sixty-five and older had Alzheimer's disease.<sup>7</sup> A more recent statistical report of the Alzheimer's Association estimates that number to be 4.9 million in 2007, with another "200,000 individuals younger than sixty-five with early-onset Alzheimer's."<sup>8</sup> By 2030, those numbers are expected to increase by forty to fifty percent.<sup>9</sup> Because Alzheimer's disease accounts for fifty to seventy percent of all cases of dementia, the total incidence of dementia could as much as double the above figures.<sup>10</sup>

Beyond dementia, there are many diseases and conditions that result in impairment of brain function, including amyotrophic lateral sclerosis (ALS), brain tumors, epilepsy, HIV (AIDS), Huntington's disease, multiple sclerosis, Parkinson's disease, strokes, and traumatic brain injury. The Family Caregiving Alliance estimates that the total prevalence of brain impairment of all types, including dementias, ranges from thirteen to sixteen million Americans.<sup>11</sup>

The convergence of these numbers brings into focus a variety of questions about whether we are disenfranchising persons with brain impairments who have a fundamental right and a threshold ability to vote, although they may need assistance. What kind of assistance may be needed and what kind is appropriate? Can technology help? And who makes the decisions about the capacity to vote and by what criteria? Conversely, concerns may rightly be raised about the potential for fraudulent exercise of the franchise by unscrupulous persons or political organizations taking advantage of groups within this population, especially those living in group settings, such as nursing homes.

Both failure to ensure proper access to the polls and failure to protect against the fraudulent manipulation of the vote of vulnerable populations will compromise the integrity of elections. As the above demographic trends continue, so the danger increases. This Symposium, its articles, and its Recommendations ultimately seek to promote a more fair, more effective, and more responsive electoral process for this group of voters, whose participation is often overlooked and whose vulnerabilities can be exploited. While increasingly greater social, political, and legal effort has

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2005 3 (2005), <http://www.aoa.gov/prof/Statistics/profile/2005/profiles2005.pdf> (on file with the *McGeorge Law Review*).

7. Liesi E. Hebert et al., *Alzheimer Disease in the US Population: Prevalence Estimates Using the 2000 Census*, 60 ARCHIVES NEUROLOGY 1119, 1119 (2003).

8. ALZHEIMER'S ASS'N, ALZHEIMER'S DISEASE FACTS AND FIGURES: 2007, at 5 (2007).

9. *Id.*

10. Other classifications of dementia besides Alzheimer's include vascular dementia, mixed dementia, Parkinson's disease, dementia with Lewy bodies, frontotemporal dementia, Creutzfeldt-Jakob disease, normal pressure hydrocephalus, and mild cognitive impairment (MCI). *Id.* at 2-3.

11. *Id.*

been aimed at assuring access to the polls by citizens overall, including those with disabilities, relatively little attention has been paid to facilitating access for the growing number of persons with disabilities caused by dementias and other brain impairments, especially those who live in long-term care settings.

The impetus for the Symposium came from the work of Jason Karlawish, M.D. and his colleagues, who took the first steps in raising the questions posed above.<sup>12</sup> The Symposium planning itself began with the collaboration of three sponsoring organizations: the Borchard Foundation Center on Law and Aging, the American Bar Association (ABA) Commission on Law and Aging, and the Capital Center for Government Law and Policy, University of the Pacific, McGeorge School of Law. With the help of a dedicated planning committee,<sup>13</sup> the project began by commissioning scholarly articles aimed at fleshing out the key legal, social, and technical issues relevant to voting by this population. These articles evolved into a thoughtful anatomy of the issues. Fifty national experts in law and aging, disability, medicine, long-term care, voting technology, and elections administration participated in a three-day Symposium at the University of the Pacific, McGeorge School of Law, where they discussed and debated the issues and options, and adopted the set of Recommendations that follows this Introduction.

## I. THE SYMPOSIUM PROCESS

Prior to the Symposium, the planning committee sent drafts of the commissioned articles to all invited participants and assigned them different, but interrelated, topics for review. The articles set the starting agenda for five working groups. Then, over the two-and-a-half days, the Symposium participants heard from and interacted with the authors and convened in one of five working groups. Each of these working groups, described below, met for four sessions, with the task of defining the questions and issues, identifying options to address the issues, finding areas of consensus and divergence, and developing recommendations for vetting by the entire Symposium assemblage.

The groups' recommendations addressed any or all of the following possible sectors or categories of action:

- Changes in state or federal statute or regulation.
- Changes in professional practice or education, or identification of promising practices.

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12. Jason H. Karlawish et al., *Addressing the Ethical, Legal, and Social Issues Raised by Voting by Persons with Dementia*, 292 JAMA 1345 (2004).

