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# Voting by Elderly Persons with Cognitive Impairment: Lessons from Other Domestic Nations

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# Voting by Elderly Persons with Cognitive Impairment: Lessons from Other Democratic Nations

Jason H. Karlawish\* and Richard J. Bonnie\*\*

## TABLE OF CONTENTS

I. INTRODUCTION .....	880
II. OVERVIEW OF COMPARATIVE ELECTORAL LAW.....	883
A. <i>Compulsory Voting</i> .....	883
B. <i>Exclusion Based on Mental Capacity</i> .....	884
C. <i>A Typology of Voting Legislation</i> .....	884
D. <i>Procedures for Increasing Access and Participation</i> .....	885
E. <i>Responsibility for Electoral Administration</i> .....	886
III. THREE CASE STUDIES .....	887
A. <i>Compulsory Voting: The Australian Approach</i> .....	887
1. <i>Overview of the Australian System</i> .....	888
2. <i>Compulsory Enrollment and Voting</i> .....	889
3. <i>Exclusion on the Basis of Incapacity to Vote</i> .....	890
4. <i>Taking the Polls to the Voters: Mobile Polling</i> .....	893
5. <i>Noteworthy Features of the Australian Approach</i> .....	894
B. <i>The Juridical Model: Germany</i> .....	895
1. <i>Voter Registration</i> .....	896
2. <i>Exclusion Based on Mental Disability</i> .....	896
3. <i>Right to Assistance and Absentee Voting</i> .....	897
4. <i>Poll Accessibility</i> .....	898
5. <i>Facilitation of Voting in Long-Term Care Settings</i> .....	899
6. <i>Noteworthy Features of the German Approach</i> .....	899
C. <i>An Emphasis on Enfranchisement and Access: The Canadian Approach</i> .....	899
1. <i>Enrollment</i> .....	900

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2. <i>Voter Qualifications</i> .....	900
3. <i>Facilitating Voting by People with Disabilities</i> .....	903
4. <i>Assistance to Voters with Disabilities</i> .....	904
5. <i>Mobile Polling</i> .....	904
6. <i>Noteworthy Features of the Canadian Approach</i> .....	905
IV. CONCLUSION.....	906
A. <i>Possible Effects of Electoral Design on Voting Participation</i> .....	906
B. <i>Lessons Suggested by Case Studies</i> .....	907

<i>Table 1. International Institute for Democracy and Electoral Assistance (IDEA), Compulsory Voting</i> .....	911
<i>Table 2. Typology of Voting in Democratic Nations</i> .....	914

<i>Figure 1. Estimated Turnout by Age Group—Australia (2004)</i> .....	915
<i>Figure 2. Estimated Turnout by Age Group—Germany (2004)</i> .....	915
<i>Figure 3. Estimated Turnout by Age Group—Canada (2004)</i> .....	916
<i>Figure 4. Estimated Turnout by Age Group—United States (2004)</i> .....	916

## I. INTRODUCTION

Modern democratic nations have designed electoral systems to achieve two fundamental goals: increasing enfranchisement and voting and assuring the integrity of the vote. Efforts to achieve these two objectives can generate a tension between them.<sup>1</sup> As an example, postal voting (also called absentee balloting) has the benefit of allowing persons who cannot easily reach a polling place to vote from remote locations at some time prior to the day of the election. This is especially valuable to persons with disabilities that limit their ability to travel. But postal voting also increases the risk of fraud. Specifically, these ballots can be stolen and either cast by other people or destroyed. The magnitude of this problem can increase in congregate living settings where multiple voters cast absentee ballots.<sup>2</sup> In short, there is a trade-off between an effort to enhance enfranchisement, in this case by postal voting, while at the same time assuring the integrity of the electoral process.

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1. This tension is captured in a customary description of the goal of a “fair and honest election” where “fair” refers to maximizing enfranchisement and “honest” refers to the integrity of elections.

2. See Karen Tolkinen, *Judge Dismisses Civil Challenge in Mount Vernon, DA Probes Election Complaints*, MOBILE REGISTER (Ala.), Aug. 28, 2004, at B5; Jill Sherman, David Coates & Dominic Kennedy, *Postal Voting System Needs Fraud Check, Officials Say*, TIMES (London), June 11, 2004, at 1; Alysia Tate, *Voter Fraud Not Absent in Chicago*, CHI. REPORTER, Nov./Dec. 2000, <http://www.chicagoreporter.com/2000/11-2000/absentee/absentee1.htm> (on file with the *McGeorge Law Review*); Lois Puglionesi, *Citizen Seeks to Oust Clouse from Top Spot*, DELCOTIMES.COM, July 27, 2004, [http://www.zwire.com/site/printerFriendly.cfm?brd=1675&dept\\_id=18171&newsid=12493576](http://www.zwire.com/site/printerFriendly.cfm?brd=1675&dept_id=18171&newsid=12493576) (on file with the *McGeorge Law Review*).

The purpose of this article is to examine and compare various nations' electoral systems in order to understand how they address this trade-off. Our focus on voting by elderly persons, particularly those with cognitive impairments, highlights how well the various approaches succeed in simultaneously facilitating voting by vulnerable elderly persons while reducing the opportunities for deception and fraud.<sup>3</sup>

Elderly voters present unique challenges to electoral agencies and policymakers. In most western nations they comprise a large and growing portion of the population. Although many people in this cohort are aging without substantial disability, the absolute number of elderly people with physical and cognitive disabilities is increasing markedly in many democratic countries. Moreover, an increasing number will be residing in nursing homes and assisted living facilities. All of these factors can affect their ability to exercise their right to vote and to do so independently.

Physical and cognitive disabilities directly affect the tension between voting participation and the integrity of elections. Physical impairments, specifically impairments in gait, vision, and manual dexterity, hinder a person's ability to travel to a polling site and independently cast a ballot. Among the elderly, one of the most common causes of cognitive impairment is dementia, a chronic and progressive loss of cognitive function that can impair a person's ability to perform their usual and everyday activities.<sup>4</sup> As dementia progresses, persons need increasing assistance in performing these activities. Voting is one such activity.

By the moderate stage of Alzheimer's disease, one of the most common causes of dementia, persons have substantial difficulty with orientation to date and place, understanding conceptual information, and initiating and independently performing activities. Hence, they will likely need someone else to remind them to vote, assist them in filling out forms, such as a change of address or request for an absentee ballot, and, if necessary, to take them to the polls and guide them through the ballot. At some point in the disease, they are likely to lose the capacity to vote even with maximal assistance. One study of the capacity of persons with Alzheimer's disease to vote suggests that persons with severe stage dementia have substantial problems understanding the nature and effect of

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3. The term "vulnerable" means being relatively or absolutely incapable of protecting one's rights and interests. ROBERT J. LEVINE, *ETHICS AND REGULATION OF CLINICAL RESEARCH* 72 (2d ed. 1986). This concept of "relative" in the definition makes an implicit comparison to a group who is considered not vulnerable. In the case of the elderly, such a comparison group would be adult persons who are not disabled as a result of either physical or cognitive impairments or do not live in a setting where other people have control over their day to day activities. Other examples of vulnerable populations would include prisoners and younger adults with developmental disability.

4. See AM. PSYCHIATRY ASS'N, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS DSM-IV* 148-50 (4th ed. 2000).

voting.<sup>5</sup> Obviously, people with such substantial impairments may be manipulated by others, threatening the integrity of the ballot.

Many elderly people with significant cognitive and/or physical disabilities no longer live in their own homes, and a growing proportion live in settings in which they are highly dependent on others to help them carry out basic activities of daily life. Some of these facilities may amount to what the sociologist Erving Goffman characterized as a “total institution.”<sup>6</sup> Such institutions are defined as places where there is little distinction between where residents live, work, and play and where other people regulate the nature and structure of the residents’ daily routine.<sup>7</sup> Examples include prisons, boarding schools, and, of particular relevance to this article, nursing homes. One study of voting in Philadelphia area nursing homes showed that staff exercise substantial control over voter registration and access to the vote.<sup>8</sup> Aside from potential staff control over voting rights, the layout and design of long-term care residences can exacerbate the impact of the resident’s disability by making it difficult to leave the facility and travel to a polling place. Similar issues exist with respect to the layout and access of the polling sites themselves.

The design of electoral systems affects all voters and can influence the outcomes of elections, as was vividly illustrated by the 2000 U.S. presidential election and the 2006 congressional election for the thirteenth district of Florida.<sup>9</sup> The elderly may have the most to gain and the most to lose from key features of electoral design and from the efforts of electoral officials to strike a proper balance between the goals of maximizing electoral participation and protecting the integrity of the ballot. They stand to benefit immensely from efforts to expand opportunities to vote, especially by efforts to facilitate participation by people with disabilities. However, they are also at particular risk of being excluded from voting due to insensitivity by caregivers or electoral officials who may assume incorrectly that elderly voters with disabilities are uninterested in voting or incapable of doing so. In addition, given the growing numbers of

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5. See Paul S. Appelbaum et al., *The Capacity to Vote of Persons with Alzheimer’s Disease*, 162 AM. J. PSYCHIATRY 2094 (2005). Severe stage dementia was defined as a mini-mental state exam score of twelve or less. The mini-mental state exam is a thirty-point scale that measures a variety of cognitive functions. Higher scores indicate greater overall cognitive ability. Marshal F. Folstein et al., “*Mini-Mental State*”: A Practical Method for Grading the Cognitive State of Patients for the Clinician, 12 J. PSYCHIATRIC RES. 189 (1975).

6. See ERVING GOFFMAN, *ASYLUMS: ESSAYS ON THE SOCIAL SITUATION OF MENTAL PATIENTS AND OTHER INMATES* 5-6 (Aldine Publ’g Co. 1962) (1961) (defining such institutions). The paradigm cases of “total institutions” are prisons and secure psychiatric hospitals.

7. *Id.*

8. See Jason H. Karlawish et al., *Identifying the Barriers and Challenges to Voting by Residents in Nursing Homes and Assisted Living Settings*, 20 J. AGING & SOC. POL’Y (forthcoming 2007).

9. See *Making Democracy Credible*, N.Y. TIMES, Feb. 9, 2007, at A18; Rachel Kapochunas, *Attention to Florida’s Disputed 13th District Wanes Even as Jennings’ Inquiry Presses On*, N.Y. TIMES, Jan. 29, 2007, [http://www.nytimes.com/cq/2007/01/29/cq\\_2195.html](http://www.nytimes.com/cq/2007/01/29/cq_2195.html) (on file with the *McGeorge Law Review*). In both races, confusing ballot design was among the causes of missed or spoiled votes. See Dexter Filkins, *Counting the Vote: Palm Beach County*, N.Y. TIMES, Nov. 11, 2000, at A11.

elderly in many nations, the extent to which an electoral system facilitates or suppresses participation by the elderly can have a direct impact on the outcome of elections, especially at the local level.<sup>10</sup>

This article explores variations in electoral design that may affect voting participation by elderly people with disabilities, especially those with cognitive impairments. After a brief comparative overview of key features of electoral legislation, we present case studies of electoral law and practice in three countries: Australia, Germany, and Canada. The concluding section reflects on the lessons that might be drawn from these case studies for election law and practice in the United States.

## II. OVERVIEW OF COMPARATIVE ELECTORAL LAW

Three features of electoral design are especially pertinent to participation by elderly persons with cognitive or physical impairments: (1) whether voting is compulsory; (2) whether the law explicitly excludes persons from the franchise on the basis of mental incapacity; and (3) the availability and scope of special procedures designed to facilitate electoral participation by persons with disabilities. These features of electoral law can be expected to play a significant role in shaping the response of electoral agencies to the twin challenges of facilitating voting by the elderly while protecting the integrity of the ballot. Another important feature of electoral design that affects all aspects of election practice is the structure of electoral administration.

