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***1 MAKE EVERY VOTE COUNT: REFORM NEW YORK’S ELECTION LAW TO PROTECT THE FRANCHISE FOR PEOPLE WITH DISABILITIES**

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INTRODUCTION

Voting is perhaps the most fundamental of all rights. It is the foundation of our democracy.¹ While the states are vested with

the power to determine the conditions under which the franchise may be exercised,² once the power to vote is granted to the electorate, the lines drawn on suffrage may not be inconsistent with the Equal Protection Clause of the Fourteenth Amendment.³

New York, like twenty-three other states, has made clear that receiving services for a mental disability is not itself a basis upon which a person may be deprived of their right to vote.⁴ *2 Nevertheless, New York also provides that “no person who has been adjudged incompetent by order of a court of competent judicial authority shall have the right to register for or vote at any election in this state unless thereafter he shall have been adjudged competent pursuant to law.”⁵ However, New York’s Election Law has not kept pace with evolving concepts of legal capacity that are reflected elsewhere in New York law.⁶ Adjudications of incompetence may arise in civil or criminal contexts that have nothing to do with voting and give no specific consideration to the subject’s ability or inability to participate in the electoral process.⁷ In the current landscape, the incompetency exclusion in New York is rife with ambiguity about the scope of its application and subject to inconsistent application by elections officials, judges, and administrative decision-makers who may serve as gatekeepers for individuals with mental disabilities seeking to exercise their right to vote.

This article begins with an overview of laws in the United States that purport to exclude people from voting based upon their mental capacity and explains that when voter qualification laws exclude people from voting based upon generalizations about mental competence, without specifically evaluating a voter’s ability to participate in the electoral process, they are likely to *3 violate the Equal Protection Clause of the United States Constitution.⁸ Next, the article discusses New York’s statutory scheme and offers the context for the authors’ concerns that voting rights of people with disabilities remain in jeopardy so long as the incompetency exclusion remains ensconced in New York law. The article then explores additional barriers to voting by people with disabilities and explains the New York response, to date. The article concludes with recommendations for reform, including repeal of the incompetency exclusion currently codified in the New York Election Law.

I. THE LEGAL LANDSCAPE

The United States Constitution delegates to the states the authority to determine the manner of holding elections and voters’ qualifications, and the Supreme Court has repeatedly emphasized the States’ power in this arena.⁹ Moreover, federal law generally allows states to exclude citizens from voting on the basis of a mental disability, although it does not require them to do so.¹⁰ Currently, forty-one states have statutory or constitutional provisions that disenfranchise persons with diminished mental capacities, although, as noted above, a majority of those states also have statutory provisions that prevent voters from being barred from voting *solely* on the basis of their receipt of services for a mental disability.¹¹

As a practical matter, states effectuate disenfranchisement of voters with mental disabilities through some combination of a general prohibition on voting by persons with mental disabilities, contained either in the state’s constitution or election law, and specific provisions defining the mental disability that would disqualify an individual from voting.¹² The determination that a *4 person lacks the mental capacity to vote may be made, in some states, by elections officials¹³ or by the staff of a facility in which an individual may be receiving care and treatment.¹⁴ In other states, the determination that a person has a mental condition that would bar them from voting must be a judicial adjudication.¹⁵ Confusingly, however, this judicial adjudication may be made in the context of a proceeding intended for another purpose entirely--for example, a criminal proceeding or a hearing to determine their need for a guardian to assist with their personal needs.¹⁶

Although federal law permits states to disenfranchise voters on the basis of diminished mental capacity, the states must utilize this power in a manner that does not offend the Equal Protection Clause of the Fourteenth Amendment.¹⁷ “[I]f a challenged statute *5 grants the right to vote to some citizens and denies the franchise to others, ‘the Court must determine whether the exclusions are necessary to promote a compelling state interest.’”¹⁸ The fact that federal law recognizes that mental disability may, in some circumstances, be a valid basis to exclude citizens from suffrage¹⁹ implicitly recognizes that the state may have a “compelling” interest in “ensuring that those who cast a vote have the mental capacity to make their own decision by being able to understand the nature and effect of the voting act itself.”²⁰ On the other hand, the state’s interest does not extend to limiting suffrage only to voters who demonstrate a nuanced understanding of the voting process. As one commentator has noted,