13. The planning committee consisted of Professor Richard J. Bonnie, University of Virginia School of Law; Eric Carlson, National Senior Citizens Law Center; Mary Jane Ciccarello, Borchard Foundation Center on Law and Aging; Professor Jason Karlawish, Department of Medicine, Division of Geriatrics, Institute on Aging, University of Pennsylvania; Naomi Karp, AARP Public Policy Institute; Charles Sabatino & Erica Wood, Commission on Law and Aging, American Bar Association; and Professor Ned Spurgeon, Borchard Foundation Center on Law & Aging, University of the Pacific, McGeorge School of Law.

- Recommendations for further study.
- Needed public education.

On the final day of the Symposium, each of the five groups presented its recommendations in a plenary session for review, discussion, and adoption by the Symposium as a whole. Those recommendations that received a majority vote of all present were adopted as Recommendations of the Symposium. *The Recommendations do not necessarily represent the views of any individual participant in the Symposium or the views or policy of any Symposium sponsor or organization affiliated with any Symposium participant.* The final section of this Introduction includes the Symposium Recommendations.

## II. THE ISSUES

The work of the Symposium was divided among five overlapping working groups, each of which had the benefit of a background article or articles providing thoughtful analysis of and perspective on the subjects. The articles and the discussion themes of each working group are summarized below.

### A. *The “Big Picture” Group: How Aging and Cognitive Impairment Fits into the Broader Issues of Access to Voting*

The task of the “Big Picture” Group was to identify cross-cutting, overlooked, or “meta-issues”—that are valuable to address so that the Symposium’s Recommendations fit into the broader context of election law and procedures and did not “miss the forest for the trees.”

Two articles formed the backdrop for this group’s deliberations. The first article, authored by Stanford University Law Professor Pamela S. Karlan, is entitled *Framing the Voting Rights of Cognitively Impaired Individuals*.<sup>14</sup> Karlan describes the interplay between the constitutional and legal frameworks governing the right to vote and the distinctive problems faced by individuals with cognitive disabilities. Karlan distinguishes three points at which individuals are winnowed out of the political process: the eligibility to vote, the ability to register, and the ability to cast a ballot and have it counted. At each of these stages, exclusion may result from legal restrictions, for instance laws that exclude persons with criminal convictions or mental incapacity from voting; or exclusion may result from procedural barriers, such as voter identification laws or restrictive absentee laws; or from the absence of affirmative government assistance in registering or voting; or from private interference, such as ballot tampering by caregivers in nursing homes.

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14. Pamela S. Karlan, *Framing the Voting Rights of Cognitively Impaired Individuals*, 38 MCGEORGE L. REV. 917 (2007).

Karlan then reviews both constitutional doctrine and statutory protections underlying the right to vote. Constitutional protections reach only government action, not private acts or omissions. Even with regard to government action, where responsibility is largely devolved to counties and municipalities, constitutional doctrine is complex and operates essentially as a negative right, protecting against improper interference, rather than requiring an affirmative duty for assistance or accommodation. Affirmative duties arise primarily by statute.

Turning to statute, Karlan examines a series of laws enacted over the past forty years, all with some bearing on the rights of people with cognitive impairments: the Voting Rights Act of 1965,<sup>15</sup> Section 504 of Rehabilitation Act of 1973,<sup>16</sup> Title II of the Americans with Disabilities Act,<sup>17</sup> the Voting Accessibility for the Elderly and Handicapped Act of 1984,<sup>18</sup> and even Medicare regulations that require nursing facilities to protect and promote the rights of residents, including the exercise of citizenship rights. None of these federal laws have placed clear obligations on private actors with respect to voting. Some states have voting laws concerning individuals in nursing homes and other institutions, but few impose mandatory duties on caregivers.

Karlan concludes that the ability of people with cognitive impairments to fully participate raises issues within and without the constitutional and statutory frameworks for voting rights. There is a need to go beyond the elimination of state-created barriers to reach privately created or maintained obstacles. All these issues must be viewed in the context of balancing the interest in participation against the broader public interest in maintaining the integrity of the electoral process.

A second overview article, *Voting by Elderly Persons with Cognitive Impairment: Lessons from Other Democratic Nations*, was authored by physician Jason Karlawish, M.D., of the University of Pennsylvania Department of Medicine and law professor Richard J. Bonnie, L.L.B., of the University of Virginia.<sup>19</sup> The authors examined the electoral systems of three nations—Australia, Germany, and Canada—to understand how these nations address two fundamental goals: increasing enfranchisement and voting and assuring the integrity of the vote. Three questions in particular were of special interest: whether voting is compulsory; whether mental incapacity excludes or excuses the franchise; and what, if any, special procedures are used to facilitate participation.

