

# Cognitive Impairment and the Right to Vote: Rethinking the Meaning of Accessible Elections

NINA A. KOHN\*

*Persons with cognitive disabilities can face formidable barriers to voting as a result of their disabilities. While some of these barriers are the unavoidable result of those disabilities, others are constructed by third parties. Given the deleterious effects that these constructed impediments may have on the civil rights of the cognitively disabled and on the democratic system of governance, democracies should take affirmative steps to increase the cognitive accessibility of voting systems. Just as democracies have found ways to make voting more accessible to persons with physical disabilities, democracies can and should design voting systems that make voting more accessible to those with cognitive impairments. This article identifies several approaches to doing so and recommends further research to guide such reforms.*

## I. INTRODUCTION

The right to vote is among the most fundamental of those held by citizens in democratic societies. In the early 1980s, both Canada and the United States began to pay serious attention to concerns that voting was not sufficiently accessible to citizens with disabilities. In a matter of a decade, both countries passed significant legislation requiring voting places be physically accessible.<sup>1</sup> These legislative advances have been

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\* Associate Professor of Law, Syracuse University College of Law; J.D., Harvard Law School; A.B., Princeton University. The author thanks Carin House and the Barclay Law Library staff for their research assistance.

<sup>1</sup> In the United States, the most significant of these reforms were the amendments added in 1982 to the United States' federal *Voting Rights Act of 1965*, which mandated that voters in federal elections who require assistance because of blindness or disability

welcomed by advocates for the disabled, who describe voting as a socially validating process, and exclusion from the franchise as “a mark of inferiority, a consignment to a degrading form of second-class citizenship.”<sup>2</sup>

Physical disabilities, however, are not the only form of disability that can prevent citizens from successfully exercising their right to vote. Cognitive disabilities can also lead to formidable barriers to voting. In some cases, these barriers flow directly from the cognitive disability itself. If cognitive capacity is sufficiently impaired, a would-be voter may be unable to form voting preferences. In other cases, formal or informal barriers may effectively disenfranchise cognitively impaired persons who, nevertheless, retain the cognitive capacity to vote. Unfortunately, the literature on voting has traditionally paid little attention to the effect that cognitive disabilities have on citizens' abilities to exercise their voting rights, and efforts to make voting accessible to persons with disabilities have focused almost exclusively on issues of physical accessibility.

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be permitted to obtain voting assistance from a person of their choosing. See 42 U.S.C. §1973aa-6 (2008). In Canada, hearings in the House of Commons in the early 1980s that focused on the inaccessibility of polling stations marked the start of a more than decade long process of significant electoral reform. See Michael J. Prince, *Persons with Disabilities and Canada's Electoral Systems - Gradually Advancing the Democratic Right to Vote*, ELECTORAL INSIGHT (April 2004), online: Elections Canada <[http://www.elections.ca/eca/eim/article\\_search/article.asp?id=15&lang=e&frmPageSize=&textonly=false](http://www.elections.ca/eca/eim/article_search/article.asp?id=15&lang=e&frmPageSize=&textonly=false)>.

<sup>2</sup> See James A. Gardner, *Liberty, Community and the Constitutional Structure of Political Influence: A Reconsideration of the Right to Vote*, 145 U. PA. L. REV. 893, 907 (1997) (arguing that plaintiffs challenging voting restrictions in the United States Supreme Court on equal protection grounds are most successful when they “base their claims on communitarian theories [of democracy]—those who complain, that is, of being stigmatized by some demeaning form of exclusion from the community's political life.”). See also Michael Waterstone, *Constitutional and Statutory Voting Rights for People with Disabilities*, 14 STAN. L. & POL'Y REV. 353, 365-66 (2003) (arguing that treating disabled citizens differently from non-disabled citizens for the purpose of voting procedures and access is problematic in part because such distinctions perpetuate negative stereotypes of disabled persons).

This article aims to expand the meaning of “accessible” elections to include cognitive accessibility by describing the barriers to voting encountered by persons with cognitive disabilities and by explaining why these barriers pose a concern for democracies. It then suggests potential techniques for increasing the cognitive accessibility of electoral systems and identifies key avenues for further research examining the intersection of cognitive disability and the right to vote. In doing so, it aims both to bring attention to the issue of cognitively accessible voting and to begin to create an agenda for future research and policymaking.

The inaugural issue of the *Canadian Journal of Elder Law* is a fitting forum for the United States-based author to raise this discussion as Canada and the United States currently take dramatically different approaches to the issue. While Canada’s legislation expanding the voting rights of the disabled increased access for both those with physical disabilities and those with cognitive disabilities, the comparable legislation in the United States has focused exclusively on those with physical disabilities. Most notably, in 1992 Canada eliminated its mental capacity requirement for voting in federal elections. By contrast, the vast majority of states in the United States have such requirements that govern both federal and state elections, and in the past few years, scholars in the United States have begun to agitate for new efforts to restrict voting by persons with dementia.<sup>3</sup>

This is also a key time to be considering the impact of impaired cognitive capacity on the right to vote. World-wide, populations are

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<sup>3</sup> See, e.g., Jason H. Karlawish et al., *Addressing the Ethical, Legal, and Social Issues Raised by Voting by Persons With Dementia*, 292 J. AM. MED. ASS’N 1345 (2004) [hereinafter “Karlawish et al., Addressing”] (discussing concerns about voting by persons with dementia and suggesting that nursing home residents who wish to vote be screened for cognitive capacity). For a critique of such approaches, see Nina A. Kohn, *Preserving Voting Rights in Long-Term Care Institutions: Facilitating Resident Voting While Maintaining Election Integrity*, 38 MCGEORGE L. REV. 1065 (2007).