“the mere fact that some citizens labor under cognitive impairments that preclude them from casting their ballots in optimally intelligent ways cannot by itself justify disenfranchisement The fact that voters who are

cognitively impaired may not process information in a sophisticated or entirely rational manner may separate them only in degree--if *6 even that--from the remainder of the electorate.”²¹

It has been suggested that states have an additional compelling interest in “preserving the integrity of [the] electoral process,” and that this interest could be undermined by the electoral participation of individuals who have “no conscious intention of expressing a preference designed to affect electoral outcomes.”²² Allowing suffrage by such individuals, it is thought, may undermine the electorate’s perception of the voting process, as well as making that process vulnerable to fraudulent actions by individuals who may seek to co-opt the votes of mentally incapacitated voters.²³ Whether or not such fraudulent actions have, in fact, ever altered the outcome of a close election, the State’s compelling interest in “preserving the integrity of its electoral process”²⁴ is thought to justify the disenfranchisement of voters with mental disabilities on the grounds that limiting suffrage to those deemed to have sufficient capacity to participate in the electoral process has the benefit of enhancing *all* voters’ confidence in the system.²⁵

There has been sparse federal litigation challenging state laws that disenfranchise citizens on the basis of mental disability on Equal Protection grounds. However, plaintiffs have generally succeeded, not by challenging the state’s underlying interest, but rather by demonstrating that a statute is overbroad in capturing some people with mental disabilities who nevertheless are able to understand the voting process and meaningfully express their preferences through the act of voting. For example, the district court in *Doe v. Rowe* invalidated a statute that did not permit voting by people “under guardianship by reason of mental illness,” explaining that

*7 “the Court must examine whether the ends--excluding persons who lack the capacity to understand the nature and effect of voting such that they cannot make an individual choice--justify the means--excluding persons under guardianship by reason of mental illness. Strict scrutiny demands a truly necessary correlation between the ends and the means.”²⁶

In other words, a state statute will be vulnerable to constitutional challenge if the lines used to exclude some people with mental disabilities from voting are so broad as to disenfranchise at least some individuals who, despite their disabilities, nevertheless have the capability of understanding and participating in the electoral process. Conversely, a state statute will most likely be insulated from Equal Protection challenge if it bars people from voting only where there has been a specific judicial determination that the person lacks the requisite understanding of the voting process. For example, the California statute provides that a “person shall be deemed mentally incompetent, and therefore disqualified from voting, if, during the course of any of the [enumerated civil and criminal proceedings], the court finds by clear and convincing evidence that the person cannot communicate, with or without reasonable accommodations, a desire to participate in the voting process.”²⁷ In Wisconsin, elections officials may petition a court for a determination of whether a voter “is incapable of understanding the objective of the electoral process.”²⁸ Several other states provide that persons under court-ordered guardianship are presumed to retain their right to vote unless a court has made a specific finding that the person lacks the ability to do so.²⁹ All of *8 these models serve to ensure that only people who truly cannot participate in the voting process are barred from voting on that basis, and that the State’s disenfranchisement provisions are not overbroad in sweeping in individuals who may be able to meaningfully participate in the electoral process.

As will be further discussed below, there are at least two categories of persons who, it has been suggested, may be barred from voting based on “incompetence” under New York State law--those under plenary guardianship pursuant to Surrogate’s Court Procedure Act 17-A, and those deemed incapacitated to stand trial under Criminal Procedure Law Article 730--although the legal proceedings in those cases did not encompass any assessment of their voting capabilities. As to these individuals, a blanket ban on their suffrage, as may currently exist in New York State law, may be vulnerable to an equal protection challenge.³⁰ The following section addresses the State’s Election Law and civil and criminal statutes that can result in adjudications of incapacity in New York.

A. Voter qualification and incapacity

 Section 5-106 of the Election Law provides:



No person who has been adjudged incompetent by order of a *9 court of competent judicial authority shall have the right to register for or vote at any election in this state unless thereafter he shall have been adjudged competent pursuant to law.³¹

In order for the exclusionary provision for incompetent voters and those disqualified by felony convictions to be implemented by local election officials, New York Law further requires:

Notifications of a death, felony conviction or adjudication of mental incompetence.

...