### A. Compulsory Voting

Most democratic countries regard voting as a right or privilege of citizenship rather than an obligation. However, Table 1 shows that at least thirty countries have made voting a legal obligation.<sup>11</sup> Among the first countries to introduce

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10. See U.S. CENSUS BUREAU, 2004, U.S. INTERIM PROJECTIONS BY AGE, SEX, RACE, AND HISPANIC ORIGIN tbl.2a (2004), <http://www.census.gov/ipc/www/usinterimproj/natprojtab02a.pdf> (on file with the *McGeorge Law Review*) (estimating that thirteen percent of the population will be sixty-five or older in 2010 and that 19.6 percent of the population will be sixty-five or older in 2030); U.S. Cent. Intelligence Agency, *The World Factbook: Canada*, <https://www.cia.gov/cia/publications/factbook/print/ca.html> (last visited June 30, 2007) (on file with the *McGeorge Law Review*) (estimating that 13.5 percent of Canada's population is sixty-five and older); Statistics Canada, *Population Projections: 2005 to 2031*, DAILY, Dec., 15, 2005, at 5, <http://www.statcan.ca/Daily/English/051215/d051215.pdf> (on file with the *McGeorge Law Review*) (estimating that twenty-three to twenty-five percent of Canada's total population will be sixty-five or older in 2031); U.S. Cent. Intelligence Agency, *The World Factbook: Germany*, <https://www.cia.gov/library/publications/the-world-factbook/print/gm.html> (last visited Mar. 1, 2007) (on file with the *McGeorge Law Review*) (estimating that 19.8 percent of Germany's population is sixty-five and older); FED. RES. DIV., LIBRARY OF CONG., COUNTRY PROFILE: GERMANY 7 (2005), <http://lcweb2.loc.gov/frd/cs/profiles/Germany.pdf> (on file with the *McGeorge Law Review*) (estimating that thirty percent of Germany's population will be more than sixty years old in 2030).

11. See *infra* Table 1; Int'l Inst. for Democracy and Electoral Assistance (IDEA), *Compulsory Voting*, [http://www.idea.int/vt/compulsory\\_voting.cfm](http://www.idea.int/vt/compulsory_voting.cfm) (last visited Apr. 24, 2007) [hereinafter IDEA] (on file with the *McGeorge Law Review*); see also LOUIS MASSICOTTE ET AL., ESTABLISHING THE RULES OF THE GAME: ELECTION LAWS IN DEMOCRACIES 34-37 (2004); Andre Blais et al., *Deciding Who Has the Right to Vote: A*

mandatory voting were Belgium in 1893, Argentina in 1914, and Australia in 1924. Mandatory voting has always been controversial. Some countries, such as the Netherlands and Spain, that once adopted it, have subsequently repealed it. Even among countries that require citizens to vote, enforcement is highly variable. Some countries that mandate voting have prescribed no sanction at all for a violation (e.g., Italy, Portugal), and even countries that have prescribed sanctions vary substantially in whether they enforce those sanctions.<sup>12</sup> Of particular relevance to this article is variation with respect to the voters' age. In some countries in which voting is otherwise mandatory, it is voluntary for people over sixty-five (e.g., Ecuador) or seventy (e.g., Luxembourg).

### *B. Exclusion Based on Mental Capacity*

Almost every country explicitly excludes people with mental incapacity from registration and voting.<sup>13</sup> In a study of the electoral laws of sixty-two democracies by Massicotte and colleagues, ninety-four percent had such exclusions, typically based on a guardianship order or residence in a psychiatric hospital.<sup>14</sup> In that study, only four countries (Canada, Ireland, Italy, and Sweden) lacked such an exclusion.<sup>15</sup> A review of these exclusions shows that mental disability has traditionally been regarded as incompatible with the capacity to make an informed, rational electoral choice. It is equally clear, however, that these traditional exclusions are now widely understood to be over-inclusive and unfairly discriminatory toward persons with a mental disability. Instead, it is increasingly recognized that exclusions of persons with mental disabilities from voting ought to be based on the loss of the specific capacity to vote.<sup>16</sup>

### *C. A Typology of Voting Legislation*

Table 2 presents a typology reflecting these two basic features of modern electoral legislation. As indicated, however, all countries with compulsory voting have an exclusion based on mental incapacity.<sup>17</sup> In the case studies presented below, Germany will be used to describe the most common approach (non-

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*Comparative Analysis of Election Laws*, 20 ELECTORAL STUD. 41 (2001); WOLFGANG P. HIRCY DE MINOS, *Compulsory Voting*, in INTERNATIONAL ENCYCLOPEDIA OF ELECTIONS 29-31 (Richard Rose ed., 2000). For information about IDEA, an intergovernmental organization, see <http://www.idea.int/about/>.

12. See *infra* Table 1.

13. MASSICOTTE ET AL., *supra* note 11, at 17-27 tbl.1.1, 1.2; Blais et al., *supra* note 11, at 51.

14. MASSICOTTE ET AL., *supra* note 11, at 26-27 tbl.1.2.

15. *Id.* at 27.

16. See *Doe v. Rowe*, 156 F. Supp. 2d 35 (D. Me. 2001).

17. As discussed in the text, we recognize that systems with compulsory voting represent a continuum determined by the intensity of enforcement. Practices range from complete lack of enforcement (under which the law serves a purely exhortatory function expressing the conviction that everyone ought to vote) to aggressive enforcement (under which electoral officials attempt to identify and penalize every non-voter).

compulsory voting with a mental incapacity exclusion—also the approach in the United States), Australia will be used to describe a system with compulsory voting and a mental incapacity exclusion, and Canada will be used to describe the most unusual arrangement—non-compulsory voting without any exclusion based on mental incapacity.

*D. Procedures for Increasing Access and Participation*

Another important feature of a country's electoral procedures is the degree of flexibility shown to accommodate people with disabilities. A century ago, election laws typically provided only one way to cast a ballot—going to the polls on election day and casting a vote. Today, most democracies have recognized that rigid adherence to a single method of voting tends to disenfranchise citizens with disabilities or those who have other superseding obligations on election day. They have created a variety of “special voting procedures” to accommodate such persons, to facilitate electoral participation, and to increase the voting rate. Each of these accommodations, however, heightens the risk of fraud, and electoral laws and practices vary substantially from country to country. The main “special voting procedures” are:

- *Advance voting*, which allows voters to go to a designated place to cast a ballot before the day of the election. A key issue is whether voters must give reasons why they cannot vote on election day.
- *Absentee voting*, or “postal voting” as it is called elsewhere, which allows voters to mail their ballots. Key issues are whether the opportunity to vote by mail (or, in the modern era, electronically) is restricted to people with certain types of justifications and in the precautions taken to reduce the risk of fraud, while preserving the secrecy of the ballot.
- *Assisted voting* for people with disabilities. The key challenge is to prevent the person who provides assistance from voting his or her own preferences rather than the wishes of the assisted voter, and these safeguards vary.
- *Proxy voting*, which allows people to designate a person to cast the ballot for them at the polling station.
- *Mobile voting* stations, which are specifically designed to facilitate voting by people in hospitals or other institutions where otherwise qualified and registered electors are confined; they differ from regular polling stations in hospitals or prisons because they are moved around by polling officials on or prior to election day and the voter has access to the ballot for the district in which the voter is registered rather than only the ballot for the district where their facility is located.

Massicotte and colleagues constructed an index of such procedures in their 2003 study of the voting laws in sixty-three democratic countries.<sup>18</sup> At the time of their research, twenty-one of these countries permitted postal voting, but only three of them (Canada, Spain, and Lithuania) allowed unrestricted use of postal balloting.<sup>19</sup> Advance voting was allowed in twenty countries (half of which also allowed postal voting); only three countries (Canada, Estonia, and Sweden) allow every person to vote in advance without restriction.<sup>20</sup> Every country allows assisted voting.<sup>21</sup> Only ten countries allow proxy voting, and this procedure is being made obsolete in many countries by greater use of postal voting.<sup>22</sup> Mobile polling stations are used in eighteen countries.<sup>23</sup> All told, nearly one-third of the countries studied by Massicotte and colleagues allowed none of these special procedures (aside from assisted voting), while thirteen percent had three of them (in addition to assisted voting).<sup>24</sup> This group includes Australia and Canada (which allow all of these special procedures except proxy voting). Germany permits neither advance voting nor proxy voting.

#### *E. Responsibility for Electoral Administration*

Another important source of variation in electoral design lies in the “structure” of election administration, specifically, the composition of the body (or bodies) charged with maintaining the voter roll and overseeing voting. In the United States, voting administration is carried out by a loose confederation of federal, state, and local agencies under a combination of federal and state laws, regulations, and guidelines. Substantial inter- and intra-state variation exists with respect to administering voting and maintaining the voter roll.<sup>25</sup> In many states, the Secretary of State, an elected official, is responsible for electoral administration. In this article, we will examine how other countries administer voting.

In their study of election law, Massicotte and colleagues identified three basic models of authority for the governance of elections—a multi-member commission typically appointed by several branches of government, a single

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18. See MASSICOTTE ET AL., *supra* note 11, at 132-41 tbl.5.6.

19. *Id.* at 136.

20. *Id.* at 138.

21. *Id.* at 139.

22. *Id.*

23. *Id.*

24. *Id.* at 140 tbl.5.8. This group also includes Sweden, Ireland, Lithuania, and New Zealand. See *id.* at 134-35 tbl.5.6.

25. The authority of secretaries of state in voting law enforcement has led to peculiar dual roles of both enforcing voting laws while at the same time supporting a campaign affected by those laws. Recent examples include Florida Secretary of State Kathleen Harris’ dual roles as chair of the Bush-Cheney 2000 Florida campaign and the official in charge of certifying the contested result of that election, and Ohio Secretary of State Kenneth Blackwell’s dual roles as candidate for governor and the official in charge of voting enforcement for that election.

official appointed by one branch, or a minister beholden to the current government.<sup>26</sup> Electoral commissions, the most common approach to electoral administration, are used in forty-three (sixty-nine percent) of the countries studied.<sup>27</sup> There is wide variation in the assignment of responsibility for appointing members, ranging from the current government (with or without participation by the opposition) to the judiciary, or some combination of these bodies.<sup>28</sup> A single public official is responsible for election administration in ten of the countries studied; this official is appointed by the President, the legislature, or various other bodies.<sup>29</sup> Six countries, all in Europe, place a minister in charge of elections; these countries include Belgium, Denmark, and the United Kingdom.<sup>30</sup>

One key difference among these different approaches is whether they are structurally designed to be non-partisan, often signaled by designating judges as members of the governing body or by the appointment of commission members by the judiciary. As Massicotte and colleagues point out, however, the tradition of independence and non-partisanship in electoral administration is as much a function of political culture and tradition as of formal legal design.<sup>31</sup> Among the three case studies presented in this article, two (Australia and Germany) have non-partisan commissions and one (Canada) uses a single non-partisan public official appointed by the House of Commons.

### III. THREE CASE STUDIES

The case studies presented below consider three important features of electoral design that bear on the enfranchisement of elderly voters with cognitive impairment. They focus on the advantages, disadvantages, and the trade-offs that each system creates: (1) policies and practices used in Australia to implement compulsory voting; (2) policies and practices used in Germany and Australia to implement legal provisions disqualifying or excusing people from registration or voting based on mental incapacity; and (3) policies and practices governing use of “special voting procedures” (in all three countries) to facilitate voting by people with disabilities.

#### A. *Compulsory Voting: The Australian Approach*

For our purposes, the distinguishing features of the Australian system are a well-enforced system of compulsory electoral enrollment and voting accom-

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26. MASSICOTTE ET AL., *supra* note 11, at 83-101.

27. *Id.* at 94.

28. *Id.*

29. *Id.* at 96.

30. *Id.* at 97.