aging.<sup>4</sup> The Canadian population is a prime example. In 2001, one in eight Canadians was over the age of 65; projections indicate that by 2026, one in five will be.<sup>5</sup> Similarly, in the United States, the number of persons age 65 and older is projected to more than double from 2000 to 2030, resulting in an additional 36.5 million elderly residents.<sup>6</sup> As populations age, the prevalence of dementia and other forms of cognitive impairment can be expected to increase. This, in turn, can be expected to result in a significantly larger portion of the electorate having diminished cognitive capacity. This is not only because a greater percentage of the population can be expected to have cognitive impairment, but also because the elderly tend to vote at disproportionately high rates.<sup>7</sup> A study of turnout for the 2004 Canadian general election found that the overall turnout rate was highest among those aged 58-67, 75 per cent of whom voted.<sup>8</sup> In Saskatchewan and the Yukon, however, the rate was highest among those aged 68 or older. In Saskatchewan, the province with the highest

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<sup>4</sup> See Adele M. Hayutin, *Graying of the Global Population*, 17 PUB. POL'Y & AGING REP. 12 (Fall 2007) (reporting that the percentage of persons age 65 or older is projected to more than double in the first half of the twenty-first century as a result of declining fertility rates and increased longevity).

<sup>5</sup> HEALTH CANADA, CANADA'S AGING POPULATION 2002 (2002); online: Health Canada <[http://www.hc-sc.gc.ca/seniors-aines/pubs/fed\\_paper/pdfs/fedpager\\_e.pdf](http://www.hc-sc.gc.ca/seniors-aines/pubs/fed_paper/pdfs/fedpager_e.pdf)>.

<sup>6</sup> ADMINISTRATION ON AGING, U.S. DEP'T OF HEALTH & HUMAN SERVS., A PROFILE OF OLDER AMERICANS: 2007 3 (2007).

<sup>7</sup> See ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, SOCIETY AT A GLANCE: OECD SOCIAL INDICATORS 103 (2006), online: Resolve a DOI <<http://dx.doi.org/10.1787/58-368180314>> (reporting on voter participation by age in twenty-three countries).

<sup>8</sup> Elections Canada, *Estimation of Voter Turnout by Age Group at the 38th Federal General Election (2005)*, online: Elections Canada <[http://www.elections.ca/loi/report\\_e.pdf](http://www.elections.ca/loi/report_e.pdf)> (The study compared turnout among those ages 18-21.5, 21.5-24, 25-29, 30-47, 58-67, and 68+. It is possible that if the study had broken apart the 68+ group into sub-groups, one or more of those sub-groups would have shown higher turnout than the 58-67 group. The study does not explain its rationale for grouping all persons aged 68+ together or address the consequences of doing so.).

percentage of elderly persons,<sup>9</sup> 86 per cent of those aged 68 and older voted.<sup>10</sup>

## II. BARRIERS TO VOTING BY PERSONS WITH COGNITIVE DISABILITIES

Dementia or other forms of cognitive disabilities do not necessarily keep a person from voting. Several studies indicate that persons with dementia and other forms of cognitive impairment express interest in voting.<sup>11</sup> Moreover, while the phenomenon remains understudied, it appears that a portion of those with dementia do in fact vote, although those with more severe levels of dementia are both less interested in voting and less likely to vote.<sup>12</sup>

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<sup>9</sup> HEALTH CANADA, *supra* note 5 at 5.

<sup>10</sup> *Id.*

<sup>11</sup> See Harald De Cauwer, *Are Cognitively Impaired Older Adults Able to Vote?*, GERIATRICS, Mar. 1, 2005, at 13 (reporting the results of a Belgian study on voting by cognitively impaired older adults and concluding that “the majority of cognitively impaired older adults are willing to participate in political elections”); Brian R. Ott, William C. Heindel & George D. Papandonatos, *A Survey of Voter Participation by Cognitively Impaired Elderly Patients*, 60 NEUROLOGY 1546 (2003) (finding that the majority of survey participants diagnosed with dementia had voted in the last election); Jason Karlawish et al., *Do Persons With Dementia Vote?*, 58 NEUROLOGY 1100 (2002) [hereinafter “Karlawish et al., *Do Persons*”] (finding that 64 per cent of dementia patients surveyed reported voting in the last election). By contrast, research on the voting desires of those with developmental disabilities and mental retardation is more anecdotal. See, e.g., Deborah Markowitz, *Voting and Cognitive Impairments: An Election Administrator’s Perspective*, 38 MCGEORGE L. REV. 871, 875 (2007) (describing a situation in which the parents and guardian of a woman with Down’s Syndrome sought to have her name removed from the Vermont voter checklist); Pam Belluck, *States Face Decisions on Who Is Mentally Fit to Vote*, N.Y. TIMES, June 19, 2007 (discussing the formal disenfranchisement of a young man with bipolar disorder, Asperger’s syndrome, and brain injury); *In the Matter of Dorothy Beers: Connecticut Probate Courts’ Authority to Curtail the Rights of Persons with Disabilities to Vote*, 13 QUINNIPIAC PROB. L.J. 49 (1998) (discussing the Connecticut Probate Court’s refusal to disenfranchise a voter with mental retardation).

<sup>12</sup> See Ott, Heindel, & Papandonatos, *supra* note 11 (in a survey of 100 non-randomly selected outpatients who apparently either had suspected or confirmed cognitive

When voting or attempting to vote, however, persons with cognitive impairments can face significant barriers. Barriers to voting encountered by persons with cognitive impairment fall into two major categories: (1) those that are internal to the would-be voter, and (2) those that are the result of third parties' choices or policies.