(2) NYS Voter shall receive notices of felons sentenced to a term of imprisonment and of persons adjudicated mentally incompetent including the voter's last name, first name, middle name, gender, date of birth, street address, city, state, ZIP code, county, and a code indicating whether the person is a convicted felon sentenced to a term of imprisonment or a person adjudicated mentally incompetent from the New York State Office of Court Administration or any court having jurisdiction over such matters. Notifications shall be sent to the appropriate county for follow-up and determination.

(3) Each local board of elections shall, within 25 days after receiving such list of decedents or list of persons subject to forfeiture of the right to vote pursuant to  [section 5-106 of the Election Law](#), use such lists to identify and remove decedents and persons subject to forfeiture of the right to vote pursuant to  [section 5-106](#) of this article from the list of eligible voters.³²

In 1909, when only men over the age of twenty-one had the right to vote, the Legislature codified an exclusion from suffrage based upon a felony conviction.³³ Subsequent chapter amendments expanded exclusions to provide that “no person who has been adjudged incompetent by order of a court of competent *10 judicial authority shall have the right to register for or vote at any election in this state unless thereafter he shall have been adjudged competent pursuant to law.”³⁴ The constitutionality of the statute was challenged in the 1981 case of *Manhattan State Citizens' Group, Inc. v. Bass*.³⁵ The plaintiffs were a not-for-profit corporation, some of whose members were involuntarily committed patients at the Manhattan Psychiatric Center. They challenged former Section 5-106 on the grounds that it violated the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the United States Constitution and suffrage provisions of the New York State Constitution.³⁶

In ruling for the plaintiffs, the district court drew a distinction between civil commitment proceedings and competency proceedings in the following terms:

Commitment proceedings should not be confused with competency proceedings. [Section 29.03 of the MHL](#) provides that an order authorizing retention of a patient shall not “be construed or deemed to be a determination or finding that such person is incompetent or is unable adequately to conduct his personal or business affairs.” Thus, absent a judgment of incompetency, an involuntarily committed patient retains the right to marry, draft a will, sue in his own name, and generally manage his affairs. Competency proceedings concern one's ability to conduct one's personal or business affairs. When it is determined that one is “incompetent” to manage one's affairs or property, or, in the case of a patient, “unable adequately to conduct his personal or business affairs,” the court appoints a committee to provide for the care of the incompetent and manage his affairs. The only similarity between one who has been adjudged incompetent and one who has been involuntarily committed by court order is that both lose their right to vote.³⁷

Defending the exclusionary provisions of the law as they pertained to people who were involuntarily committed, the State alleged that it had an interest in assuring that electoral choices will be made by “intelligent and interested” voters.³⁸ For purpose *11 of its analysis, the district court did not challenge the State's assumption, but held that the statute was nevertheless constitutionally defective because it was not narrowly tailored to effectuate that interest. Judge Goettel stated in

his opinion:

When one is declared incompetent, the court has found that person unable to conduct any of his personal or business affairs. Presumably, this includes the ability to cast a rational vote. One who has merely been committed, however, is in quite a different position. The principal issue in a commitment proceeding is a medical one: does the person to be committed have a mental illness for which hospitalization is essential and is the person's judgment so impaired that he does not understand his need for hospitalization. A finding that a person lacks understanding about his mental illness and need for hospitalization is not determinative of his ability to vote intelligently. For example, consider the situation of a brilliant political science professor who is so depressed that he is on the brink of suicide. Contrary to the advice of his friends and family, the professor refuses treatment for his depression. If two physicians certify that he is in need of involuntary care and treatment, he can be held on an involuntary basis for up to sixty days. If, after the sixty day period elapses, the professor still refuses treatment, he may continue to be retained if a court determines that his judgment is so impaired that he does not understand the need for such care and treatment. Such a determination by a court would not necessarily bear on the professor's ability to make rational, if not brilliant, voting decisions. Consequently, because the statute does not meet the 'exacting standard of precision' required of statutes that restrict the right to vote ... it is unconstitutional, but only as applied to persons involuntarily committed to hospitals by court order who have not been adjudged incompetent.³⁹