31. *Id.* at 101.

panied by explicit criteria for excusing persons from their electoral obligation on the basis of mental incapacity. Compulsory voting undoubtedly promotes enfranchisement and voting, and the Australian election officials have also embraced proactive strategies for facilitating voting by people with disabilities who have difficulty going to a polling place. However, by allowing advance “excuses” for persons with mental incapacity, the Australian system facilitates efficient enforcement of the compulsory voting regime, while also protecting the integrity of the electoral system.

### 1. *Overview of the Australian System*

The Commonwealth Electoral Act of 1918 inaugurated the modern system of voting in Australia.<sup>32</sup> In 1984, the Electoral Act was amended to redefine the capacity to vote and create mobile polling, the system of collecting ballots at hospitals, nursing homes, and remote areas.<sup>33</sup> Since 1918, the Australian Electoral Commission (AEC) has overseen the national voter roll and the conduct of federal elections. In addition, each of Australia’s six states has its own commission to administer state and local elections. Differences do exist in how the federal and state electoral commissions enforce voting laws and regulations; as we will discuss below, some of these differences are relevant to voting by the elderly. In general, however, systematization and uniformity characterize the Australian electoral system.

Registration and voting policies and procedures are largely uniform and have a notable degree of detail. For example, the electoral law specifies that ballots must be filled out with a pencil, not a pen.<sup>34</sup> Electoral officials describe their system as a “McDonald’s system,” referring to the fast food chain that markets a fairly uniform menu, store front, and cooking production.<sup>35</sup>

The AEC’s responsibilities include managing the electoral roll, administering elections, drawing electoral districts, and educating voters.<sup>36</sup> Australian electoral

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32. See Commonwealth Electoral Act, 1918 (Austl.), available at [http://www.comlaw.gov.au/ComLaw/Legislation/ActCompilation1.nsf/0/C0CDF1413F86A6C8CA2572C20014E69B/\\$file/CwlthElectoral1918\\_WD02.pdf](http://www.comlaw.gov.au/ComLaw/Legislation/ActCompilation1.nsf/0/C0CDF1413F86A6C8CA2572C20014E69B/$file/CwlthElectoral1918_WD02.pdf).

33. The Commonwealth Electoral Act of 1983 was assented to on December 22, 1983 but enacted in 1984. Commonwealth Electoral Legislation Amendment Act, 1983, No. 144 (Austl.), available at <http://www.comlaw.gov.au/ComLaw/Legislation/Act1.nsf/framelodgmentattachments/FEAF288DB517FEF4CA256F72001584B5>.

34. See Commonwealth Electoral Act, 1918 § 206 (Austl.), available at [http://www.comlaw.gov.au/ComLaw/Legislation/ActCompilation1.nsf/0/C0CDF1413F86A6C8CA2572C20014E69B/\\$file/CwlthElectoral1918\\_WD02.pdf](http://www.comlaw.gov.au/ComLaw/Legislation/ActCompilation1.nsf/0/C0CDF1413F86A6C8CA2572C20014E69B/$file/CwlthElectoral1918_WD02.pdf).

35. Interview with Michael Maley, Dir., Int’l Servs., Austl. Electoral Comm’n (AEC), AEC office, West Block Offices, Queen Victoria Terrace, Parkes, ACT (Nov. 15, 2006) (notes on file with the *McGeorge Law Review*); Interview with Andrew Moyes, Assistant Comm’r (Enrolment), Austl. Electoral Comm’n (AEC), AEC office, West Block Offices, Queen Victoria Terrace, Parkes, ACT (Nov. 15, 2006) (notes on file with the *McGeorge Law Review*).

36. AUSTL. ELECTORAL COMM’N, ANNUAL REPORT 2005-2006, at 11-13 (2006).

processes feature centralization and independence from the political system. The AEC model is the “Westminster System” of an impartial bureaucracy that serves the people, not the party, as referees for the electoral process.<sup>37</sup> Commissioners are not allowed to be members of a political party or engage in political activities. The staff are typically persons trained in auditing, accounting, and statistics.

Although some states are testing electronic voting and internet voting, the Australian ballot is largely the same paper and pencil-completed ballot used at the beginning of the twentieth century. Computerized voting in Australia is described as “some way off.”<sup>38</sup> Provisions to assist a voter who cannot complete a paper ballot include detailed guidelines for assistance at the polling booth and the ability to register as a voter who cannot sign a ballot paper. The reluctance to adopt new technologies is in large part attributable to concerns about the potential impact of such technologies on the integrity of elections.<sup>39</sup>

Enrollment for Australian federal elections is recorded on a single nationwide list of voters. To keep the list up-to-date, the AEC continually monitors a variety of data sources, such as tax returns and driver’s licenses, to identify unregistered voters. In addition, voters can enroll by mail without the need to provide proof of identification. Collectively, these procedures foster ease of enrollment and voting. Although the incidence of fraudulent enrollment is unknown, it has become the source of controversy with rising debate over federal efforts to tighten the requirements for new enrollees.

## 2. *Compulsory Enrollment and Voting*

Compulsory electoral enrollment was initiated in 1911 and compulsory voting went into force in 1924.<sup>40</sup> Enforcement of compulsory voting occurs as follows. After each election, the electoral commission compares the list of persons who voted with the list of enrolled voters and sends those who did not vote letters notifying them of their failure to vote and assessing a fine of twenty Australian dollars. Non-voters are allowed to appeal, and the commission reviews these appeals to determine if the reason for non-voting is “valid and sufficient.”<sup>41</sup> In instances where the excuse is found to be “valid and sufficient,”

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37. Colin Hughes, *The Independence of Electoral Administration*, Mar. 23, 2007, [http://www.aph.gov.au/Senate/pubs/occa\\_lect/transcripts/230307/230307.pdf](http://www.aph.gov.au/Senate/pubs/occa_lect/transcripts/230307/230307.pdf) (on file with the *McGeorge Law Review*).

38. Graeme Orr et al., *Australia Electoral Law: A Stocktake*, 2 ELECTION L.J. 383, 393 (2003).

39. *Id.*

40. Austl. Electoral Comm’n, *Compulsory Voting*, ELECTORAL BACKGROUNDER, Aug. 2004, at 1 [http://www.aec.gov.au/pdf/backgrounders/17/EB\\_17\\_Compulsory\\_Voting.pdf](http://www.aec.gov.au/pdf/backgrounders/17/EB_17_Compulsory_Voting.pdf) [hereinafter Austl. Electoral Comm’n, *Compulsory Voting*] (on file with the *McGeorge Law Review*). Subsection 245(1) of the Electoral Act 1918, § 245(1) (Austl.) available at [http://www.comlaw.gov.au/ComLaw/Legislation/ActCompilation1.nsf/0/C0CDF1413F86A6C8CA2572C20014E69B/\\$file/CwIthElectoral1918\\_WD02.pdf](http://www.comlaw.gov.au/ComLaw/Legislation/ActCompilation1.nsf/0/C0CDF1413F86A6C8CA2572C20014E69B/$file/CwIthElectoral1918_WD02.pdf).

41. Many years of court decisions have developed interpretations of what is a “valid and sufficient

the commission drops the action. Otherwise, it pursues a nonvoter until either payment of the fine or a court hearing, which may result in either a judge's acceptance of the voter's excuse or collection of the fine plus court costs.

AEC officials exercise discretion in deciding which cases to pursue. Not all non-voters will receive a non-participation penalty letter and, if they do, their failure to reply may not be followed up or the case may be dropped. For example, pursuing certain non-voters could generate negative public reaction. This is particularly relevant to elderly persons whose non-voting is likely attributable to illness or other reasons that would amount to valid excuses. In fact, some state commissions routinely decline to pursue non-voting by elderly persons. For example, in state elections, the state of Victoria does not pursue non-voters over seventy years of age. The AEC's background paper on compulsory voting states that it would be "unlikely, for example, that a DRO [Divisional Returning Officer] would impose a fine for not voting on the elderly and frail, women in late pregnancy, or the intellectually disabled."<sup>42</sup>

The intensity of enforcement by AEC officials is also affected by the overall voting rate. When the proportion of persons who fail to vote rises, the electoral commission is likely to be more aggressive in enforcing the compulsory voting law.

### 3. *Exclusion on the Basis of Incapacity to Vote*

The 1918 election law provided that "no person who is of unsound mind . . . shall be entitled to have his name placed on or retained on any roll or to vote at any Senate election or House of Representatives election."<sup>43</sup> This formulation's lack of specificity and overbreadth is typical of the laws of most countries in the twentieth century but was rectified by Australia's Parliament in 1984, when the definition was changed to the current version: "A person who . . . by reason of being of unsound mind, is incapable of understanding the nature and significance of enrollment and voting . . . is not entitled to have his or her name placed on or retained on any Roll or to vote at any Senate election or House of Representatives election."<sup>44</sup> Note that this provision is framed as a disqualification and is indistinguishable in this respect from the laws of countries without compulsory voting. However, in Australia (and presumably in other

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reason" for non-voting. AEC officials use this body of law not only to guide their decisions in individual cases but also to limit a non-voter's fraudulent use of the criteria. The Commission has not formalized or disseminated any "list" of valid excuses. For example, see *Judd v. McKeon* (1926) 38 C.L.R. 380, and *O'Brien v. Warden* (1981) 54 F.L.R. 16.

42. Austl. Electoral Comm'n, *Compulsory Voting*, *supra* note 40, at 3.

43. Commonwealth Electoral Act 1918, § 4, 39(4) (Austl.) (currently codified as amended at Commonwealth Electoral Act 1918, § 93(8)(a)) (on file with the *McGeorge Law Review*).

44. Commonwealth Electoral Act 1918, § 93(8)(a) (Austl.), available at [http://www.comlaw.gov.au/ComLaw/Legislation/ActCompilation1.nsf/0/C0CDF1413F86A6C8CA2572C20014E69B/\\$file/CwithElectoral1918\\_WD02.pdf](http://www.comlaw.gov.au/ComLaw/Legislation/ActCompilation1.nsf/0/C0CDF1413F86A6C8CA2572C20014E69B/$file/CwithElectoral1918_WD02.pdf).

countries with compulsory voting), the “exclusion” also functions as an “excuse”—exempting people from punishment for failing to vote.

The 1984 revisions also changed the process for invoking the statutory exclusion on the basis of mental incapacity. First, the process for removing someone from the roll on the basis of unsound mind must be initiated by a private citizen, not by the government. Second, the decision to do so must be based on a medical certificate. Third, the person whose capacity is in question must be notified of the objection. Overall, this process is designed to be as objective as possible and to be effectuated in advance so that a person’s mental capacity to vote is not challenged at the time of voting at a polling site.

The process of removing someone from the roll on the basis of “unsound mind” is remarkably “unjuridified” in Australia compared to the United States and Germany.<sup>45</sup> It begins with an elector submitting two forms: a private objection form (“removal of elector’s name from roll on grounds of unsound mind”) and a medical certificate from a “registered medical practitioner.” The private objection form requires the objector to sign and date a form specifying the name and address of the voter they object to and the location of that voter’s voting roll. No documentation of a reason is requested from the objector. A private objection form unaccompanied by a certificate of a medical practitioner is automatically dismissed without notifying the challenged elector.

Any elector can initiate this process. It is typically done by a family member or nursing home administrator. The AEC does not specify the training or qualifications of the registered medical practitioner (for example, by requiring a psychiatrist to conduct the assessment) and offers no guidance on how a physician should assess voting capacity. The one-page form simply requires the physician to sign beneath the conclusory statement that “I am a registered medical practitioner and consider that the following person by reason of being of unsound mind is incapable of understanding the nature and significance of enrolment and voting.”<sup>46</sup> The form requires the challenged voter’s name, address, and date of birth, as well as the physician’s name, signature, and the date. There are no requirements for court review, a practice that differs substantially from the legal requirements in countries that link voting eligibility to guardianship adjudications, such as the United States and, as discussed below, in Germany.

Upon receipt of these forms, the AEC then sends the disqualified voter a “notification of removal” letter advising the voter of the objection that has been raised and giving them thirty days to object to the removal. Assuming the person does not protest this process, they are then removed from the electoral roll. Persons who regain capacity can of course re-enroll.