### A. Internal Barriers

Persons with moderate or severe cognitive impairments may not only be unable to make informed voting choices, but may not even understand the nature and consequences of the voting process. A person is commonly said to have the capacity to make a decision when he or she has the ability to understand the nature and consequences of that decision. Using this approach, a person can be said to lack cognitive capacity to vote when he or she cannot understand the nature or effect of voting.<sup>13</sup>

Some forms of cognitive impairment can render would-be voters incapable of understanding the nature or effect of voting and

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impairment, finding that, according to their caregivers: (1) a number of the outpatients with mild to moderate dementia, and two with severe dementia, had voted in the 2000 United States' Presidential election, and (2) those deemed to have voted in that election were significantly less likely to suffer from moderate to severe dementia than those deemed not to have voted in that election); De Cauwer, *supra* note 11 (reporting the results of a Belgian study which found a significant negative correlation between voting participation and severity of dementia as assessed by the Global Deterioration Scale); Karlawish et al., *Do Persons*, *supra* note 11 (in a study of patients with dementia, finding that patients who had voted in the last election had less severe dementia than those who did not).

<sup>13</sup> See *Doe v. Rowe*, 156 F. Supp. 2d 35 (D. Me. 2001) (describing the incapacitated who vote as those people who "lack the capacity to understand the nature and effect of voting"). See also Paul S. Appelbaum, Richard J. Bonnie & Jason H. Karlawish, *The Capacity to Vote of Persons with Alzheimer's Disease*, 162 AM. J. PSYCHIATRY 2094, 2097 (2005) (using the *Doe v. Rowe* approach to defining capacity to vote); Karlawish et al., *Addressing*, *supra* note 3 at 1346 (advocating the use of the *Doe v. Rowe* standard for capacity to vote).

thus function as an independent – and at times complete – barrier to voting. Dementia is a prime example. Although the existence of dementia or another form of diminished cognitive capacity does not itself indicate a lack of such understanding,<sup>14</sup> recent research has found a strong, inverse correlation between such “capacity to vote” and severity of dementia.<sup>15</sup>

## B. External Barriers

Lack of capacity to vote is only one of the potential barriers to voting faced by those with cognitive impairments. Policies and practices adopted by the government as well as by non-governmental actors also create significant – and sometimes insurmountable – barriers to voting. There are three primary types of such external barriers that persons with cognitive impairments disproportionately face: (1) formal, legally sanctioned mechanisms that screen for capacity to vote; (2) informal, third-party mechanisms that screen for capacity to vote; and (3) procedural hurdles to voting.

### 1. Formal Screening

Historically, democracies have embraced the notion that citizens should have at least a minimum level of mental capacity in order to vote. Most democratic countries have capacity-related qualifications for voting.<sup>16</sup> Most commonly, such countries disqualify

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<sup>14</sup> Rather, the determination of whether a person suffers from dementia is distinct from that of whether a person lacks voting capacity. Cf. Karlawish et al., *Addressing, ibid.*; Ott, Heindel, & Papandonatos, *supra* note 11 at 1548 (“[A] diagnosis of A[lzheimer’s] D[isease] does not necessarily imply incompetence to vote . . .”).

<sup>15</sup> See Appelbaum, Bonnie & Karlawish, *supra* note 13 (finding that it appears that “most (but not all) persons with very mild to mild dementia of the Alzheimer’s type retain adequate ability to vote and that most persons with severe dementia do not.”).

<sup>16</sup> See LOUIS MASSICOTTE, ANDRÉ BLAIS, ANTOINE YOSHINAKA, *ESTABLISHING THE RULES OF THE GAME: ELECTION LAWS IN DEMOCRACIES* 27 (2004).

citizens who are adjudicated by a court to be incompetent or of unsound mind.<sup>17</sup>

Canada, by contrast, is somewhat of an anomaly. A recent study of sixty-two countries found that Canada was one of only four countries studied that did not impose any mental capacity requirement on the right to vote.<sup>18</sup> Until 1992, however, Canada did limit the right to vote in federal elections to those with a requisite level of mental capacity. Specifically, the *Canadian Elections Act* excluded from voting any person “restrained of his liberty of movement or deprived of the management of his property by reason of mental disease. . . .”<sup>19</sup> The road to repeal was set in motion in 1988 when Madam Justice Reed of the Federal Court of Canada, Trial Division held that the provision was invalid because it conflicted with the *Canadian Charter of Rights and Freedoms*, which guarantees the right to vote to “every citizen of Canada.”<sup>20</sup> Justice Reed indicated that a requirement of “mental competence” or “judgmental capacity” could be valid under the *Charter*,<sup>21</sup> but found the provision at issue overbroad in that it excluded persons whose disability might not affect their voting judgment, and arbitrary in that it excluded only a subset of persons whose voting judgment might be affected by mental disease.<sup>22</sup> She explained that “[i]t simply does not follow that people who are declared incapable of managing their financial affairs are necessarily incapable of understanding the nature of the right to vote and of exercising it in a

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<sup>17</sup> See *id.*

<sup>18</sup> See *id.* (the other three countries were Ireland, Italy, and Sweden).

<sup>19</sup> See *Canada Elections Act*. R.S.C., c.14 (1985).

<sup>20</sup> See *Canadian Disability Rights Council v. Canada*, [1988] 3 F.C. 622, 624.

<sup>21</sup> *Id.* at 624.

<sup>22</sup> *Id.* at 624-25.

rational manner. It is similarly a non sequitur to assume that psychiatric patients are necessarily incapable of voting.”<sup>23</sup>

Following the Federal Court ruling, the Royal Commission on Electoral Reform and Party Financing considered the effect of mental disability on voting rights in its final report. The Royal Commission noted that the case required the reconsideration of mental disability disqualifications. The Commission agreed that exclusion considered by the Federal Court “cast too wide a net,” but unequivocally supported the use of mental capacity requirements for voting.<sup>24</sup> The Commission explained that some citizens are “clearly incapable” of voting because of their mental incapacity and that 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.”<sup>25</sup> The Commission therefore recommended a more limited mental capacity disqualification.<sup>26</sup> Specifically, the Commission recommended that two groups of persons be disqualified by reason of mental incapacity: (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 institute as a result of being acquitted of an offence under the *Criminal Code* by reason of insanity.”<sup>27</sup>

While the Report was unequivocal, the recommendation was not adopted by Parliament. Instead, Parliament chose to repeal the

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<sup>23</sup> *Id.* at 625.