One feature that distinguishes the electoral systems of all three countries from the United States is their reliance on centralized, non-partisan election commissions or authorities to oversee and regulate the election process. The

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15. 42 U.S.C. § 1973 (2000).

16. Rehabilitation Act, Pub. L. No. 93-112, § 504, 87 Stat. 355 (1973).

17. 42 U.S.C. § 12131 (2007).

18. 42 U.S.C. § 1973ee to 1973ee6 (2000).

19. Jason H. Karlawish & Richard J. Bonnie, *Voting by Elderly Persons with Cognitive Impairment: Lessons from Other Democratic Nations*, 38 MCGEORGE L. REV. 879 (2007).

United States, in contrast, has always relied primarily on party-affiliated, elected secretaries of state and local election authorities to oversee the process, an approach that is very decentralized and laden with potential political conflicts of interest.

Australia provides an instructive contrast to the United States in that registration or “enrollment,” as well as voting, is compulsory. However, the authors could not find clear evidence to confirm whether compulsory voting in Australia actually enhances voting by the elderly, and indeed, it appears that the obligation may not be enforced against the over seventy population. In both Canada and Germany, enrollment for voting is mandatory, but voting is voluntary.

Karlawish and Bonnie found mental capacity exclusions under both Australian and German law, although they are quite different in approach. Australia has a remarkably discretionary administrative process that must be initiated by a private citizen and relies heavily on a medical certificate form completed by a “registered medical practitioner.” Germany’s process is ancillary to judicial guardianship proceedings. Most remarkable is Canada’s absence of any exclusion based on mental incapacity. Incapacity does not appear to be a controversial issue in Canada, perhaps because those lacking capacity simply tend not to vote, and perhaps because of the greater attention paid to providing information, education, and accessibility services to persons who have cognitive or physical disabilities, persons with limited reading and writing skill, and persons living in transitional situations.

Canada and Australia also provide for “mobile voting.” Mobile voting is characterized by the conducting of elections by election officials at convenient outreach locations, such as nursing homes or the room of the nursing home resident. The outreach and oversight by nonpartisan officials furthers the goals of both enhanced access and integrity of the process.

What lessons are there for the United States? The authors recognize that for the United States, compulsory voting is not a likely policy option, and it would also be a huge leap for the United States to move away from its decentralized, political organization of voting oversight to centralized, non-partisan, professional oversight. However, all three comparison nations demonstrate real advantages to such organization and challenge us to think innovatively in the long-term. Australia and Canada, for example, offer support for adopting the concept of mobile voting as an effective enhancement for many populations, especially for voters with disabilities. And finally, the Canadian experience may suggest that minimizing, and even eliminating, the exclusion from voting based on incapacity may indeed be a viable option for consideration.

*Deliberations of the “Big Picture” Group.* Drawing upon the background articles, the discussion of the “Big Picture” Group revolved primarily around the issue of maximizing access while preserving integrity. The group wrestled with defining assistance and delineating its limits—i.e., at what point does “assistance” become substituting one’s personal beliefs for those of the voter’s due to an

inability to understand the voter's wishes. A health care proxy can make a decision using substituted judgment, but proxies are not permitted for incapacitated voters.

The group's policy priority leaned towards access, but there was a legitimate concern about integrity. The group considered a hypothetical like the following: A person with Alzheimer's responds to the question: "Do you want to vote?" "Yes." The person providing assistance asks "Do you want to vote for John?" and the response is "Yes." However, the person seems to say yes in response to every question. Is that an authentic choice, and should the person providing "assistance" carry out the mechanical act of casting the person's ballot for John? How can we provide guidance for the would-be "assistor" on the limits of assistance? There may, of course, be somewhat better ways to ask the questions to ensure authentic responses.

If a state's law limits eligibility to vote based on capacity, how is access maximized for those close to, but not over, the limits of capacity, however defined? Group members concurred that impaired people should be treated as we would treat non-impaired people.

Ultimately, the group gave priority to the concept of "intent." That is, it is inappropriate for someone providing voting assistance to make a capacity determination, i.e., screen the would-be voter for eligibility based on perceived mental capacity. Instead, the person providing assistance should assist voters in expressing their intent, but assistance must end if they cannot ascertain the person's intent. While it is difficult to prescribe what an individual should do if he or she were in the ballot booth with the person described in the above hypothetical, all agreed in principle on the key concepts of presuming capacity but declining to assist if intent cannot be ascertained. For example, if in the above hypothetical, the assistor is not certain whether the voter intends to vote for John, the assistor would decline to physically assist recording the impaired person's vote.