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45. See Orr et al., *supra* note 38, at 384.

46. AUSTRALIAN ELECTORAL COMMISSION, ORDINARY ENROLMENT: REMOVAL OF ELECTOR’S NAME FROM ROLL ON GROUNDS OF UNSOUND MIND, pt. 1, subpt. 16, attachment 2 (1998) (on file with the *McGeorge Law Review*).

Medical certificates not accompanied by a formal citizen request for removal are retained in the event that a subsequent non-voter enforcement action is taken against the voter, in which case the certificate may be used as an “advanced-valid and sufficient excuse” for not voting.<sup>47</sup>

As with the enforcement of compulsory voting, discretion enters into the process of managing the “removal” process based on mental incapacity. The most common point in the process where officials exercise discretion is the decision whether to send the letter to the allegedly incapable voter notifying them of the request for removal. Officials may elect not to send the removal letter because the family has expressed concern that the letter will cause distress to the elderly recipient.

Relatively few persons are removed from the roll on the basis of lack of capacity to vote. Among all removals from the roll at any given time, approximately two to three percent are removed on the grounds of unsound mind.<sup>48</sup> As expected, very few voters are removed on this ground before they are elderly, but the number of removals begins to increase in direct relation to age at around seventy. Among people eighty-five and older, about fifteen percent have been removed from the roll on this basis.

Among the “removed” voters classified by the AEC as being of “unsound mind,” only about half have been *formally* removed on this basis; the others have been informally removed through the “back door,” so to speak. “Back door” removals refer to those cases in which a relative notifies the electoral agency that the elderly family member is residing in a nursing home and is no longer capable of voting. In such cases, the reason for removal officially recorded may be that the voter “no longer resides at their address,” having been relocated to a long-term care facility. In some of these cases, the family member may even have submitted the paperwork for removal on the basis of unsound mind but did not want a notification letter sent to the affected person. In all of these cases in which people are removed from the roll informally due to perceived incapacity to vote, a “NC” notation (“not competent”) is recorded on their registration. If an NC elector does not vote, non-voter action is not initiated, and if an NC elector does vote, the vote is counted without question.<sup>49</sup>

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47. *See id.*

48. As of 2004, there were 14.25 million Australians eligible to vote and 40,000 who had been removed from the roll on the basis of unsound mind. E-mail from Jim Doyle, Executive Sec’y, Electoral Council of Austl., to Jason Karlawish, Assoc. Professor of Med., Univ. of Pa. and Inst. On Aging (Feb. 15, 2007) (on file with the *McGeorge Law Review*). Up to age sixty, the number of removals within each age category is less than 100. *Id.* By age seventy, the number climbs to about 200. *Id.* Among eighty-year-olds, it is near 1,000, and among eighty-four-year-olds, it is near 1,350. *Id.* Among people eighty-five and older, 26,000 have been removed (approximately fifteen percent of all persons in the eighty-five plus age group). E-mail from Jim Doyle, Executive Secretary, Electoral Council of Austl., to Jason Karlawish, Assoc. Professor of Med., Univ. of Pa. and Inst. On Aging (Feb. 28, 2007) (on file with the *McGeorge Law Review*).

49. As of 2004, approximately 10,000 persons have such NC status (approximately one percent of persons enrolled aged seventy-five or older). E-mail from Jim Doyle, Executive Secretary, Electoral Council of Austl., to Jason Karlawish, Assoc. Professor of Med., Univ. of Pa. and Inst. On Aging (Feb. 15, 2007) (on file

#### 4. *Taking the Polls to the Voters: Mobile Polling*

The 1984 modifications to the Australian Commonwealth Electoral Act of 1918 also created mobile polling.<sup>50</sup> The term describes bringing the polls to a voter's residence. Mobile polling was designed to address voters in three kinds of residential settings: remote areas such as the Australian territories, hospitals, and nursing homes (the law calls these "special hospitals"). People who live in these settings typically do not have easy access to a polling facility, and voting involves an increased risk of fraud, such as the theft or manipulation of postal votes. For example, concerns were raised that persons claiming to assist institutionalized elderly persons or illiterate aboriginal peoples would steal their votes. Notably, no actual scandal of this nature motivated the adoption of mobile polling. Instead, it was a preventive action taken to reduce the chance of scandal and to maximize access to the polls by people otherwise highly likely to be disenfranchised. Key features of Australia's electoral system that facilitate mobile polling are its centralized and common list of voters and the lack of a requirement that a voter vote at any particular precinct.

Mobile polling is not absentee balloting. Instead, two or more AEC officials take the voting materials to a facility and gather ballots there. Ballots are provided for the district in which the person is registered, which may or may not correspond to the location of the facility. This process starts several days prior to Election Day, and officials typically revisit facilities several times to accommodate voters who may have been missed during previous visits. An elector cannot be removed from the roll as a result of incapacity at the time of mobile polling. In the event a voter is unable to complete the ballot or otherwise demonstrates resistance to voting, the ballot is voided and the polling officials are required to complete a form explaining what happened.

As with the enforcement of compulsory voting and the removal of a voter on the basis of mental capacity, mobile polling has clear and detailed criteria, but several issues require administrative judgment. For example, should the availability of mobile polling at the voter's residence preclude the resident from becoming a postal voter? Australian law permits a person to become a "general postal voter," which means they can always vote as a postal voter.<sup>51</sup> There are seven possible circumstances under which a person can qualify as a general postal voter. These include being a patient in a hospital or nursing home (that is not a polling place) with serious illness and infirmity and being unable to travel to a polling place.<sup>52</sup> Officials differ in their willingness to approve a general

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with the *McGeorge Law Review*).

50. Commonwealth Electoral Legislation Amendment Act, 1983, No. 144, § 89 (Austl.), available at <http://www.comlaw.gov.au/ComLaw/Legislation/Act1.nsf/framelodgmentattachments/FEAF288DB517FEF4CA256F72001584B5>.

51. *Id.* § 62.

52. See Austl. Electoral Comm'n, Application for Registration as a General Postal Voter for Federal

postal voting application from an applicant whose hospital or nursing home is serviced by mobile polling, a condition that at least formally makes it a polling place and dispenses with the “need” for postal voting.

Some believe that the risk of fraud favors making mobile polling the only permissible method of voting when it is available. Fraud can take one of two forms. The postal vote can be stolen and cast by some other person or otherwise destroyed or manipulated, a risk that is virtually eliminated by mobile polling. The second concern is double voting, e.g., the person votes by both mobile polling and postal voting. Although officials will detect double voting after the election when they review the vote, they must then either disqualify both votes or only count one.

The actual practice of mobile polling also requires several discretionary judgments by election officials. First, they must determine which facilities should be designated as mobile polling facilities. A special hospital or nursing home is permitted to become a mobile polling facility if more than ten voters reside there. However, a facility with more than ten residents may decline to be a mobile polling site if it represents that all of its residents can get to the polls or that it prefers to leave voting to the family, or, conversely, if all of the residents are too impaired to vote.

Second, they must determine how mobile polling should be. Specifically, should election officials actively go from room to room to recruit voters, remain in a single location of the facility and wait for voters to come to them, or follow the guidance of the facility staff regarding which rooms to visit?

Third, they must determine the role of facility staff in the mobile polling process. Election officials are divided over the appropriateness of a staff member serving as the polling official for the mobile polling facility. Some think it is appropriate and others believe it presents too great of an opportunity for fraud and coercion.

### 5. *Noteworthy Features of the Australian Approach*

The Australian system is a professionally administered, centralized, and depoliticized system of compulsory voting that yields voting rates as high as ninety-five percent of registered voters. But as systematic and uniform as the Australian system is, voting by the elderly presents some challenges. How well does the system score on facilitating voting by elderly people who have physical or cognitive disabilities or who reside in nursing homes?

If it is to be enforced, a system of compulsory voting would seem to necessitate aggressive steps to enhance access to the polls by people with disabilities, including special procedures such as mobile polling and postal

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Elections and New South Wales State and Council Elections (2007), [http://www.aec.gov.au/pdf/enrolment/forms/general\\_postal/ER022Gw\\_NSW\\_0307\\_F.pdf](http://www.aec.gov.au/pdf/enrolment/forms/general_postal/ER022Gw_NSW_0307_F.pdf) (on file with the *McGeorge Law Review*).

voting. As a matter of principle, it would seem grossly unfair to penalize people whose ability to vote is compromised by disability, distance, or lack of resources for failing to do so. Compulsory voting also creates a strong incentive for the electoral officials to develop administrable criteria for “excusing” non-voting and, in order to maintain voter confidence and support, to create a fair process for enforcing these criteria. In Australia, the “excuse” for people who lack mental capacity to vote appears to be administered fairly, largely without judicial involvement, and in a manner that disqualifies only a small proportion of elderly voters and generates little controversy.

We were struck by a general tendency to withhold enforcement for elderly voters. In some Australian states, voting is not mandated for older voters, and in others the threshold for dropping the case against non-voters is lower than for an otherwise younger person. Medical certificates for removal from the roll on the basis of mental capacity seem to be readily granted, and the electoral agencies also appear to give a “pass” to nursing home residents who fail to vote. Families can persuade an official not to send a notification letter to voters formally removed from the roll on the basis of unsound mind. Overall, these forms of “leniency” seem to reflect reasonable efforts to ameliorate the impact of compulsory voting on the older population.

A few features of the Australian system highlight the tension between enhancing participation and reducing the risk of fraud. While mobile polling probably facilitates voting by long-term care residents in a way that minimizes the risk of fraud, there appear to be significant variations in practice that could affect the voting opportunities of disabled elderly voters, such as whether election officials seek voters from room to room and whether they rely on facility staff to identify and assist voters. Although postal voting may be a useful option in such contexts, some election officials are reluctant to grant voters permanent postal voting status if they have access to mobile polling, and this may depress voting participation.

Finally, the Australian system has been reluctant to adopt balloting technologies different from its long-standing use of the pencil and paper ballot, such as ballots in Braille or computer-assisted voting. In mobile polling, this reliance on the paper and pencil ballot requires frequent one-on-one assistance for the elderly voter. The result is that elderly Australians have access to the ballot but limits upon their ability to vote privately.

### *B. The Juridical Model: Germany*

As in Australia, the German electoral system is overseen by a centralized, apolitical, and professional authority. The Federal Electoral Law assigns the responsibilities for overseeing and conducting elections and evaluating their results to various federal and provincial officials, among whom the Federal Returning Officer has the most responsibility. One of his primary roles is “to act as an electoral body and as such to prepare and conduct Bundestag elections and

European elections, supported by the electoral bodies at Land [regional], constituency and electoral district level . . .”<sup>53</sup> He serves as Chairman of the Federal Electoral Committee and appoints the eight members of the Committee. In addition, he serves as Chairman of all other Electoral Committees and appoints committee members to each.

The Ministry of the Interior appoints the Federal Returning Officer and his deputies “indefinitely.” Although this is a political appointment, the actual practice stresses its apolitical nature. “In continuation of an old tradition going back to the Reichstag elections, the President of the Federal Statistical Office is regularly entrusted with the responsibilities of the Federal Returning Officer.”<sup>54</sup> The Federal Statistical Office defines its primary assignment as “provid[ing] and distribut[ing] objective, independent and highly qualitative statistical information to all, namely politicians, government, administrative agencies, business and industry, and the citizens in general.”<sup>55</sup> The office is governed by Federal Statistics Law, which aims to assure objectivity, neutrality, and scientific independence in the federal statistical system.<sup>56</sup>

### 1. *Voter Registration*

Voter enrollment in Germany is automatic, and voting is voluntary. Voter registration in Germany is part of a general mandatory population registration process conducted by local governments. Every registered citizen is issued a national identity card that is stamped by local authorities according to the location of the person’s residence. Voter lists, in turn, are drawn from the municipalities’ general registers and are closed thirty-five days before an election. Voters who demonstrate that they were unable to register before the closing date can do so according to procedures and timetables set by the local election officials. These voter lists are used for local, national, and European parliamentary elections.