<sup>24</sup> ROYAL COMMISSION ON ELECTORAL REFORM & PARTY FINANCING, FINAL REPORT 39-40 (1992).

<sup>25</sup> *Id.* at 39.

<sup>26</sup> *Id.* at 40-41.

<sup>27</sup> *Id.* at 41.

offending portion of the *Election Act* entirely.<sup>28</sup> The result is that inadequate mental capacity is no longer a basis for voter disqualification in Canada in federal elections.<sup>29</sup> Moreover, only one province or territory, Nunavut, currently allows for voter disqualification on the basis of mental incapacity.<sup>30</sup>

In the United States, by comparison, mental capacity requirements for voting are the norm. In the United States, qualifications for voting are determined at the state level. Thirty-seven states' constitutions have provisions limiting the franchise on the basis of mental capacity or allowing for such limitations to be imposed by the state legislature.<sup>31</sup> However, a number of states' election laws supposedly implementing these restrictions effectively weaken – and even ignore – them.<sup>32</sup> Similarly, in the two states whose constitutions

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<sup>28</sup> See *An Act to Amend the Canada Elections Act*, s. 23(3) (assented May 6, 1993) in Acts of the Parliament of Canada, 41-42 Eliz. II, Vol. 1 (1993). See also Diane R. Davidson & Miriam Lapp, *The Evolution of Federal Voting Rights for Canadians with Disabilities*, ELECTORAL INSIGHT (April 2004), online: Elections Canada <[http://www.elections.ca/eca/eim/article\\_search/article.asp?id=17&lang=e&frmPageSize=&textonly=false](http://www.elections.ca/eca/eim/article_search/article.asp?id=17&lang=e&frmPageSize=&textonly=false)>.

<sup>29</sup> The repeal was one of a series of changes made to the *Election Act* that were designed to increase the accessibility of the election system. See ELECTIONS CANADA, EXPLORE A HISTORY OF THE VOTE IN CANADA 19-21(2000), online: Library and Archives Canada <[http://epe.lac-bac.gc.ca/100/200/301/elections\\_can/explore\\_history\\_vote\\_can-e/chronique\\_e.pdf](http://epe.lac-bac.gc.ca/100/200/301/elections_can/explore_history_vote_can-e/chronique_e.pdf)>; Davidson & Lapp, *supra* note 28. For a discussion of these changes in the context of the broader Canadian disability rights movement, see Fraser Valentine & Jill Vickers, “Released from the Yoke of Paternalism and ‘Charity’”: *Citizenship and the Rights of Canadians with Disabilities*, 14 INT’L J. OF CANADIAN STUD. 155 (1996).

<sup>30</sup> See *Nunavut Elections Act*, S. Nu. 2002, c. 17, § 7.

<sup>31</sup> Only California, Connecticut, Idaho, Illinois, Indiana, Maine, New Hampshire, New York, North Carolina, Oklahoma, Pennsylvania, Tennessee, and Vermont do not have such constitutional provisions. See 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, 936 (2007).

permit their legislatures to exclude the mentally ill or incompetent from voting, the legislatures have not accepted the invitation.<sup>33</sup> In a recent article examining this phenomenon, Sally Hurme and Paul Appelbaum suggest that this may reflect the fact that both perceptions and treatment of the cognitively impaired have changed since the adoption of most state constitutions.<sup>34</sup>

## 2. *Informal Screening*

Informal screening based on cognitive capacity has the potential to result in citizens being disenfranchised on the basis of their cognitive status despite their ability to make voting decisions.

To date, the research on such informal screening is limited and has focused on long-term care facilities in the United States. Surveys of long-term care facilities in Pennsylvania and Virginia indicate that, at least in these regions, many such facilities engage in some form of screening for capacity to vote in order to determine which residents should be permitted to vote or to be assisted with voting.<sup>35</sup> In the Pennsylvania study, nearly two-thirds of the facilities were found to

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<sup>32</sup> See *id.* (“In all but fourteen states, different terminology is used in state election laws and state constitutions to describe persons ineligible to vote because of cognitive impairment. . . . A possible explanation for this divergence between constitution and statute may be that states have found it easier to legislate improvements to enfranchisement criteria than to amend constitutions.”).

<sup>33</sup> See *id.* at 940 (describing the status of exclusions in Missouri, Kansas, and Michigan).

<sup>34</sup> See *id.* at 939.

<sup>35</sup> See Jason H. T. Karlawish, Richard J. Bonnie, Paul S. Appelbaum, Constantine Lyketos, Pamela Karlan, Bryan D. James, Charles Sabatino, Thomas Lawrence, David Knopman, & Rosalie Kane, *Identifying the Barriers and Challenges to Voting by Residents in Nursing Homes and Assisted Living Settings*, 20 J. AGING & SOC. POL’Y 65 (2008) (surveying long-term care facilities in the Philadelphia area) [hereinafter “Karlawish et al., *Identifying the Barriers*”]. See also Richard Bonnie & Colleagues, *How Does Voting Occur in Long-Term Care*, Interview Script and Responses (Spring 2005) (unpublished manuscript, on file with the author).

have “assessed” whether residents were capable of voting.<sup>36</sup> Staff used a variety of techniques to assess voting capacity, ranging from asking election-related questions (such as quizzing residents on current political officer holders), to conducting a Folstein Mini-Mental State Exam (MMSE), to assessing the residents’ abilities to vote based on earlier formal or informal assessments of residents’ mental statuses.<sup>37</sup> In the smaller Virginia study, seven out of eight nursing homes and three out of eight assisted living facilities reported conducting such assessments.<sup>38</sup> The Virginia facilities used an array of techniques similar to those used in Pennsylvania. Such techniques did not appear to reflect any legal understanding of the capacity without which residents could legally be disenfranchised<sup>39</sup> and in some cases appeared to bear no relationship to the underlying law.<sup>40</sup>

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<sup>36</sup> See Karlawish et al., *Identifying the Barriers*, *supra* note 35.