In disposing of the case in the plaintiffs' favor, the federal court seemed unburdened by its assumptions that a person adjudicated incompetent would be incapable of making a rational choice while voting. As stated by the court, "[w]hen one is declared incompetent, the court has found that person unable to conduct any of his personal or business affairs. Presumably, this includes the ability to cast a rational vote."⁴⁰ With the repeal of New York's committee statute in 1992, civil adjudications of incompetency no longer arise. However, distinctions between a legal finding of "incapacity" and one of "incompetence" are not always understood.⁴¹ There is also a discrete statute in New York providing for guardianship of persons with intellectual and other developmental disabilities. Codified at Article 17-A of the Surrogate's Court Procedure Act, the statute is plenary in nature and potentially more prone to impact the civil rights of the person subject to its provisions.⁴² New York also has a criminal statute where mental capacity is implicated. That statute is codified at Article 730 of the Criminal Procedure Law (CPL). A brief explanation of the three statutes follows to aid in the analysis of whether voting rights remain imperiled in New York by reason of judicial findings of capacity in civil or criminal proceedings.⁴³

1. Article 81 of the Mental Hygiene Law

Article 81 proceedings for appointment of a guardian for personal needs or property management became effective on April 1, 1993.⁴⁴ Article 81 replaced the former dual structure conservatorship and committee statutes that operated in New York. Historically, the appointment of a committee, pursuant to former Article 78 of the Mental Hygiene Law, was the only available legal remedy to address the affairs of a person alleged to be incompetent. However, the committee statute required a plenary adjudication of incompetence.⁴⁵ Due to the stigma and loss of civil rights accompanying such a finding, the judiciary became reluctant to adjudicate a person "incompetent."⁴⁶ In 1972, the conservatorship statute (former Article 77 of the Mental Hygiene Law) was enacted into law as a less restrictive alternative to the committee procedure.⁴⁷ Unlike the committee statute, the appointment of a conservator did not require a finding of incompetence. Rather the former law authorized the appointment of a conservator of the property for a resident who had not been:

[J]udicially declared incompetent and who by reason of advanced age, illness, infirmity, mental weakness, alcohol abuse, addiction to drugs, or other cause ... suffered substantial impairment of [their] ability to care for [their] property or [have] become unable to provide for [themselves] or others dependent upon [them] for support.⁴⁸

However, by design, the statute limited the power of the conservator to property and financial matters. In 1974, two chapter amendments to the Mental Hygiene Law were enacted attempting to expand the role of conservators. The first amendment established a statutory preference for the appointment of a conservator.⁴⁹ The second statutory change authorized conservators to assume a limited role over the personal needs of the person who was the subject of the proceeding.⁵⁰ Cast as reform

measures, the chapter amendments actually contributed to the “legal blurring between Articles 77 and 78.”⁵¹ In 1991, the Court of Appeals was confronted with a case requiring a construction of the statutory framework to determine the boundaries of the authority of a conservator.⁵² The question presented to the tribunal was whether a conservator could authorize the placement of his ward in a nursing home.⁵³ *14 In *Matter of Grinker*,⁵⁴ the Court of Appeals determined that such power could be granted only pursuant to the committee statute. The *Grinker* decision quieted the controversy surrounding the authority of a conservator to make personal needs decisions. However, the decision also added urgency to the quest to identify a remedy to assist people who may be in need of assistance in managing their personal and financial affairs short of adjudicating the person completely incompetent.

To resolve the difficulties inherent in the conservator/committee dichotomy, the New York State Law Revision Commission proposed the enactment of a single remedial statute with a standard for appointment dependent upon necessity and the identification of functional limitations.⁵⁵ Article 81 established a wholly new guardianship procedure to address the personal and property needs of persons alleged to be incapacitated. The statute rejected plenary adjudications of incompetence in favor of a procedure for the appointment of a guardian whose powers are specifically tailored to the needs of the individual.⁵⁶ The objective of the proceeding is to arrive at the “least restrictive form of intervention” to meet the needs of the person while, at the same time, permitting the person to exercise the independence and self-determination of which he or she is capable.⁵⁷ However, “[a]n incapacitated person for whom a guardian has been appointed retains all powers and rights except those powers and rights which the guardian is granted.”⁵⁸