### 2. *Exclusion Based on Mental Disability*

Like most countries, Germany disqualifies people from voting based on mental incapacity. The determination of the legal ground for disqualification is tied to the scope of guardianship orders. If a caretaker or guardian has been appointed to take care of all a person’s affairs, what would be called “plenary

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53. Federal Electoral Regulations, Mar. 8, 1994, last amended Aug. 28, 2000, § 1, art. 1 (F.R.G.), available at <http://www.legislationline.org/legislation.php?tid=57&lid=1817>; Fed. Returning Officer, Responsibilities of the Federal Returning Officer, [http://www.bundeswahlleiter.de/wahlen/e/leiter\\_e.htm](http://www.bundeswahlleiter.de/wahlen/e/leiter_e.htm) (last visited Feb. 28, 2007) (on file with the *McGeorge Law Review*).

54. *Id.*

55. Fed. Statistical Office Germany, About Us, [http://www.destatis.de/allg/e/ueber/ueber\\_start.htm](http://www.destatis.de/allg/e/ueber/ueber_start.htm) (last visited Feb. 28, 2007) (on file with the *McGeorge Law Review*).

56. *Id.*

guardianship” in the United States, the person is automatically excluded from the franchise, and the court is required by the Federal Electoral Law<sup>57</sup> to notify the local office responsible for keeping voters lists of the entry of such orders so that the person can be taken off the roll.<sup>58</sup> Similarly, a report must be sent to the local election office whenever such an order has been terminated or the level of care has been reduced, after which the person’s right to vote will be revived. However, this automatic exclusion does not apply to “partial care”—i.e., care that is limited to certain affairs—or what would be called “limited guardianships” in the United States. In such cases, it is the responsibility of the guardians or caretakers themselves to judge whether the citizens under limited guardianship have lost their ability to vote (and whether citizens under plenary orders have regained the capacity to vote) and to take action accordingly to modify the relevant judicial orders.<sup>59</sup>

Germany’s exclusively juridical approach to disqualification based on mental disability stands in stark contrast to the medical certification process that prevails in Australia. For example, if nursing home staff in Australia are doubtful about a resident’s capacity to vote, they can arrange for the necessary medical certification and initiate an administrative process of removing the patient from the roll. However, in Germany, the only process through which a person can be disqualified from voting, even if they are residing in nursing homes, is through a plenary guardianship order.

### 3. *Right to Assistance and Absentee Voting*

The law specifically permits technical assistance (e.g., reading, checking, and placing the ballot into the voting box) in order to help an incapacitated voter express his or her intent.<sup>60</sup> However, any influence on the voter’s decision or on the vote itself is illegal. As this implies, the voter has to be mentally capable of understanding his right to vote and of expressing his wishes. Thus, if the person has an impairment that prevents him from marking and folding the ballot or dropping it into the voting box, or if he is unable to read the ballot, the voter may ask for assistance (e.g., of his caretaker). However, this assistance must be exercised to carry out the desires of the voter. If the voter is unable to recognize

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57. Bundeswahlgesetz [BWG] [Fed. Electoral Law], July 23, 1993, last amended May 21, 1999, § 3, art. 13(2) (F.R.G.), available at <http://www.legislationline.org/legislation.php?tid=57&lid=1818>. People are eligible to vote under BWG Article 12(1) as long as they are Germans and over eighteen years of age. Letter from The Fed. Election Manager (Der Bundeswahlleiter), Germany, to Christian Schwagerl (Nov. 15, 2006) (translated by Dieter H.M. Gröschel, M.D., Dec. 13, 2006) [hereinafter Fed. Election Letter] (on file with the *McGeorge Law Review*).

58. Fed. Election Letter, *supra* note 57.

59. *Id.* (“The caretakers have to test whether or not the citizens (female or male) are excluded from voting or whether a change in their condition will permit franchise again.”).

60. Fed. Electoral Regulations, Mar. 8, 1994, last amended Aug. 28, 2000, § 3, art. 57 (F.R.G.), available at <http://www.legislationline.org/legislation.php?tid=57&lid=1817>.

the significance of the act of voting or to make a decision, then such assistance is not permitted.<sup>61</sup>

Technical assistance is also permissible for voting by mail (“briefwahl”), similar to absentee voting in the United States. When applying for voting by mail, a physically impaired voter or one who cannot read may use the help of other people. If another person applies for an absentee ballot on behalf of a voter, he has to prove his authorization with a written power of attorney.

Proxy voting is not permissible in Germany. German election law does not recognize a delegated voting right. Voting is a personal act and, by law, substitution is not possible.<sup>62</sup>

These rules apply to guardians as well. As noted above, a person under plenary guardianship is not eligible to vote. However, a person under limited guardianship is eligible. It follows, of course, that the guardian or caretaker is permitted to assist the client at the polls but may not execute the voter’s right. Similarly, if the guardian applies on behalf of his client for a mail ballot, he must show his power of attorney in writing. His appointment as caretaker is not sufficient proof because in a case of limited guardianship or partial care, voting rights are not included in the caretaker’s powers, and the persons cared for would have to prepare an amended power of attorney to permit the caretaker to apply for the absentee ballot.<sup>63</sup>

#### 4. *Poll Accessibility*

According to the Federal Statistical Office, polling locations should be selected according to local conditions and must assure that access is possible for physically handicapped persons and that all people eligible to vote can easily participate in the election, especially the handicapped and those with impairments of mobility.<sup>64</sup> The community administration is directed to report in a timely and appropriate fashion which polling locations are free of barriers. However, persons with physical disabilities do not have a legally enforceable right of equal access to the polls, apparently on the theory that the availability of voting by mail and the right to have the assistance of a helper provide sufficient protection for the right to vote.

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61. Fed. Election Letter, *supra* note 57.

62. Bundeswahlgesetz [BWG] [Fed. Electoral Law], July 23, 1993, last amended May 21, 1999, § 3, art. 14(4) (F.R.G.), available at <http://www.legislationline.org/legislation.php?tid=57&lid=1818>.

63. Should the caretaker present himself as the person cared for and apply for a ballot “under a false name” and perform the vote by mail, he would be legally liable for election fraud and forgery of documents. Fed. Election Letter, *supra* note 57. See also Strafgesetzbuch [StGB] [Penal Code] Nov. 13, 1998, §§ 108, 267 (F.R.G.), available at <http://www.iuscomp.org/gla/statutes/StGB.htm>.

64. Fed. Election Letter, *supra* note 57.

### 5. *Facilitation of Voting in Long-Term Care Settings*

As previously indicated, residents of long-term care facilities, including persons diagnosed with dementia, retain their right to vote in the absence of a plenary guardianship; if they are placed in a nursing home or similar institution, they are entitled to vote there or via mail ballot. Mobile polling is specifically authorized by the Federal Election Law. If needed, the local election officials may establish special election precincts in nursing homes and similar institutions for voting by registered voters,<sup>65</sup> and mobile election supervisors may be appointed.<sup>66</sup> However, we have been unable to ascertain how frequently mobile polling occurs in practice.

### 6. *Noteworthy Features of the German Approach*

On the face of the law, the German system appears to be typical of most European systems in many respects: it has a tradition of independent professional electoral regulation; voting is a right, not a legal obligation; people with substantial mental disability are not qualified to vote; and German law embraces voting procedures designed to increase voting by people with disabilities. However, two features of the German system are noteworthy. First, since registration is automatic (being tied to residential registration), one of the possible impediments to electoral participation has been removed. Second, the exclusion for mental disability appears to be a categorical one automatically effectuated by the judicial notification of local election officials whenever a person is subject to a plenary guardianship order (or whenever such an order is modified). Notwithstanding the efficiency of this system, it is vulnerable to the criticism that the exclusion is overbroad—not everyone subject to a plenary guardianship order lacks the capacity to “understand his right to vote and express his wishes.”<sup>67</sup> It would be better if German law required a specific determination regarding the person’s right to vote, even when a plenary guardianship order is entered.

### C. *An Emphasis on Enfranchisement and Access: The Canadian Approach*

The passage of the Dominion Elections Act in 1920 inaugurated the modern centralized and relatively apolitical Canadian electoral system.<sup>68</sup> Canadian electoral law for federal elections has been marked by a progressive and

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65. Fed. Electoral Regulations, Mar. 8, 1994, last amended Aug. 28, 2000, § 2, art. 13 (F.R.G.), available at <http://www.legislationline.org/legislation.php?tid=57&lid=1817>. See also *id.* § 3, arts. 61(6), 62(3).

66. *Id.* See also *id.* § 3, arts. 61(6), 62.

67. See, e.g., *Can. Disability Rights Council v. Can.*, [1988] 3 F.C. 622 (Can.).

68. Jean-Pierre Kingsley, *The Administration of Canada's Independent, Non-Partisan Approach*, 3 ELECTION L.J. 406, 406 (2004).

sustained effort to expand the franchise and to facilitate its exercise. Particular attention has been paid to creating a uniform system for registration and polling that removes impediments to voting by persons with disabilities, including those with mental illness and residents of long-term care facilities. Similar to Australia, the Canadian electoral system is run by an independent and nonpartisan commission, Elections Canada, which is responsible for administering and maintaining federal elections, electoral districts, the voting roll, registering political parties, monitoring and publishing parties' election spending, reporting on the administration and outcome of elections, and educating the electorate about voting.<sup>69</sup> To assure the independence of Elections Canada from the government and the political parties, the Dominion Elections Act provides that the head of Elections Canada, the Chief Electoral Officer, is an "officer of Parliament" who reports directly to Parliament and is forbidden to vote in any federal election, by-election, or referendum.<sup>70</sup>

### 1. *Enrollment*

Like Australia, Canada maintains a national computerized registry of voters. However, unlike the Australian system, where registration is mandatory, the Canadian system increasingly emphasizes the citizen's responsibility for enrollment. Until the 1990s, Canada practiced enumeration, an intensive and proactive system under which two people nominated by opposing political parties went door to door to enroll people onto the national register. It registered nearly ninety-five percent of eligible voters. This system was replaced with the process called "active consent," a term denoting the citizen's responsibility to register. When a Canadian turns eighteen, Elections Canada sends the person a letter asking whether he or she consents to be added to the voter register. Elections Canada also encourages registration after that birthday. For example, the person can indicate on his or her tax return that his name, address, and pertinent information should be forwarded to Elections Canada.

### 2. *Voter Qualifications*

The Canadian approach to electoral rights has been one of progressive centralization of the authority to define who has the right to vote and the subsequent expansion of that right to virtually all Canadian citizens eighteen

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69. ELECTIONS CAN., *THE ELECTORAL SYSTEM OF CANADA* 13-14, 17 (2d ed. 2007), [http://www.elections.ca/gen/canelecsys\\_e.pdf](http://www.elections.ca/gen/canelecsys_e.pdf) (on file with the *McGeorge Law Review*). For more information, see the Elections Canada website, <http://www.elections.ca/home.asp>. Canada's Elections Act resembles Australia's in its degree of specificity, such as strict requirements for the voting surface and the color of the lead of the pencil (black). See Canada Elections Act, S.C., ch. 9, pt. 8, § 121(4) (2000) (Can).

70. Kingsley, *supra* note 68, at 406. Jean-Pierre Kingsley has served as Canada's Chief Electoral Officer since 1990. Like all appointments to this position since it was created in 1920, his appointment was by unanimous consent of the Parliament.

years of age and older who have resided outside of Canada for less than five years. This differs from the United States, where federal laws largely focus on who cannot be denied the right to vote, and the states have latitude in restricting the right based on requirements such as residency, criminal record, or mental capacity. Canada, in contrast, is one of a few nations that does not require mental capacity as a qualification for voting. How the traditional mental exclusion came to be repealed in 1993 provides a telling illustration of the ascendancy of contemporary egalitarian values in Canadian electoral law.