<sup>37</sup> See *id.* (surveying long-term care facilities in the Philadelphia area regarding methods of screening residents for voting purposes). See also Bonnie & Colleagues, *supra* note 35 (finding that 18 per cent of the long-term care facilities surveyed during a pilot survey identified people who wanted to vote in the preceding election by asking only those residents whom staff thought could vote). The Folstein Mini-Mental State Exam is a simple, widely-used instrument for assessing cognitive impairment.

<sup>38</sup> See Bonnie & Colleagues, *supra* note 35 at 13.

<sup>39</sup> Cf. Karlawish et al., *Identifying the Barriers*, *supra* note 35 (finding that, in a survey of long-term care facilities in the Philadelphia area, “[n]o staff member used a standardized method of assessing voting competence grounded in constitutional law”).

<sup>40</sup> For example, in a pilot survey of long-term care facilities in Virginia, one facility responded that persons who “had” a power of attorney would not be allowed to vote. See Bonnie and Colleagues, *supra* note 35. Similarly, a telephone survey of activities directors at eight facilities indicated that some would allow family members to determine which residents should be escorted to a polling location or assisted with ballot completion. See Ann Wislowski & Norma Cuellar, *Voting Rights for Americans with Dementia: Implications for Health Care Providers*, 54 *NURSING OUTLOOK* 68, 70-71 (2006). Such an approach also bears no relation to the underlying law.

While the research on informal electoral “gate-keeping” is both limited and focused on institutional caregivers, it seems probable that community-based and family caregivers may engage in similar forms of screening. While further research is needed to determine if and how such informal screening occurs, it is reasonable to hypothesize that informal screening is particularly likely in situations in which the would-be voter would require assistance (either to obtain a ballot or complete the ballot) in order to vote. In such situations, family members could either implicitly or explicitly engage in a form of capacity assessment before deciding whether or not to render such assistance. Given that the existing research indicates that professional caregivers tend to use assessment mechanisms that are inconsistent with the law, it also seems reasonable to hypothesize that the assessment mechanisms used by family caregivers are also likely to be inconsistent with legal standards for voting participation.

In short, emerging research on voting by persons with cognitive impairments indicates that third parties may create affirmative barriers to voting even where not authorized to do so and where their manner of doing so is inconsistent with the law. This suggests that even in jurisdictions such as Canada that have rejected formal cognitive capacity requirements for voting, citizens may nevertheless be disenfranchised on the basis of cognitive disability even when they are able to form voting preferences.<sup>41</sup>

### 3. *Procedural Hurdles*

Procedural processes associated with voting may also create significant barriers to voting by persons with cognitive impairments. Voting is often a confusing and cognitively taxing task. The prospective voter must not only have the capacity to make voting choices, but also the cognitive capacity to negotiate the voting process and to conform to required voting procedures. The extent to which cognitively impaired voters can do so depends on the nature and design of generally

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<sup>41</sup> Cf. Prince, *supra* note 1 (noting that “citizens with mental disabilities . . . may still confront architectural (in certain jurisdictions) and attitudinal barriers to exercising their right to vote”).

applicable procedural requirements for voting. Certain procedures and practices have the potential to pose such significant challenges that they may have the effect of disenfranchising would-be voters.

The design of the ballot itself, for example, can increase the likelihood that voters with cognitive impairments either will or will not be able to register their voting choices. Confusing or unduly complex ballots can significantly undermine a person's ability to record his or her voting choices. A common problem is "undervoting" – people not voting in all elections they wish to vote in. A related problem is "overvoting" – people voting for more candidates or positions than permissible.<sup>42</sup> The design of a ballot has a significant effect on the rate of both undervotes and overvotes.<sup>43</sup> In addition, where polling technologies are excessively confusing, it opens the door to undue coercion as voters are more likely to need assistance to vote.<sup>44</sup> With this in mind, researchers at the Massachusetts Institute of Technology and the California Institute of Technology have been working to develop more cognitively accessible voting systems, which their early studies indicate may reduce voting errors by nearly 50 per cent over existing electronic voting interfaces.<sup>45</sup>

Similarly, the design of the polling place may not only affect the extent to which disabled persons are physically able to vote, but also the extent to which they are cognitively able to vote. The cognitive burden

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<sup>42</sup> While undervotes may sometimes be intentional, overvotes are almost always unintentional and thus can be assumed to be errors. See David C. Kimball & Martha Kropf, *Ballot Design and Unrecorded Votes in Paper-Based Ballots*, 69 PUB. OPINION Q. 508, 524 (2005).

<sup>43</sup> See *id.*

<sup>44</sup> See Ted Selker, *The Technology of Access: Allowing People of Age to Vote for Themselves*, 38 MCGEORGE L. REV. 1113, 1115 (2007) (arguing that "[w]henver assisted voting occurs, coercion is a concern" and therefore advocating the development of voting technologies that reduce the need for assistance).