2. Article 17-A of the Surrogate’s Court Procedure Act

Under Article 17-A, the basis for appointing a guardian is determined by whether the person has a qualifying diagnosis of an intellectual or other developmental disability.⁵⁹ Current law permits the appointment of a guardian upon proof establishing, to the “satisfaction of the court,” that a person is intellectually or developmentally disabled and that his or her best interests would *15 be promoted by the appointment.⁶⁰ As a jurisdictional prerequisite, an Article 17-A petition must be accompanied by certifications of two physicians, or a physician and a psychologist, attesting that the respondent meets the diagnostic criteria of an intellectual or other developmental disability.⁶¹ On its face, Article 17-A provides only for the appointment of a plenary guardian and does not expressly authorize or require the Surrogate Court to dispose of the proceeding in a manner that is least restrictive of the individual’s rights. Indeed, Article 17-A does not require the court to find that the appointment of a guardian is necessary, does not guarantee the right to counsel, and permits the proceeding to be disposed of without a hearing at the discretion of the Surrogate.⁶²

When ordering the appointment of a guardian under Article 17-A, the court will determine that the subject of the proceeding is “incapable” of managing him or herself and/or his or her affairs by reason of intellectual disability or developmental disability and “that such condition is permanent in nature or likely to continue indefinitely.”⁶³ Whether the Article 17-A adjudication is the equivalent of a finding of incompetence is certainly a point of debate. As noted by Surrogate Kristin Booth Glen in *Matter of Chaim A.K.*:


Unlike article 81, article 17-A provides no gradations and no described or circumscribed powers. Given a finding of either mental retardation or developmental disability, inability to care for one’s self (making no distinctions between what the subject of the proceeding can and cannot do) and the amorphous “best interests standard,” a guardian is appointed with seemingly unlimited power, much like the old conservator and committee.⁶⁴

*16 The persistent ambiguity about the scope of authority of a 17-A guardian is reflected in guidance literature generated by the Office for People with Developmental Disabilities (“OPWDD”). For example, in a document entitled *Voting in New York State for People with Developmental Disabilities*, no definitive answer is provided to the question of whether a guardian can prevent a person with developmental disabilities from voting. Instead, the OPWDD guidance suggests that the person contacts their “care manager” for advice and assistance.⁶⁵ As Judge Glen recently observed, “the plenary nature of an Article 17-A guardianship, and its original purpose of essentially continuing persons with [developmental disabilities] in the legal status of ‘children,’ strongly suggests the intention to deny persons subject to such guardianship of the right to vote.”⁶⁶


3. Article 730 of the Criminal Procedure Law

A criminal defendant who is not mentally competent to stand trial--*i.e.*, an “incapacitated person”--cannot be prosecuted for a criminal offense.⁶⁷ That principle was understood at common law⁶⁸ and presently is understood as a precept of federal constitutional due process.⁶⁹ Article 730 of the CPL furnishes New York’s statutory procedures for determining a defendant’s fitness to stand trial. The provisions of Article 730 are distinguished from the procedures relating to a defendant’s mental capacity when alleged to have committed the crime. The latter circumstance implicates the affirmative defense of not responsible by reason of mental disease or defect,⁷⁰ a plea of not *17 responsible by reason of mental disease or defect,⁷¹ and the post-plea and post-verdict commitment procedures applicable to a person found not responsible.⁷² The test for capacity is “whether [the defendant] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding--and whether he has a rational as well as factual understanding of the proceedings against him.”⁷³ The New York Court of Appeals has determined “that the burden should be on the prosecution to establish the defendant’s competency by a preponderance of the evidence.”⁷⁴ Once adjudicated as incapacitated, a defendant may be committed to the custody of a hospital licensed by the Office of Mental Health (“OMH”).⁷⁵ The commitment may be on an inpatient or outpatient basis.⁷⁶

4. Administrative Responses

Informal interpretations of the Election Law’s exclusionary provisions have been offered by both the New York State Office of Court Administration (“OCA”) and OMH. In 2009, OCA counsel opined that with the repeal of Articles 77 and 78 of the Mental Hygiene Law (the conservator and committee statutes),  Election Law § 5-106 is “obsolete” and cannot be followed.⁷⁷ The OCA memorandum did not address the potential for the law to be applied to criminal defendants adjudicated as incapacitated pursuant to Article 730 of the CPL.