The recommendations of the "Big Picture" Group appropriately focused on broad principles and goals reflecting themes of access and inclusion that run throughout the recommendations. The recommendations also include two "preliminary recommendations" introduced by other groups, but which fit more appropriately in this cross-cutting category: one calls for greater flexibility in voter identification rules (because voters with chronic disabilities are less likely to have standard forms of identification), and the other calls for a private right of action under the Help America Vote Act.<sup>20</sup>

#### *B. The Capacity Group: Defining and Assessing Capacity to Vote*

The Capacity Group reviewed the meaning, assessment, and adjudication of capacity to vote, and explored under what circumstances, if any, some form of

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20. 42 U.S.C. § 15301 (2006).



capacity screening or evaluation should be used. An extensive review of the issue was provided in *Defining and Assessing Capacity to Vote: The Effect of Mental Impairment on the Rights of Voters* by the law and aging expert Sally Balch Hurme, J.D., of AARP and psychiatrist professor Paul S. Appelbaum, M.D., of the Columbia University College of Physicians and Surgeons.<sup>21</sup>

Voting is a fundamental right protected by the U.S. and state constitutions—and is a hallmark of our democracy. If a state limits or denies this right to individuals with cognitive impairments, it must have a compelling state interest—such as protecting the electoral process from fraud and ensuring its integrity. The premise of the Hurme and Appelbaum article is that because voting is a fundamental constitutional right and a hallmark of democracy, the emphasis should be on expanding the franchise and enhancing access to and assistance with the ballot for persons who are capable of voting. Any limitations should be narrowly circumscribed in terms of specific focus on the capacity to understand the nature and effect of voting, rather than on categorical exclusions.

With that principle in hand, the authors provide a comprehensive and fascinating survey of state constitutional provisions, election law provisions, and guardianship provisions relating to the question of capacity to vote. They also offer a close examination of potential criteria for assessing voting capacity and appropriate ways to implement a capacity standard, however it is defined.

The legal survey informs us that all but twelve state constitutions bar people with various kinds of mental impairment from voting—for example, those who are *non compos mentis*, admitted to a mental institution, under guardianship, incapacitated, or mentally ill. The categories are sweeping and imprecise.

State election law concerning voter eligibility on cognitive grounds does not necessarily track the state constitutional provisions, using different terminology in all but fourteen states. Some twenty-nine state election laws do not address voter eligibility due to mental status at all. Additionally, the vagueness of many of the provisions creates uncertainty concerning capacity.

Turning to guardianship law, the authors note favorably that guardianship reform over the last twenty years has emphasized a more nuanced judicial determination of capacity, moving away from categorical labels to an examination of specific cognitive and functional abilities. Moreover, state laws now allow courts to fashion limited guardianship orders, removing decision-making rights from the individual only in specific areas of incapacity. Nineteen states have specific statutory provisions that provide persons under full or limited guardianship retain all legal and civil rights not explicitly removed—which would include the right to vote. Along with additional provisions that favor limited guardianship, a total of thirty-two states appear to allow a judicial determination that a person under guardianship may retain the right to vote.

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21. Sally Balch Hurme & Paul S. Appelbaum, *Defining and Assessing Capacity to Vote: The Effect of Mental Impairment on the Rights of Voters*, 38 MCGEORGE L. REV. 931 (2007).

Moreover, some statutes and case law specifically articulate a *requirement* for the court to determine the capacity of an individual to vote.

The authors give special attention to a case pending before the Eighth Circuit Court of Appeals at the time of the Symposium, *Missouri Protection and Advocacy Services, Inc. v. Carnahan*.<sup>22</sup> In this case, the Missouri Protection and Advocacy Services, as an organizational plaintiff, argued that a guardianship proceeding aimed at determining incapacity to manage personal or financial affairs is not necessarily determinative of the capacity to vote, yet an adjudication of incapacity under Missouri law automatically (and unlawfully) triggers a ban on voting. The outcome of that case will indicate whether the trend away from categorical exclusions and toward more finely tuned individualized determinations is moving forward or slowing down.

However, if individualized determinations of capacity to vote are to be the norm, the authors ask how these assessments are to be made. Relatively little attention has been paid to the question. Reviewing the case law, the clinical literature, and the policy underpinnings of the right to vote, the authors conclude that “there is every reason to whittle down the required abilities to a bare minimum” requirement of *understanding* the nature of the voting process.<sup>23</sup> The question is how such a standard can be operationalized.

Appelbaum and colleagues previously developed and tested one instrument to operationalize this capacity standard—the Competence Assessment Tool for Voting (CAT-V). It targets the understanding of the nature and effect of voting and the ability to choose among candidates. Their article describes the CAT-V questions, scoring, and the initial test of the instrument—and maintains that it could be especially useful for individuals with moderate dementia who may have borderline understanding.