<sup>45</sup> See *id.* at 1127.

associated with voting may vary depending on the physical design of the polling place. For example, conditions such as low lighting and distracting noises can increase the cognitive demands of voting.<sup>46</sup>

Depending on their design, procedures allowing voters to vote from home or at another non-polling place locale may also make voting more or less cognitively accessible. Absentee balloting schemes, often designed to enhance the accessibility of the vote, can themselves involve confusing ballot designs, complex application procedures, and multi-step procedures for returning ballots.<sup>47</sup> The fact that a person has capacity to vote does not mean that he or she has the capacity to complete the series of tasks needed to vote by absentee ballot.

In addition, limitations on who may provide assistance to voters can pose a special barrier to persons with cognitive disabilities, who may require special help in order to comply with confusing or complex election procedures. Some such limitations may be legally permissible or even legally mandated;<sup>48</sup> others may be unlawful.<sup>49</sup>

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<sup>46</sup> See generally *id.* at 1135-36 (discussing the impact of lighting and other environmental factors on voting behavior).

<sup>47</sup> See generally Daniel P. Tokaji & Ruth Colker, *Absentee Voting by People with Disabilities: Promoting Access and Integrity*, 38 MCGEORGE L. REV. 1015, 1034-42 (2007) (discussing how absentee balloting procedures can make absentee voting more or less accessible to voters).

<sup>48</sup> See, e.g., LA. REV. STAT. ANN. § 18:1333(g) (2004 & Supp. 2007) (Louisiana statute limiting third-party voting assistance to nursing home residents).

<sup>49</sup> In the United States, the federal *Voting Rights Act* requires that “[a]ny voter who requires assistance to vote by reason of blindness, disability, or inability to read or write may be given assistance by a person of the voter’s choice, other than the voter’s employer or agent of that employer or officer or agent of the voter’s union.” See 42 U.S.C. § 1973aa-6 (2003). Disability rights advocates note that these provisions are not always heeded.

In short, generally applicable election practices and procedures can create significant barriers to voting for persons with cognitive impairments. This is troubling because it means that persons may be effectively disenfranchised on the basis of their mental capacity despite the fact that they understand the nature and consequences of voting, and are able to make voting decisions.

### III. APPROACHES TO OVERCOMING SUCH BARRIERS

As a result of the external barriers to voting faced by citizens with cognitive impairment, such citizens may be unable to register their voting preferences even if they have mental capacity to vote. This poses a significant concern for democracies. Selective disenfranchisement of distinct groups of citizens with shared interests reduces the likelihood that elected officials and democratically enacted initiatives will reflect the will of the people. This is particularly likely where the selectively disenfranchised group is otherwise politically marginalized. For cognitively impaired citizens, who face a myriad of other barriers to full participation in the political community, the right to vote is not only their primary mechanism for exerting political power, it may also be their only mechanism for doing so. When unable to exercise their right to vote, they are less likely to be able to promote and protect their common interests (e.g., enhanced interests in high quality health care or disability accommodations), and thus the government as a whole may be less representative of the general population.

In addition, selective disenfranchisement of the cognitively impaired has the potential to have a detrimental effect on non-political aspects of civil society. The right to vote is not merely protective of a citizen's political power, but also helps define a citizen's role in society. Voting is a powerful indicator of community belonging, and can help shape an individual's personal and community identity.<sup>50</sup> Where

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<sup>51</sup> Cf. Waterstone, *supra* note 2, at 365-66 (arguing that election systems that treat disabled persons differently from non-disabled persons are problematic both from an "instrumentalist" point of view and an "equal dignity" perspective as such distinctions perpetuate negative stereotypes of the disabled). Notably, the United States Supreme Court has been receptive to similar lines of reasoning. See Gardner, *supra* note 2, at 901-02 (arguing that "the plaintiffs most likely to meet with success as Supreme Court

disabled citizens are disenfranchised from voting, they stand to lose not only their political power, but also potentially an important part of their identity. Policies and practices that would facilitate voting by the disabled are thus important not only because they allow persons with disabilities to express political choices, but also because they promote the dignity of such persons and help combat negative stereotypes of the disabled.

Given the deleterious effect of selectively disenfranchising persons with cognitive disabilities, democracies should take affirmative steps to increase the cognitive accessibility of voting systems. Just as democracies have found ways to make voting more accessible to persons with physical disabilities, democracies can and should design voting systems that enhance the cognitive accessibility of the vote. While prescribing any particular approach to increasing the cognitive accessibility of the voting process is outside of the scope of this article, several approaches are worth consideration and evaluation.

### **A. Reconsider Capacity Requirements**

First, societies that retain legal capacity requirements for voting should reconsider the relative wisdom and value of such requirements. In the United States, for example, since the 2000 election, attention has increasingly been placed on the issue of how and when to restrict those with diminished mental capacity from voting (e.g., whether current procedures in the United States provide adequate protection for the would-be disenfranchised).<sup>51</sup> By comparison, the underlying question

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litigants are those who base their claims on communitarian theories [of democracy]—those who complain, that is, of being stigmatized by some demeaning form of exclusion from the community's political life.”).

<sup>51</sup> Volume 38, Issue 4 of the *McGeorge Law Review*, for example, presents a series of such articles that were created for a symposium on facilitating voting as people age. While these concerns have gained prominence in recent years, they had been raised previously. See, e.g., Adam Winkler, Note, *Expressive Voting*, 68 N.Y.U. L. REV. 330, 346-350 (1993) (“It seems clear that individuals who cannot understand that pulling a lever inside a voting booth is indeed “voting” do not have a legitimate claim to the

of *whether* the right to vote should be restricted on account of mental incapacity has received almost no attention in the legal literature.<sup>52</sup> While the argument that healthy democracies require intelligent and informed electorates appears, at first glance, to be a compelling reason for imposing mental capacity requirements, further examination is warranted. Although it is certainly desirable for voters to be able to intelligently and rationally evaluate candidates and issues, it does not necessarily follow that there should be a threshold level of capacity legally required of voters. Such capacity requirements pose a myriad of problems, including those associated with selective enforcement and those associated with the potential disenfranchisement of individuals who do understand the nature and consequences of their votes. Thus, at least in some democracies, the costs imposed by such requirements may outweigh their benefits.<sup>53</sup> In reexamining such requirements, countries would fare well to examine the Canadian experience with the repeal of such requirements in order to determine what effect, if any, the repeal has had on the Canadian system of government.<sup>54</sup>

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right. Courts should, however, ensure that the statutory definitions are not over-inclusive when deciding right-to-vote cases involving the mentally disabled.”).