Until 1993, paragraph 14(4)(f) of the Canada Elections Act excluded from voting “every person who is restrained of his liberty of movement or deprived of the management of his property by reason of mental disease.”<sup>71</sup> The Parliament repealed this provision in 1993 in response to a 1988 ruling by the Federal Court of Canada<sup>72</sup> that declared paragraph 14(4)(f) to be invalid on the grounds that it conflicted with section 3 of the Canadian Charter of Rights and Freedoms, which guarantees every citizen of Canada the right to vote.<sup>73</sup> In explaining the Federal Court’s ruling in *Canadian Disability Rights Council v. Canada*, Madame Justice Reed noted that, as written, the Charter was both over- and underinclusive, and it did “not address itself only to mental competence or capacity insofar as that quality is required for the purposes of voting.”<sup>74</sup>

No action was taken in Parliament after the Federal Court’s ruling pending the report of the Royal Commission on Electoral Reform and Party Financing.

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71. Canada Elections Act, R.S.C., ch. 14 (1st Supp.) (1970) (repealed 1993).

72. *Can. Disability Rights Council v. Can.*, [1988] 3 F.C. 622 (Can.). The Federal Court’s decision was handed down in the midst of the 1988 federal election campaign. Consequently, paragraph 14(4)(f) was not in effect for that election, and those individuals who had previously been disqualified were eligible to vote in that election.

73. *Id.* at 624. The House of Commons Special Committee on the Disabled and the Handicapped had recommended amending the Act as early as 1981, while the Chief Electoral Officer of Canada had, on a number of occasions, encouraged Parliament to seriously examine paragraph 14(4)(f) in light of the probability of a Charter challenge. In fact, Parliament had attempted to address this issue in 1987. Bill C-79 would have repealed paragraph 14(4)(f). However, Bill C-79 died when Parliament was dissolved for the Nov. 21, 1988, federal general election.

74. *Id.* at 625-26; see also Diane R. Davidson & Miriam Lapp, *The Evolution of Voting Rights for Canadians with Disabilities*, 6 ELECTORAL INSIGHT 15, 16, Apr. 2004, [http://www.elections.ca/ec/eim/pdf/insight\\_2004\\_04\\_e.pdf](http://www.elections.ca/ec/eim/pdf/insight_2004_04_e.pdf) (on file with the *McGeorge Law Review*).

In explaining her ruling, Madame Justice Reed noted that while section 1 of the Charter “allows for limitations that are demonstrably justifiable in a free and democratic society” and that “a requirement of mental competence or judgmental capacity” may well constitute such a limitation, paragraph 14(4)(f) “as presently drafted does not address itself only to mental competence or capacity insofar as that quality is required for the purposes of voting.” She went on to describe the limitation as “arbitrary,” noting that “[i]t catches people within its ambit who should not be there and, arguably, it does not catch people who perhaps should be.” Madame Justice Reed also made reference to two parliamentary committee reports, as well as to changes that had been made to the law in Ontario and Manitoba.

In its final report in 1991, the Royal Commission discussed the exclusion of people with mental disabilities and recommended that

the following persons not be qualified to vote in federal elections: 1) a person subject to a regime established to protect the person or the person's property, pursuant to the law of a province or territory, because the person is totally incapable of understanding the nature and consequences of his or her acts; and 2) a person confined to a psychiatric or other institution as a result of being acquitted of an offence under the *Criminal Code* by reason of insanity.<sup>75</sup>

The rationale for this recommendation was explained by the Commission as follows:

The current disqualification clearly belongs to history, a history in which our understanding of mental illness and its effects was seriously deficient and the social stigma attached to mental illness was based on this ignorance. Mental illness no longer implies a necessary deficiency in the capacity to know one's political interests or to make choices on the basis of them; nor does it necessarily mean an impaired ability to act as a rational and informed voter . . . . By itself, being deprived of the management of property does not mean that a person's exercise of the franchise would . . . undermine the public interest in democratic government. Canada's elections law contains no provisions requiring otherwise eligible voters to demonstrate any minimal standard of mental ability, knowledge or literacy.<sup>76</sup>

Yet some citizens are clearly incapable, because of mental incapacity, of exercising the franchise in a way that meets the standard of a rational and informed vote. The integrity of the vote and the dignity of citizens who cannot function as voters for reasons of mental incapacity demand that there be some restrictions on the franchise.

[Persons] who have been deemed by the court to lack the capacity to understand the nature and consequences of their actions within the norms of society should not be entitled to vote. If their incapacity has been judged to be so, then they must be deemed to lack the ability to make a rational and informed vote.<sup>77</sup>

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75. 1 ROYAL COMM'N ON ELECTORAL REFORM AND PARTY FIN., REFORMING ELECTORAL DEMOCRACY: FINAL REPORT 41 (1991) [hereinafter ROYAL COMM'N ON ELECTORAL REFORM].

76. *Id.* at 39.

77. *Id.* at 40-41.

After the Royal Commission's report, several bills were introduced to revive the mental disability exclusion. In the end, however, Parliament apparently could not agree on a criterion for disqualification to replace paragraph 14(4)(f) and simply repealed that provision. In so doing, Parliament went beyond the requirements of both the 1988 Federal Court ruling and the recommendation of the Royal Commission—neither of which had demanded the complete repeal of the exclusion.

### 3. *Facilitating Voting by People with Disabilities*

Canada's federal electoral process has become progressively more accessible, in large measure because of advocacy by or on behalf of persons with disabilities. Successive Chief Electoral Officers have adopted a number of administrative measures to increase the accessibility of the voting process, particularly access to polling stations and information for voters with disabilities. The Elections Act of 1960 extended a right to vote in advance to any voter who expected to be absent from his or her polling division on election day. In 1970, a revised Canada Elections Act extended the right to vote in advance to persons with disabilities and required "level access" for all advance polling stations.

In 1977, Parliament amended the Act to require a minimum number of advance voting polling stations with "level access" for people with disabilities. In 1981, the House of Commons Special Committee on the Disabled and the Handicapped released a report recommending that Canada establish a postal voting system and otherwise remove obstacles to voting.<sup>78</sup> The Chief Electoral Officer supported those recommendations and began to implement them administratively.<sup>79</sup>

In 1992, Parliament amended the Act to further improve access to the electoral system for persons with disabilities. The requirements included level access at *all* polling stations. Mobile polling stations were also introduced. In 1993, the electoral legislation was amended again to enable mail voting by any voter who is unable to go to a regular or advance poll, thereby effectively displacing proxy voting for people with disabilities who are unable to travel to a polling station.<sup>80</sup>

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78. See THE SPECIAL COMMITTEE ON THE DISABLED AND THE HANDICAPPED, CANADA HOUSE OF COMMONS, OBSTACLES, Parl. 32, 1st. Sess., at 22 (1981), [www.endexclusion.ca/documents/obstacles.pdf](http://www.endexclusion.ca/documents/obstacles.pdf) (on file with the *McGeorge Law Review*).

79. Davidson & Lapp, *supra* note 74, at 15, 17.

80. In its final report, the Royal Commission on Electoral Reform and Party Financing recommended that voting officials be allowed to enable voters to cast ballots in their rooms at polling stations in hospitals, residences for the elderly, or mobile voting stations visiting such hospitals or residences. ROYAL COMM'N ON ELECTORAL REFORM, *supra* note 75, at 69-71.

#### 4. *Assistance to Voters with Disabilities*

Elections Canada is notably proactive in its efforts to facilitate not only voting but voter education for persons with disabilities or other impairments in learning and communication. It provides a range of “information, education, and accessibility services to persons who have a disability, seniors, persons with limited reading and writing skills, and persons living in transitional situations (homeless or living in a shelter for victims of abuse).”<sup>81</sup> Ballots are available in alternative formats: large print, Braille, audiocassette and diskette (for talking computers), different languages, and there is level access into a polling center.<sup>82</sup> The Canadian system’s proactive ethos extends to monitoring the effectiveness of these efforts. A 2001 amendment to the Ontario Election Act requires elections officials to submit a report within three months of election day summarizing the measures taken to provide access for disabled voters.<sup>83</sup>

#### 5. *Mobile Polling*

Like Australia’s election law, the Canada Elections Act establishes mobile polling stations for elderly or disabled persons residing in long-term care facilities, health institutions and homes for the aged, and sparsely populated and isolated areas in some provinces. These polling stations are set up in polling

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81. Elections Canada, Programs and Services for Persons with Special Needs, <http://www.elections.ca/content.asp?section=gen&document=ec92610&dir=bkg&lang=e&textonly=false> (last visited Mar. 1, 2007) (on file with the *McGeorge Law Review*).

82. *Id.* The Elections Canada website lists the following services for persons with a disability: [1] information, e-mail access, and special ballot registration forms available on the Internet at [www.elections.ca](http://www.elections.ca); [2] documents specifically for persons with disabilities including reading difficulties; open- and closed-captioned videotapes for persons who are deaf or hard of hearing; [3] a voting template for persons with a visual disability; [4] a toll-free information line for persons who are deaf or hard of hearing; [5] a special ballot, which allows early voting by mail, or in person at the office of the returning officer, or at home in the case of electors who cannot read or cannot go to the office of the returning officer because of a physical disability; [6] help with registration at the advance polls and election day polling stations; [7] flexible options for voting at advance polls and election offices with guaranteed level access; [8] where possible, level-access polling sites (accessibility is indicated on the voter information card); [9] transfer certificates permitting electors who use wheelchairs or who have other physical disabilities to vote at facilities providing level access if, in exceptional cases, their own polling sites do not provide this; [10] assistance available at the request of the elector to mark the ballot at the polling station (ordinary or advance), or at the office of the returning officer; [11] transportation of the ballot box from room to room to facilitate voting in hospitals and certain residential institutions; [12] language or sign language interpreter services on request.

*Id.*

83. As an example of Elections Canada’s commitment to access for persons with disability, in the general election of November 27, 2000, only eighty-nine polling stations (0.5 percent) did not have level access. See Elections Canada, Thirty-Seventh General Election 2000: Official Voting Results: Synopsis, <http://www.elections.ca/content.asp?section=gen&dir=rep/37g&document=synopsis05&lang=e&textonly=false> (last visited Mar. 1, 2007) (on file with the *McGeorge Law Review*).

divisions containing two or more health care institutions and are open for voting prior to an election at the discretion of the election officials.<sup>84</sup>

#### 6. Noteworthy Features of the Canadian Approach

The Canadian electoral system differs from the other systems we have examined in two significant respects. Unlike Australia, it does not require voting, and, unlike either Australia or Germany, it does not remove people from the voting roll on the basis of the lack of capacity to vote. The absence of any exclusion for mental incapacity would presumably reduce the risk of unfair discrimination against elderly people with cognitive impairment, although it might also be accompanied with a greater risk of manipulation and fraud. Despite a very different framework from Australia's, Canada's initiatives over the past two decades appear to have substantially enhanced access to the polls for elderly voters with disabilities. These features include mobile polling and substantial innovation in ballot design and formatting to maximize a voter's opportunity to vote without the assistance of someone else.

Canada's system has several features that reduce the risk of fraud. Mobile polling run by elections officials limits the chance that nursing home staff will co-opt or otherwise manipulate residents' ballots. Limiting a non-family member to assisting only one disabled voter and requiring an oath to document this also reduces the likelihood that a person aiming to affect the outcome of an election will be able to influence the votes of a large number of residents. It should be emphasized, however, that our research is limited to published materials and has not identified any information bearing on actual practices in nursing homes and other long-term care facilities.

A common feature of electoral design in Canada, Germany, and Australia is that voting is run by a non-partisan and independent commission. Elections Canada is notable for its proactive mandate to research problems and to educate voters.<sup>85</sup> This, in turn, provides an institution that can identify and address unforeseen problems and, given the non-partisan structure, do so in a manner that likely has the trust of the public in the process and outcomes.