However, the CAT-V, as well as any other test, opens the door to critical questions about the use of any such screenings. The instrument, or similar assessment tools, could be helpful in the context of guardianship proceedings, providing significant evidence for judicial findings. Use in other settings—such as at the polls or in long-term care facilities—is more problematic and merits careful scrutiny as to questions about who conducts the test, who makes the assessment, how the results would be used, and whether the use of any such screening test is appropriate.

*Deliberations of the Capacity Group.* The Capacity Group began the discussion by asking the fundamental question of why public policy, as reflected in state constitutions and guardianship and election laws, generally excludes clearly incapacitated voters. Who is harmed by an incapacitated person voting? The Canadian experience suggests that perhaps we do not need a process for exclusion. But weighing against that view are concerns about possible fraud and

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22. *Mo. Prot. & Advocacy Servs., Inc. v. Carnahan*, No. 06-3014 (8th Cir. filed Nov. 27, 2006).

23. Hurme & Appelbaum, *supra* note 21, at 965.

coercion, as well as the notion of public faith in the franchise. The group considered whether they were asking the wrong question in looking at exclusions. A more fruitful question may be to ask whether individuals with cognitive impairments need protection against coercion and assistance in exercising their rights. In any case, even if some kind of an exclusionary policy is justified, the policy should be tempered by the realization that the “harm” will be small and self-limiting because clearly incapacitated voters are not likely to articulate a desire to vote and take actions to do so.

To set these questions in a historical context, the group reviewed categories of individuals who have been excluded from voting in the past and noted that the historical trend of voting has been toward ever more inclusion. Voting exclusion is primarily a policy question and not a scientific or medical one. As a policy matter, should we not continue the historical trend toward inclusiveness to individuals with cognitive impairments?

The Capacity Group focused on a scenario in which voting exclusions may arise most frequently—state guardianship proceedings. They readily agreed that a judge should not remove voting rights based on a global definition of incapacity for making personal decisions and/or managing property. Neither guardianship status, institutional status, nor any medical diagnosis should *per se* deny an individual the right to vote. Group members concurred that voting rights should only be removed, if at all, upon a specific determination of incapacity to vote—specifically, the cognitive capacity to conceive of the act of voting. But even though there was consensus on this point, group members recognized that, in the real world, things will be complicated by: (1) differing practices in individual courts that may not consistently follow any statutory standard; (2) the fluctuating nature of decisional capacity; and (3) the differing roles of guardians in supporting an incapacitated person’s right to vote.

Further discussion acknowledged that judges should not be making a determination about capacity to vote in every guardianship case. There should be a presumption of voting capacity, such that the right to vote would remain unless challenged. A challenge could be in the context of guardianship or in a specific, statutorily authorized proceeding with appropriate due process protections. Participants agreed that any challenge to voting capacity should be in a courtroom with a clear and convincing standard of evidence and not be determined by an election official, long-term care staff or in any other non-judicial context.

This position brought the group squarely to the core issue: what *is* capacity to vote? What elements should a judge consider in reviewing evidence? The standard set out in the prominent Maine U.S. District Court case, *Doe v. Rowe*, is “understanding” the act of voting<sup>24</sup>—but what does this mean? Should there be an assessment instrument that would seek to parse it out, such as the CAT-V, or

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24. *Doe v. Roe*, 156 F. Supp. 2d 35, 58-59 (D. Me. 2001).

would any questions in such a tool amount to a discriminatory screening, given that no effort is made to probe the understanding of voters generally?

Rather than assessing cognitive attributes, should the statutory standard simply be whether a person indicates that he or she wants to vote? This would be a very low threshold that would be most inclusive. The objective would be to avoid differential treatment in voting rights based on any perceived impairment or other personal characteristic. However, the group struggled with the same hypothetical faced by the “Big Picture” group: where a person answers “yes” as to whether they want to vote, how do we know that the affirmative response is linked to an understanding of the voting process? Maybe the person answers “yes” to everything, seeking merely to please the questioner, or fundamentally misconceives the object of the question. The meaningless “yes” might open the door to manipulation.