<sup>52</sup> The most comprehensive article to date on the subject is a student note published nearly three decades ago. See Student Note, *Mental Disability and the Right to Vote*, 88 YALE L. J. 1644 (1979).

<sup>53</sup> The costs and benefits associated with such capacity requirements may vary among democracies depending on both their electoral systems and their underlying cultures.

<sup>54</sup> While it seems likely that, as others have suggested, there is no reason to believe that the repeal has had a detrimental effect on the Canadian system of governance, such conclusions are premature given the lack of research on the topic. Cf. Jason H. Karlawish & Richard J. Bonnie, *Voting by Elderly Persons with Cognitive Impairment: Lessons from Other Democratic Nations*, 38 MCGEORGE L. REV. 879, 905, 909 (Stating that “[i]nsofar as we have been able to ascertain, dispensing with the [Canadian] capacity exclusion has not created major difficulties” but nevertheless suggesting that the Canadian system “might also be accompanied with a greater risk of manipulation and fraud”).

## **B. Educate About Voter Rights**

Second, democracies should devote resources and attention to providing education about the voting rights of those with cognitive impairments. Since emerging research indicates that caregivers may screen out individuals from voting even when not authorized to do so and even when such screening is inconsistent with voting standards, education of caregivers is likely to be of particular value. It seems probable that educating nursing facility staff, senior residence administrators, and family caregivers about the voting rights of the cognitively impaired might well reduce the likelihood that such persons will unduly screen out cognitively impaired voters. Since anecdotal evidence suggests that election workers may also serve as gatekeepers to the vote by potentially screening out individuals with suspect cognitive capacities, educating election workers about the voting rights of persons with cognitive disabilities is also likely to be of particular value.<sup>55</sup> Canada, notably, would be an excellent place to test the efficacy of various approaches of providing such education as Canada has an unusually simple approach to the issue: mental disability is no basis for disenfranchisement in federal elections.

It should be noted that there is a significant difference between educating caregivers and election officials about voting rights of the cognitively impaired and inviting or encouraging such individuals to screen would-be voters for capacity. In the past several years, scholars in the United States have suggested that one approach to addressing the improper disenfranchisement of voters through informal screening mechanisms is to create more reliable, scientific mechanisms for such screening. This was first proposed in a 2004 article in the *Journal of the American Medical Association (JAMA)*, in which a number of prominent United States-based scholars, led by doctor Jason Karlawish,

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<sup>55</sup> In the United States, the National Network for Election Reform has in fact called for such training. See National Network for Election Reform, *Removing Voting Barriers for Citizens with Mental Disabilities*, online: National Campaign for Fair Elections <<http://nationalcampaignforfairelections.org/issues>>.

suggested that such a system be used in long-term care institutions.<sup>56</sup> The authors noted that staff in such institutions tend to “serve as gatekeepers, deciding whether to inform individuals of their right to vote and whether and how to assist them in registering or voting.”<sup>57</sup> Calling such screening “inevitabl[e],” the authors called for the development of uniform policies in such facilities and recommended the use of a simple capacity-assessing instrument.<sup>58</sup> In subsequent articles, Karlawish and his colleagues have come to present a more circumscribed view on capacity testing. For example, writing again in 2006, they advised against the “systematic screening of competence to vote based exclusively on a diagnosis of dementia or on residence in a long-term care facility,” but recommended “encouraging assessments for residents whose voting competence is reasonably in doubt.”<sup>59</sup> Karlawish and colleagues have also since developed an instrument designed to determine whether or not a person has the capacity to vote.<sup>60</sup>

While the notion of empowering long-term care staff or others to assess properly the mental capacity of suspect individuals before permitting them to vote has received some support, such approaches are likely to deny would-be voters both due process and equal protection of the law. Moreover, singling out certain citizens for such assessments is likely to unfairly target already marginalized and stigmatized populations, thus further marginalizing them and limiting

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<sup>56</sup> See Karlawish et al., *Addressing*, *supra* note 3.

<sup>57</sup> *Id.* at 1346.

<sup>58</sup> *Id.* at 1348-49.

<sup>59</sup> Jason Karlawish, Paul S. Appelbaum, Richard Bonnie, Pamela Karlan, & Stephen McConnell, *Policy Statement on Voting by Persons with Dementia Residing in Long-Term Care Facilities*, 2 ALZHEIMER'S & DEMENTIA 243, 244 (2006). See also Hurme & Appelbaum, *supra* note 31 at 973 (arguing that not permitting staff to screen residents for voting capacity would be “wasteful and costly” and would undermine staff’s faith in the electoral process, and recommending informal capacity assessment of residents to identify residents who should have their voting capacity more formally determined).