In recent years, Elections Canada has called attention to the declining level of voter participation among Canadians, especially among younger Canadians. In contrast, the agency has highlighted the increasing rate of participation by people with disabilities in Canadian elections as well as a growing level of political engagement.<sup>86</sup>

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84. In the general election of 2000, Canada had 883 mobile polling stations to serve 141,260 registered electors. *Id.* at tbl.G.

85. Kingsley, *supra* note 68, at 406-11.

86. See Michael Prince, *Persons with Disabilities and Canada's Electoral Systems: Gradually Advancing the Democratic Right to Vote*, ELECTORAL INSIGHT, Apr. 2004, at 2, [http://www.elections.ca/ecal/eim/pdf/insight\\_2004\\_04\\_e.pdf](http://www.elections.ca/ecal/eim/pdf/insight_2004_04_e.pdf) (on file with the *McGeorge Law Review*).

#### IV. CONCLUSION

This article has examined and compared the electoral systems of Australia, Germany, and Canada. Our focus on voting by elderly persons, particularly those with cognitive impairments who are residents of nursing homes, highlights how well the various approaches succeed in increasing enfranchisement and voting while preserving the integrity of the vote. Here we summarize our findings and suggest how they might inform practices in the United States.

##### A. *Possible Effects of Electoral Design on Voting Participation*

No single study exists that compares enrollment and participation rates by the elderly in these three countries. An ideal comparative study would use the same methods to measure the proportion of elderly who are registered to vote and the turnout in an election, not only in the population at large but also in comparable long-term care facilities. Unfortunately, data regarding voting rates among the oldest age groups tend to be sketchy, and virtually nothing is available regarding voting by residents of long-term care facilities. However, the available data regarding voting participation rates in Australia, Germany, and Canada, as well as the United States, are presented in Figures 1 through 4.

Although the available data categorize “the elderly” using variable age cut-offs, these data show that voting participation in all countries typically increases with age until about age seventy-five and begins to decline thereafter. In general, political engagement of older voters appears to be a cross-national phenomenon. Even though participation rates are high among elderly voters in all of these countries, the voting rates appear to be highest in Australia, presumably a function of an enforced system of compulsory voting together with other proactive efforts to increase the convenience of voting.<sup>87</sup> The participation rate in Germany (77.6 percent among people seventy and older in the 2004 federal election)<sup>88</sup> is considerably higher than the participation rates in the United States (seventy-one percent of people sixty-five and older in the 2004 national election)<sup>89</sup> and in Canada (seventy-one percent among people sixty-eight and

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87. See Figure 1, showing a remarkable eighty-five percent participation rate among eligible people aged seventy-five to eighty-four in the 2005 federal election. *See also* E-mail from Jim Doyle, Executive Sec’y, Electoral Council of Austl., to Jason Karlawish, Assoc. Professor of Med., Univ. of Pa. and Inst. On Aging (Feb. 28, 2007, 5:00 AM) (on file with the *McGeorge Law Review*). The “eligible” group excludes non-citizens only. Under Australian law, people of “unsound mind” are not eligible to vote, and should therefore be removed from the denominator; however, in order to make the rate estimates comparable to other countries, we have not excluded them.

88. Doreen Namislo et al., *Wahlverhalten bei der Bundestagswahl 2005 nach Geschlecht und Alter* 225 (2006) (on file with the *McGeorge Law Review*).

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

older in the 2004 federal election).<sup>90</sup> The higher rate in Germany, a country without compulsory voting, compared to the United States and Canada appears to be a function of culture rather than electoral design: as can be seen clearly in Figures 2 through 4, the turn-out among *all* age groups (especially the younger ones) is much higher in Germany than in the United States and Canada.

Although indicators of fraud or manipulation, such as double voting and spoiled votes, might be created and measured, we are not aware of any available data that would permit estimates of the magnitude of electoral fraud in any of these countries.

### *B. Lessons Suggested by Case Studies*

Several features of the electoral systems of these countries should be carefully studied by reformers in the United States, not only as a basis for enfranchising elderly voters with physical or cognitive disabilities but also as a basis for more far-reaching improvements.

*Centralized Registration.* The existence of one national roll maintained by a single authority substantially facilitates registration. For example, in Australia, a person can register by mail and does not need to show proof of identity in order to do so. In Germany, registration is automatic because it is linked to issuance of identity cards to all citizens. Although Canada eliminated enumeration, it maintains a national roll and actively identifies unregistered voters from federal databases and solicits their interest in registration. A national roll also permits voters to vote at different precincts as there is one central roll against which officials can check if a voter is registered. These features are particularly valuable for elderly voters who may move and need to reregister or may find it difficult to have to vote at an assigned precinct, rather than the precinct with easiest access. The national roll also minimizes the chance of fraud, such as a person enrolled in multiple locations or persons staying on the roll after they have died or otherwise become ineligible.

The policies and practices used elsewhere may not be transplantable to the United States, as continuing debates about driver's licenses and other forms of "national identity cards" indicate. However, serious consideration should be given over the short term to statewide databases of registered voters.

*Mobile Polling.* Mobile polling is especially appealing as a device for maximizing the enfranchisement of elderly voters. Mobile polling is not simply setting up a polling station in a nursing home. While making the facility a polling site does bring the ballot to the residents, that station will bring in other voters as well. Thus, the elderly residents have to compete with outside voters for a place

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90. ELECTIONS CAN., ESTIMATION OF VOTER TURNOUT BY AGE GROUP AT THE 38TH FEDERAL GENERAL ELECTION (JUNE 28, 2004): FINAL REPORT 5 fig.1 (2005), [http://www.elections.ca/loi/report\\_e.pdf](http://www.elections.ca/loi/report_e.pdf) (on file with the *McGeorge Law Review*).

in line.<sup>91</sup> In addition, simply setting up a polling station in a room at a nursing home does not bring the ballot to persons who cannot get out of their room to get to the polling station. Fully realized mobile polling is specific for the residents and includes resources to go to rooms of residents who cannot get to the polling station in order to provide them the ballot for the district where they are registered.

The absence of an organized system of mobile polling in long-term care settings allows for fraud, abuse, and denying voters the right to vote.<sup>92</sup> One study of elections in the City of Philadelphia, a city where there are no guidelines or resources for voting in long-term care settings, found that voting was largely left to the charge of nursing home staff who struggled with the deadlines for voter registration and ordering absentee balloting, arranging transportation to the polls, and deciding whether a resident was capable of voting.<sup>93</sup>

Of course, mobile polling is labor intensive and requires adequate staffing. Decisions must be made about how aggressively to implement it, not only in selecting the sites for mobile polling but also determining how individual outreach and assistance is undertaken, whether it is available for all elections (national, statewide, and local), and how to provide all relevant ballots.

*Mental Incapacity.* Mobile polling conducted and overseen by election officials seems to be the most sensible policy for preventing “wholesale” fraud or manipulation of residents of long-term care facilities. If this is accomplished, there is little reason to worry that occasional “incompetent” voting by individual residents will threaten electoral integrity. Such a safeguard also reduces the importance of designing a legal mechanism for disqualifying persons with substantial cognitive impairment from voting. This observation casts light on the Canadian experience.

Before the 1988 decision by the Federal Court of Canada in *Canadian Disability Rights Council v. Canada*,<sup>94</sup> Canadian law disqualified people who had been placed under a plenary guardianship order from voting. Such a law is easy to administer if election officials are notified of the entry of the order and can remove disqualified persons from the roll, as is done in Germany. However, such a categorical disqualification is unduly broad and amounts to unwarranted discrimination against people with disabilities. The question faced by the federal Parliament in Canada was whether to replace the unconstitutional categorical exclusion with a rule that would require individualized determinations of

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91. Australian officials consider lines at the polls a failure of the electoral system. Oddly, American officials often cite lines at the polls as a testament to the strength of voter enthusiasm. See Kenneth Blackwell, *Howard Dean Got It Wrong*, HUMAN EVENTS, July 1, 2005, <http://www.humanevents.com/article.php?id=7952> (on file with the *McGeorge Law Review*).

92. See sources cited *supra* note 2.

93. See Karlawish et al., *supra* note 8.

94. *Can. Disability Rights Council v. Can.*, [1988] 3 F.C. 622 (Can.).

capacity to vote, presumably by courts. The Parliament chose not to do that and dispensed with any disqualification based on mental incapacity.

Insofar as we have been able to ascertain, dispensing with the capacity exclusion has not created major difficulties. However, additional investigation is warranted, especially in nursing homes, where staff are inevitably faced with decisions about how aggressively to assist residents to register and vote. Based on anecdotal evidence, it appears that eliminating the mental capacity exclusion does not eliminate the need to respond to the legal and ethical issues raised by prospective voters with substantial cognitive impairment. Family members and other caregivers must decide when the person's capacity to understand voting or to make a choice is so impaired that one is no longer "assisting" the person express his or her "intent." As indicated in the article by Hurme and Appelbaum,<sup>95</sup> six states in this country appear to have no exclusion based on mental capacity. Practice in these states should also be studied.

The Australian approach to mental incapacity is, as far as we can tell, unique (although we have not studied other countries with compulsory voting). From a voting rights standpoint, the exclusive reliance on an administrative medical certification process initiated by families and long-term care staff would appear to be subject to mistake and abuse, leading to unwarranted disenfranchisement of elderly voters. However, in our opinion, the Australian system functions in practice as a mechanism for "excuse" rather than exclusion. Since the Australian approach to capacity assessment is linked so intimately with the system of compulsory voting, it is highly doubtful that this system could be transplanted to the United States.

*Non-Partisan Oversight.* At present, the U.S. system for administering elections is "decentralized beyond the limits of the sensible" and permits substantial overlap between the officials responsible for elections and the people running in elections.<sup>96</sup> Until there is greater centralization and a clear separation of the roles of "referee" and "player," and until the referee is trusted as non-partisan, it is unlikely that substantial progress can be made in implementing the kinds of reforms seen in Australia, Canada, and Germany.<sup>97</sup>

Australia, Canada, and Germany provide models of nations that have placed these duties in the hands of non-partisan election officials at the national level. Non-partisan oversight helps to promote enfranchisement and voting for the elderly while maintaining the integrity of the vote, especially for mobile polling.<sup>98</sup>

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95. 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).

96. Robert A. Pastor, *Improving the U.S. Electoral System: Lessons from Canada and Mexico*, 3 ELECTION L.J. 584, 586 (2004).

97. It warrants emphasis that the electoral laws and practices reviewed in this article have pertained to national elections in each of the countries studied. However, each of these nations has a federal system of government, and the states, provinces, or regions exercise control over local elections. This article does not address the laws and practices governing local elections.

98. For example, in *Australia Electoral Law: A Stockade*, Graeme Orr and his colleagues review

Procedures such as mobile polling require centralized administration and non-partisan and professional officials who can commit resources of time and money and assure that voting is free and fair. Each of the innovations designed to increase registration and voting carries with it threats to the integrity of the vote. In the Introduction, we noted how postal voting, while potentially quite valuable for increasing voting by persons who cannot travel to a poll, also creates opportunities for fraud. Perhaps the most effective safeguard is the existence of a fair, apolitical, and centralized system for identifying potential fraud, studying it, and addressing it.

In addition, no rule book can be sufficiently detailed to cover all circumstances. Our close study of the Australian system shows that detailed and meticulous guidelines cannot avoid the need to exercise discretion in how these guidelines are applied. An election official has to be a judge who does not simply enforce the rules but interprets them. The rule book cannot anticipate every situation. Jean-Pierre Kingsley, the Canadian Chief Electoral Officer, is quoted as saying that “[a]s chief electoral officer, it is my duty to be ready for every electoral scenario that might influence the administration of elections.”<sup>99</sup> This is especially true in the various issues raised by elderly voters, including the impact of their living arrangements and their physical and cognitive abilities on their ability to vote.