The group wrestled vigorously with whether there should be a second question after “do you want to vote?” to evidence the ability to make an intentional choice—not the choice of a candidate or issue, but the choice to participate in the process of voting itself. Some group members pointed out that any second question that is not asked of other voters is a form of screening that sets people with cognitive impairments apart. After considerable debate on wording that might ferret out meaningful intent but that would avoid a discriminatory inquiry, participants agreed on a recommendation that any state law exclusion should be only on the basis that a person “cannot communicate, with or without accommodations, a specific desire to participate in the voting process.”<sup>25</sup>

Finally, the Capacity Group turned to the realities of community practice and considered that, even if public policy limited formal voting capacity determinations to a judicial setting, staff in long-term care facilities and others may engage in informal, *ad hoc* capacity assessments. Like the Long-Term Care Group, this group determined that staff, guardians, and others concerned with the care of persons with cognitive impairments should be educated about voting rights and community resources to facilitate voting. In connection with this need, participants also noted that there is very little data on the statutory and *de facto* exclusion of persons with cognitive impairments from voting and urged government and private funders to support relevant research.

### C. The Absentee Balloting Group

The task of the Absentee Balloting Group was to examine the potential advantages and perils of absentee balloting, “no-excuse” absentee voting rules, and permanent absentee balloting rules for enhancing access to voting by persons with dementia and other cognitive impairments. Law professors Daniel P. Tokaji, J.D., and Ruth Colker, J.D., of Ohio State University’s Moritz College of Law

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25. See Recommendations of the Symposium, 38 MCGEORGE L. REV. 861 (2007).

co-authored the article *Absentee Voting by People with Disabilities: Promoting Access and Integrity*.<sup>26</sup>

The authors' purpose in this article is to discuss how to promote accessible absentee voting while guarding against threats to electoral integrity. They define "access" as a system that allows voters with disabilities to obtain and cast absentee ballots privately, independently, and accurately. They define "integrity" as a system that allows people with disabilities to choose for themselves for what and whom they vote and guards against anyone casting absentee ballots in their stead. They discuss the tension between the values of access and integrity when it comes to absentee voting by people with disabilities, but they argue that these values are reconcilable.

The groundwork of the authors' analysis is a thorough survey of state absentee balloting requirements and a recognition of the dramatic increase in absentee voting in the past four decades. In that period of time, there has been a significant liberalization of absentee voting laws, with current laws now reflecting a continuum of permissiveness from an all-mail voting system (like Oregon's), to the "no excuse" absentee voting in a majority of states, to absentee voting with significant requirements, e.g., verification of inability to appear at the polls due to age, illness, or disability (like Kentucky law).

Absentee balloting takes place somewhere other than the polling place on election day and includes two distinct forms: voting by mail and in-person voting at some designated location other than the official polling place. For the most part, the authors focus on voting by mail since it is the most prevalent form of absentee balloting. They review the full range of arguments and evidence that have been posited both in favor of and against voting by mail. They also detail the range of practical and policy obstacles to voting at the polls by persons with disabilities.

The authors recommend a menu of choices for policy-makers to consider that would make it easier to obtain and cast an accurate ballot, while safeguarding the absentee voting process from ballot manipulation.

The authors stop short of identifying "best practices" because existing research on most of the identified problems is not sufficiently well-developed. Among the options detailed for policy-makers are:

- Better outreach;
- Easing the application process;
- Permanent absentee voter status;
- More accessible ballots;
- Better guidance for caregivers who assist with voting; and
- Bringing the polling place to the voter with mobile, accessible voting equipment.

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26. Daniel P. Tokaji & Ruth Colker, *Absentee Voting by People with Disabilities: Promoting Access and Integrity*, 38 MCGEORGE L. REV. 1015 (2007).

*Deliberations of the Absentee Balloting Group.* The overarching goal of the Absentee Balloting Group's deliberation was to develop a process that assures that individuals with disabilities, including those with cognitive impairments, can vote privately and independently as required by federal law. The group discussed the merits of voting by mail, which allows residents to "vote at home," and there was a sense that the terms "permanent absentee" and "absentee voting" are a mischaracterization of the process. Voters should have the revocable option to "vote at home" for all elections without having to complete forms for each electoral cycle. Given that most individuals with Alzheimer's disease and related dementias reside in the community, the group agreed that the option to "vote at home" should be available, simple, and encouraged by election officials.

The group had greater difficulty addressing the question of where an individual should register and vote. Often a voter with cognitive impairments no longer resides in the family home but has moved to a family member's home or into a long-term care facility. The voter may still feel connected to the community where she lived for her adult life. However, if she sold her house and moved out of the geographic area, there may be no real connection, other than emotional, to the jurisdiction. For election officials, the property address where the voter permanently resides (i.e., where she wakes up and brushes her teeth most mornings) normally determines the voting jurisdiction. The group recognized that residence for voting may be different than for other purposes, such as Medicaid, especially since some states make long-term care placements out-of-state.