<sup>60</sup> See Appelbaum, Bonnie & Karlawish, *supra* note 13 at 2094.

their ability to exert political power. Moreover, informal assessments – even when done using a standardized assessment tool – invite fraud by providing justification for both good faith and bad faith disenfranchisements of persons whom the evaluator believes will vote in a manner of which or for a candidate of whom the evaluator disapproves.<sup>61</sup>

### C. Reform Election Procedures

Third, democracies should revisit their voting policies and procedures with an eye to voting access for the cognitively impaired. Such review should include both balloting procedures and polling places. In terms of balloting procedures, democracies must recognize the numerous ways in which the ballots they utilize may confuse voters and frustrate their efforts to record their intent,<sup>62</sup> and should give priority to designs that minimize voter confusion. In terms of polling places, minor changes to remedy conditions such as low lighting and distracting noises may significantly decrease the cognitive demands associated with voting, and thus make it significantly easier for citizens to record their votes. A more expansive definition of “polling place” may also help. The majority of Canadian provinces have adopted mobile polling schemes that allow a portion of the electorate – typically those in an institution – to vote where they already reside.<sup>63</sup> Since familiar settings may reduce confusion and distraction, mobile voting itself may decrease the cognitive demands of voting. It may also allow for more private, more paced, less embarrassing opportunities for assistance for the cognitively disabled. Vote-by-mail systems, such as that adopted by the State of Oregon, may have similar benefits.<sup>64</sup>

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<sup>61</sup> For a thorough critique of such approaches, see Kohn, *supra* note 3.

<sup>62</sup> Cf. Richard G. Niemi & Paul S. Herrnson, *Beyond the Butterfly: The Complexity of U.S. Ballots*, 1 PERSP. ON POL. 317 (2003) (outlining the myriad of sources of confusion observed in U.S. ballots).

<sup>63</sup> See Prince, *supra* note 1 at 5-6.

Unfortunately, policies and procedures that increase the cognitive accessibility of the vote are not without cost. Mobile voting, for example, has the potential to heighten the possibility of undue influence or ballot tampering, may reduce the sense of community as voting becomes a personal rather than a public act, and may reduce the public visibility of persons with disabilities if such persons disproportionately elect to vote at home. Some techniques that may reduce the cognitive burden associated with voting may encourage disfavored voting behaviors. For example, placing candidates' photos alongside their names on the ballot page may assist voters with memory deficits,<sup>65</sup> but may also encourage racially-based voting.<sup>66</sup> Accordingly, jurisdictions at times will need to balance the interest in increasing the cognitive accessibility of elections against other important governmental interests.

In balancing the value of election reform against its costs, it is important to recognize that improving the cognitive accessibility of elections has the potential to help a broad range of voters, not merely those who have diagnosed cognitive impairments. Confusing ballot designs, for example, can lead to unintentional undervotes and overvotes among both the cognitively impaired and the cognitively

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<sup>64</sup> Oregon's Vote by Mail system has increased turnout by elderly individuals, perhaps for some of these very reasons. See Adam J. Berinsky, Nancy Burns, & Michael W. Traugott, *Who Votes by Mail: A Dynamic Model of the Individual - Level Consequences of Voting-by-Mail Systems*, 65 PUB. OPINION Q. 178 (2001) (finding that Oregon's vote-by-mail system increases the rate at which elderly individuals vote by increasing voter retention).

<sup>65</sup> See Ott, Heindel, & Papandonatos, *supra* note 11 (finding that study participants – persons who apparently either had dementia or were suspected of having dementia – had more trouble recalling candidates' names when presented with identifying information than they did with matching a candidate's photograph to that information).

<sup>66</sup> See Susan A. Banducci et al., *Ballot Photographs as Cues in Low - Information Elections*, POLITICAL PSYCHOL. (forthcoming 2008), online: Nuffield College, University of Oxford <<http://www.nuffield.ox.ac.uk/General/Seminars/Papers/690.pdf>>.

intact. Both the cognitively intact and the cognitively impaired may be disenfranchised as a result of failing to comply with complex absentee balloting procedures. Distracting polling conditions may confuse the non-disabled as well as the disabled. While those with cognitive impairments are likely to benefit disproportionately from changes to election systems which reduce confusion and complexity, the general electorate stands to benefit as well.

Moreover, creating less cognitively demanding voting systems may have the advantage of decreasing opportunities for fraud and undue coercion of voters. Where voting systems are confusing, voters are more likely to require third-party assistance in order to record their votes. This, in turn, opens the door for third parties to exert undue coercion or otherwise manipulate the voting process. While those with cognitive impairments may be particularly susceptible to such manipulation, the cognitively unimpaired may also be impacted.<sup>67</sup> In short, improving the cognitive accessibility of election systems is likely to enhance the legitimacy of elections by making it more likely that both the cognitively impaired and the cognitively non-impaired will be able to vote successfully for the candidates and positions that they prefer.

#### IV. CONCLUSIONS

Cognitive impairment can pose a significant barrier to exercising the fundamental right to vote. This is true even when that impairment does not prevent a person from understanding the nature and consequences of voting and making a voting choice.

Accordingly, if democracies are to truly make voting accessible to persons with disabilities, they must seek not only to minimize physical barriers to voting but also to create cognitively accessible voting systems. This article has identified a range of barriers to voting

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<sup>67</sup> Cf. Kohn, *supra* note 3 at 1078-79 (noting that despite concerns about demented nursing home residents being targeted for voting fraud, the fraud that has occurred in such settings does not appear to have targeted demented residents; rather, such fraud appears to have targeted nursing home residents regardless of their mental capacity).

encountered by persons with cognitive impairments, and has suggested a variety of techniques that could be employed to try to minimize such barriers. Further research is needed to determine the relative strengths and weaknesses of these techniques and to assess their efficacy.

Such research should not be delayed. The importance of cognitively accessible voting systems is likely to grow in the upcoming decades. As populations age, a greater proportion of the electorate can be expected to suffer from dementias and other forms of diminished cognitive capacity. Without changes to election procedures and practices, existing barriers to voting by the cognitively impaired will increasingly result in the improper disenfranchisement of greater and greater numbers of citizens.