Another advantage of non-partisan election officials is post-election review and scrutiny of the electoral processes, such as required in Australia and Canada. This fosters accountability, problem identification, and problem solving. Of particular relevance to voting by the elderly are requirements for a report summarizing the measures taken to provide access for disabled voters, as is the case in Ontario. These kinds of procedures foster confidence and trust in the system and are especially valuable in the event of accusations of fraud.

In summary, the electoral systems of Canada, Germany, and Australia suggest several possible improvements in the U.S. electoral system. This in turn can increase voter turnout among the elderly and the cognitively impaired while still retaining the integrity of elections.

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Australian electoral law and argue that “[u]ltimately, the most important institutional measure in Australia for achieving free, efficient and reliable elections is ensuring electoral authority independence.” Orr et al., *supra* note 38, at 399, 383-402.

99. Pastor, *supra* note 96, at 587.

**Table 1. International Institute for Democracy and Electoral Assistance (IDEA), Compulsory Voting.<sup>100</sup>**

Country	Type of Sanction	Level of Enforcement	Year Introduced	Comments
Argentina	1, 2, 4	Weak enforcement	1912	-
Australia	1, 2	Strict enforcement	1924	-
Austria (Tyrol)	1, 2	Weak enforcement	N/A	The region of Tyrol.
Austria (Vorarlberg)	2, 3	Weak enforcement	N/A	The region of Vorarlberg.
Belgium	1, 2, 4, 5	Strict enforcement	1919 (men)	Women in 1949.
Bolivia	None/4	N/A	1952	-
Brazil	2	Weak enforcement	N/A	Voluntary for illiterates and those over 70.
Chile	1, 2, 3	Weak enforcement	1925(?)	-
Costa Rica	None	Not enforced	N/A	-
Cyprus	1, 2	Strict enforcement	1960	-
Dominican Republic	None	Not enforced	N/A	-
Ecuador	2	Weak enforcement	1936	Voluntary for illiterates and those over 65.
Egypt	1, 2, 3	N/A	1956	This is the year from which we have found the earliest law.
Fiji	1, 2, 3	Strict enforcement	N/A	Presumably strict prior to the coup d'état.
France (Senate only)	2	N/A	1950's or 60's	-
Gabon	N/A	N/A	N/A	-

100. The table and the following explanation were taken directly from the IDEA website. See IDEA, *supra* note 11.

2007 / *Lessons from Other Democratic Nations*

Country	Type of Sanction	Level of Enforcement	Year Introduced	Comments
Greece	1, 5	Weak enforcement	N/A	-
Guatemala	None	Not enforced	N/A	-
Honduras	None	Not enforced	N/A	-
Italy	5	Weak/Not enforced	N/A	-
Liechtenstein	1, 2	Weak enforcement	N/A	-
Luxembourg	1, 2	Strict enforcement	N/A	Voluntary for those over 70.
Mexico	None / 5	Weak enforcement	N/A	-
Nauru	1, 2	Strict enforcement	1965	-
Netherlands	-	Not enforced	Practiced 1917 to 1967	-
Paraguay	2	N/A	N/A	-
Peru	2, 4	Weak	1933	-
Philippines	None	Not enforced	Attempt to practice 1972-1986 under martial law.	-
Singapore	4	Strict enforcement	N/A	The non-voter is removed from the voter register until he/she reapplies and provides a reason.
Switzerland (Schaffhausen)	2	Strict enforcement	1904	Practiced in only one canton. Abolished in others in 1974.
Thailand	None	Not enforced	N/A	-
Turkey	1, 2	Weak	N/A	-
Uruguay	2, 4	Strict enforcement	1934	Law not in practice until 1970.

The numbers listed in the column for Type of Sanction stands for different types of sanctions. These are as follows:

1. Explanation. The non-voter has to provide a legitimate reason for his/her abstention to avoid further sanctions, if any exist.
2. Fine. The non-voter faces a fine sanction. The amount varies between the countries, for example 3 Swiss Francs in Switzerland, between 300 and 3000 ATS in Austria, 200 Cyprus Pounds in Cyprus, 10-20 Argentinean Pesos in Argentina, 20 Soles in Peru, etc.
3. Possible Imprisonment. The non-voter may face imprisonment as a sanction, however, we do not know of any documented cases. This can also happen in countries such as Australia, where a fine sanction is common. In cases where the non-voter does not pay the fines after being reminded or after refusing several times, the courts may impose a prison sentence. This is usually classified as imprisonment for failure to pay the fine, not imprisonment for failure to vote.
4. Infringements of Civil Rights or Disenfranchisement. It is, for example, possible that the non-voter, after not voting in at least four elections within fifteen years will be disenfranchised in Belgium. In Peru, the voter has to carry a stamped voting card for a number of months after the election as a proof of having voted. This stamp is required in order to obtain some services and goods from some public offices. In Singapore, the voter is removed from the voter register until he/she reapplies to be included and submits a legitimate reason for not having voted. In Bolivia, the voter is given a card when he/she has voted so that he/she can proof the participation. The voter would not be able to receive his/her salary from the bank if he/she can not show the proof of voting during three months after the election.
5. Other. For example, in Belgium, it might be difficult getting a job within the public sector if you are a non-voter, or difficulties obtaining a new passport or driver's license in Greece. There are no formal sanctions in Mexico or Italy, but possible arbitrary or social sanctions. This is called the "innocuous sanction" in Italy, where it might, for example, be difficult to get a daycare place for your child or similar but this is not formalized in any way.

**Table 2. Typology of Voting in Democratic Nations.**

	<b>Compulsory Voting</b>	<b>Non-compulsory voting</b>
<b>Explicit exclusion based on mental incapacity</b>	Australia Austria Belgium Luxembourg <sup>101</sup> [and about 25 other countries, see Table 1]	Czech Republic Netherlands <sup>102</sup> Spain <sup>103</sup> United Kingdom United States Germany [and most other countries]
<b>No exclusion based on mental incapacity</b>	No country	Canada Ireland Italy Sweden

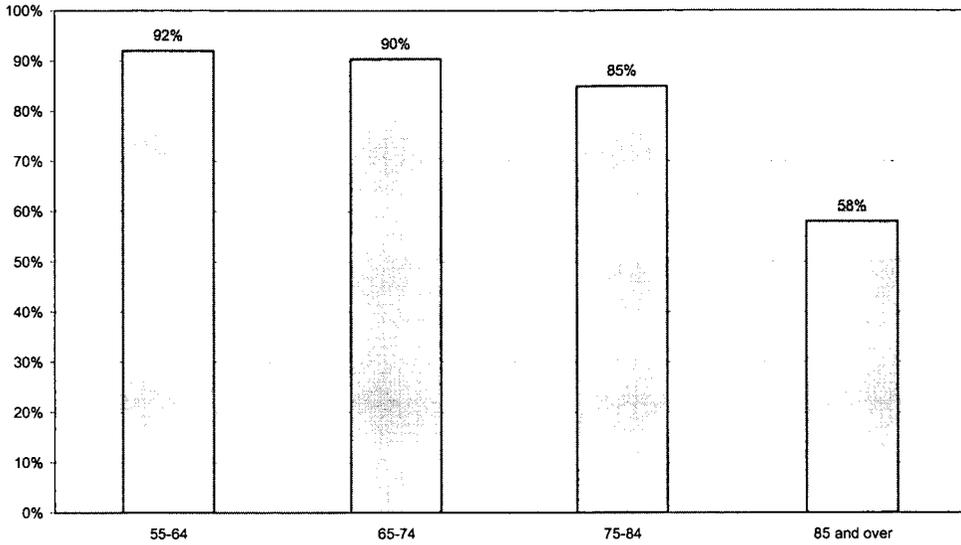
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101. Strong sanctions for failing to vote.

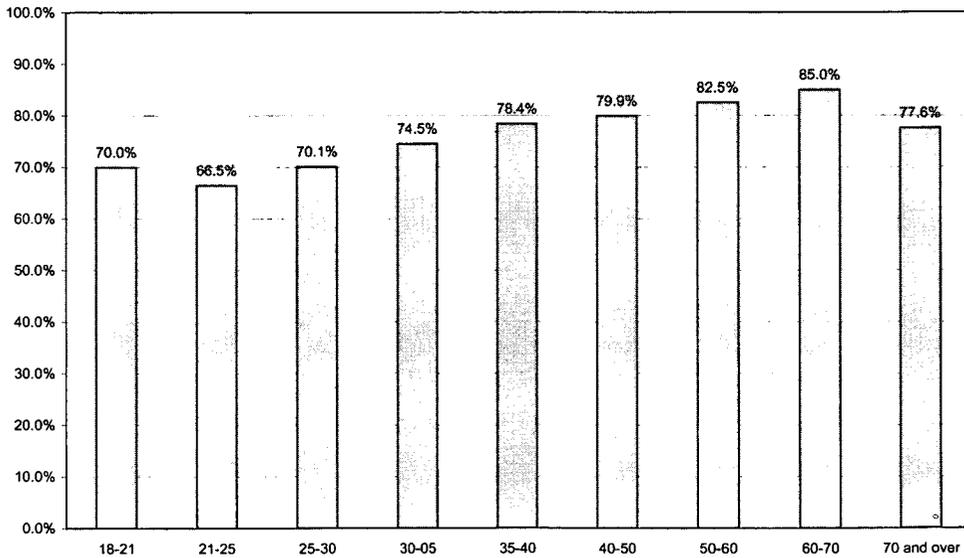
102. Formerly had compulsory voting.

103. Formerly had explicit exclusion based on mental incapacity.

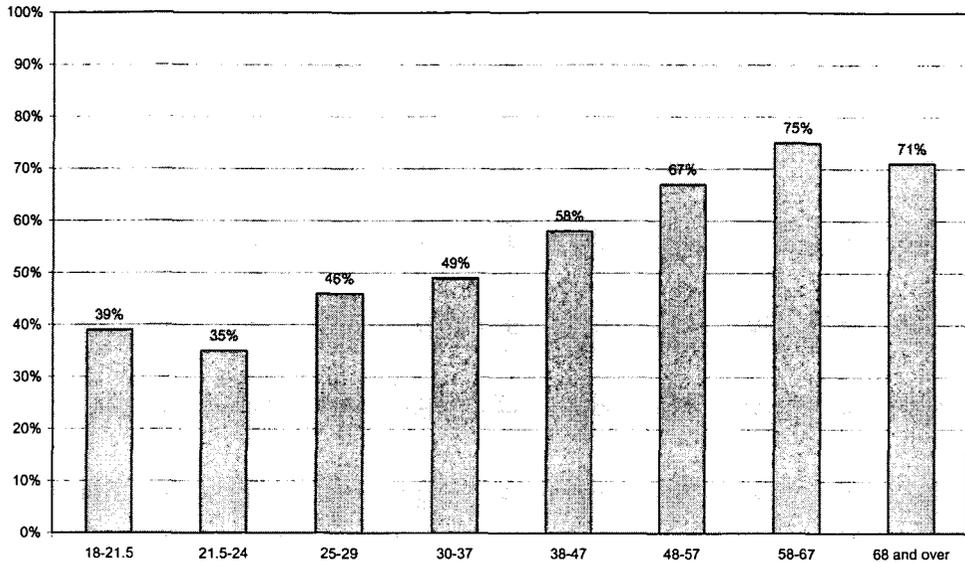
**Figure 1: Estimated Turnout by Age Group—Australia (2004) (%)**  
(Based on citizens in the voting age population)



**Figure 2: Estimated Turnout by Age Group—Germany (2004) (%)**  
(Based on citizens voting in the age population)



**Figure 3: Estimated Turnout by Age Group—Canada (2004) (%)**  
(Based on citizens in the voting age population)



**Figure 4: Estimated Turnout by Age Group—United States (2004) (%)**  
(Based on total number of citizens)