Voting at home may provide greater opportunity for voters to complete their ballots privately and independently. Discussion focused on what privacy and independence means when individuals are cognitively impaired. "Private" was taken to mean "confidential and anonymous," unless the voter requests assistance. The group discussed how much assistance a family or caregiver should provide. One approach focused on the voter's independence in arriving at the specific voting decision, rather than on who actually marks the ballot. By this criterion, assistance does not violate the voter's independence. Independence is consistent with either marking the ballot oneself or independently asking for assistance from someone else to do so. Technology also plays a major role in obviating human assistance. There needs to be a variety of alternatives to provide the least restrictive alternatives for individuals who are unable to mark the ballot in a conventional manner.

A significant concern was the practice of voter signature requirements on absentee ballots and on the return envelope for absentee ballots. Signatures of cognitively impaired individuals often change as their condition progresses. There is a concern that votes may be discarded, and thus not counted, if the signature on the envelope does not match the signature on record. The group agreed that election officials need to develop procedures to address this issue.

Finally, the Absentee Balloting Group emphasized the importance of outreach and education regarding the voting process and the voting options

available, especially for family caregivers. Outreach should be provided in a variety of community forums, and guidance should be included with all absentee ballots.

#### *D. The Long-Term Care Group*

The Long-Term Care Group examined current policies, practices, and issues relating to registration, and voting in nursing facilities and other residential long-term care settings. Syracuse University law professor Nina A. Kohn authored the background article entitled *Preserving Voting Rights in Long-Term Care Institutions: Facilitating Resident Voting While Maintaining Election Integrity*.<sup>27</sup>

Kohn's article explores current and potential policies, practices, and issues related to voting by residents of long-term care (LTC) facilities, including nursing homes and assisted living facilities. Like the other authors, Kohn's examination recognizes two key, interrelated concerns: (1) providing residents with meaningful access to the ballot and (2) minimizing improper and abusive voting practices. It analyzes whether LTC facility staff or state election officials should play a gate-keeping role in the electoral process by conditioning access to the ballot or assistance with its completion on a positive assessment of mental capacity. Arguing that such "high-stakes" gate-keeping is unconstitutional, possibly in violation of federal statutes, and contrary to public policy, Kohn proposes alternative approaches to providing LTC residents with meaningful access to the ballot while guarding against fraudulent voting practices.

Effective approaches to access must overcome both "internal" and "external" barriers to voting, according to Kohn. Internal barriers include residents' physical or mental impairments. External barriers may include:

- Staff attitudes and beliefs about residents and whether residents should vote;
- Reduced access to mechanisms for outside communication compared to those living in community-based settings;
- Limited access to outside information; and
- Social changes that increase isolation.

Access strategies currently in place in some states rely wholly on absentee balloting. She notes that while some twenty-three states have laws or regulations specifically addressing voting in nursing homes, and sometimes other LTC settings, they vary significantly in the degree to which assistance is provided to residents. She offers several recommendations and a framework for model state legislation. Among her recommendations is a call for state adoption of legislation providing for election officials to conduct absentee balloting in LTC facilities in

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27. Nina A. Kohn, *Preserving Voting Rights in Long-Term Care Institutions: Facilitating Resident Voting While Maintaining Election Integrity*, 38 MCGEORGE L. REV. 1065 (2007).

a transparent and accountable manner. She details the essential components of such a system, including the provision of bipartisan teams of election officials, rather than facility staff, to assist residents who need help with ballot completion.

Kohn also concludes that LTC facilities should have an affirmative obligation to assist all residents in obtaining access to a ballot, and she offers several recommendations for implementing that obligation in the form of model guidelines for LTC facilities.

*Deliberations of the Long-Term Care Group.* The Long-Term Care Group identified a wide range of concerns about voting in LTC settings. However, the highest priority was given to residents who have the capacity to vote but who are not able or allowed to do so because of barriers such as: lack of transportation to the polls, denial of registration by voting officials or LTC facility staff, and difficulties in obtaining or completing absentee ballots. These barriers affect all residents of LTC facilities, not just those with cognitive impairments. Approaches used in certain states and in other countries were reviewed and considered, and a variety of potential solutions were identified.

The group found a strong consensus in support of the long-range solution of bringing the polls to residents via “mobile voting,” rather than relying on family and facility staff to initiate and assist in absentee balloting. But the group was also quite concerned about developing more immediate solutions to the identified problems and developing options that could be used in jurisdictions that may decline to embrace mobile voting.

The following ideas engendered strong support: requiring state surveyors to assess whether LTC facilities foster residents’ voting rights; changing state laws and regulations to allow LTC facility residents to choose whether they register to vote in the location of the LTC facility or their previous residence; requiring LTC facility staff to help residents with voter registration; changing state laws to guarantee that all residents are able to obtain absentee ballots; ensuring assistance with ballot completion upon request; prohibiting capacity assessments or screening of residents by facility staff and election officials; encouraging LTC facilities to invite non-partisan community groups to educate residents about voting; and encouraging election officials to conduct voter registration drives at facilities.

If mobile voting is not available, the group favored policies that would require election officials to conduct absentee balloting, allow LTC facility staff to process registration forms and absentee ballots of multiple residents, and accept the facility’s representation of the identity of individual voters. The Long-Term Care Group’s recommendations detail the points of consensus and are organized according to the entity that would be responsible for implementing them.

#### *E. The Technology Group*

The task of the Technology Group was to examine current and evolving voting technologies that have the potential to enhance access for persons with



disabilities, including dementia and other cognitive impairments, and to examine technologies that pose new barriers to voting or create new risks of fraud. The group's starting point was the article *The Technology of Access: Allowing People of Age to Vote for Themselves*, authored by Ted Selker, Ph.D., Co-Director of the MIT/Caltech Voting Project.<sup>28</sup>

Selker's analysis begins with the premise that technology's goal is to create *access*, which is different from *assistance*. The more access is facilitated and the more barriers are removed, the less there is a need to depend on absentee ballots or assistance by another person in the voting booth.

The proper goal is universal access through universal design. Several evolving technologies have an impact on voters with cognitive and physical disabilities but at the same time improve access for all populations of voters. Even among voters without any identified disability, the number of people who make mistakes varies dramatically. Selker asserts that one in every thirty voter selections on a typical ballot is actually for an adjacent selection.

Providing examples of both the burdens as well as benefits that new technologies can create, Selker gives a historical overview of voting technology from the Greek era to the present, culminating in the growing use of Direct Record Electronic (DRE) voting machines and options for internet voting that have been embraced by many companies for corporate voting but not by the public sector.

Focusing on DRE machines, the author details several design approaches that have shown promise but are still being developed and tested. Selker identifies several design characteristics that have particular promise for accommodating cognitive impairments, which include:

- Interfaces that focus on one task at a time;
- Simple navigation through steps in the process with the ability to refer back to instructions at any time;
- Redundancy of information; and
- Feedback on selections made with the opportunity to change selections. Spoken audio feedback appears to be especially effective in reducing errors.

In addition to the design of voting equipment itself, Selker highlights the need to address a variety of environmental factors that can pose barriers in the polling place. For example, potential equipment setup barriers include: ambient glare from windows and poor room lighting; problems with electrical connections or forgetting to plug in machines and using up battery life; poor design and visibility of warning features on equipment, such as low battery warnings; and the lack of simple aids, such as magnifying glasses for paper ballots with small print.

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28. Ted Selker, *The Technology of Access: Allowing People of Age to Vote for Themselves*, 38 MCGEORGE L. REV. 1113 (2007).

Examples of better environmental design include: electronic screens with automatic variable contrast to adapt to different lighting conditions; voter training media available and accessible at the polling site while voters are waiting in line to vote; the availability of a demonstration voting machine at the polling site; available space in the voting booth to set down papers that the voter may have carried in; and the use of curtains or partitions to ensure the sense and reality of privacy.

Selker concludes his review with a glimpse of other evolving technologies that hold promise down the road, such as machines for the visually impaired that provide audio ballot and audio vote options; tactile ballots; visible prompts or use of vibrations for the hearing impaired; computer mouse driven navigation of voting machines; telephone audio response systems for voting; and "sip and puff" or mouth stick selection methods for the physically impaired. The ultimate goal is to design effective, optional capabilities into all voting stations so that accessibility is truly universal and segregation of voting by disability accommodation is unnecessary.

*Deliberations of the Technology Group.* The Technology Group vigorously explored the question of how technology can assist in providing all persons universal access to voting. It reviewed a variety of evolving systems designed to serve that goal. While the discussion initially centered on seniors with cognitive impairments, it expanded necessarily to address persons with all types of disabilities.

The discussions and recommendations of this group ultimately focused on the full breadth of the voting process from registration, through the training of poll workers and assistants to persons in need, to more effective education of and outreach to all individuals, improved logistics of the polling site, and election materials and ballot design. While several of the recommendations concentrated on those issues, the other recommendations and discussions dealt with improving the research and development of universal voting systems, ensuring that polling places are accessible, and protecting the privacy of voters while meeting their various needs.

### III. THE RECOMMENDATIONS

In the Symposium's final plenary session, the participants deliberated over each group's recommendations with serious questioning, lively debate, revisions of text, and ultimately with a vote of support by the majority of participants to the recommendations set forth below. It is our hope that the discussions and recommendations of this Symposium can help guide the law and policy in future electoral reforms to meet the changing demographics of the modern American society.

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