On October 1, 2020, and in the midst of the COVID-19 public health crisis, OMH issued a guidance memorandum to its facility directors with the subject heading “Ensuring Access to Voting Rights for Psychiatric Center Clients During COVID-19.”⁷⁸ In its *18 guidance, OMH stated that disqualification from voter registration occurred, among other reasons, (i) if a person was sentenced to prison upon a felony conviction and/or is currently on parole; and (ii) if a person is adjudged mentally incompetent by order of a court.⁷⁹ Included in the OMH guidance to its facility directors was the conclusion that clients with a CPL 730 status are disqualified from voting because they have been adjudicated mentally incompetent by order of a court.⁸⁰

The authors agree with the interpretation of OCA that  Election Law § 5-106 does not operate to exclude people adjudicated to be in need of a guardian from voting. However, absent a legislative repeal of the exclusionary provision, there is a risk of the law being misapplied by local election officials, as well as facility directors who may, as a practical matter, control potential voters’ access to the franchise. The authors disagree with the OMH guidance regarding the disqualification of potential voters adjudicated as incapacitated defendants under Article 730 of the CPL. The adjudication is limited to a judicial finding that defendant lacks capacity to understand the proceedings against him or to assist in his own defense.⁸¹ The criminal court has made no finding relative to the ability of the person to vote. The exclusion is too broad and constitutionally suspect, as a result.

B. Determining Capacity to Vote

Notably, although forty-one states have adopted some form of voter disenfranchisement based on mental disability, only a handful of states have attempted to articulate a standard by which a court might determine which voters lack the requisite capacity to participate in the electoral process.⁸² In New York (as *19 in dozens of other states), the lack of an articulated standard by which an individual’s capacity to vote might be judged means that decision makers--who may be judges, but may also include elections officials in some states--have wide-ranging latitude to interpret “capacity to vote.” This leads to inconsistent results.

In 2007, the American Bar Association (ABA) adopted a recommendation that would permit disenfranchisement only if a court finds, by clear and convincing evidence, that the individual “cannot communicate, with or without reasonable accommodations, a specific desire to participate in the voting process”⁸³ The ABA explained that:

A premise of this recommendation is that, because voting is a fundamental constitutional right and a hallmark of democracy, the emphasis should be on expanding the franchise and enhancing access to and assistance with the ballot for persons who are capable of voting. Any limitations should be narrowly circumscribed in terms of specific functional abilities, rather than on categorical exclusions.⁸⁴

Thus, the ABA's recommended standard looks only at whether the individual is able to communicate a desire to vote, not whether the person has a particular quantum of understanding of the electoral process itself.⁸⁵

***20** Subsequently, three states (California, Maryland and Nevada) have adopted a substantive standard that incorporates the ABA's recommendation and disqualifies only those voters who are unable to express a desire to participate in the voting process.⁸⁶ Uniquely, and beyond what was contemplated by the ABA, California permits the prospective voter to have their ability to express this desire determined by a jury, rather than a judge, if they so choose; a prospective voter will not be disqualified unless the jury unanimously determines that they meet this standard.⁸⁷

In contrast, some other states have articulated a standard that requires the prospective voter to demonstrate some understanding of nature or objective of voting. For example, Wisconsin will bar a person from voting "if the court finds that the individual is incapable of understanding the objective of the elective process."⁸⁸ Washington permits disenfranchisement if a court finds "that the person is incompetent for the purposes of rationally exercising the franchise in that the individual lacks the capacity to understand the nature and effect of voting such that she or he cannot make an individual choice."⁸⁹ These standards seek to balance the individual's fundamental interest in voting with the state's interest in having an electorate that understands the meaning of its participation in the electoral process. As the Washington Legislature explained:

[T]he right to vote is a fundamental liberty and that this liberty should not be confiscated without due process The legislature further finds that the state has a compelling interest in ensuring that those who cast a ballot understand the nature and effect of voting is an individual decision, and that any restriction of voting rights imposed through guardianship proceedings should be narrowly tailored to meet this compelling interest.⁹⁰

By setting a relatively high bar that requires voters to demonstrate that they understand what it means to vote but placing the burden of demonstrating an absence of that understanding on those who would seek to disenfranchise the ***21** voter, Washington's law strikes a balance between these compelling interests.

Regardless of whether New York chooses a substantive standard that prioritizes voter participation, as under the ABA model, or one that explicitly permits inquiry into the voter's understanding of the electoral process, as in Washington and Wisconsin, electoral reform is needed to provide guidance to courts about the specific circumstances in which a person's right to vote may be circumscribed.

II. FACILITATING ACCESS TO THE FRANCHISE

Part I of this article discussed statutory exclusions that prevent people from voting and the constitutional and practical implications of such prohibitions. Physical obstacles to actually exercising the franchise exist and these are worthy of examination because they have enormous implications for people with disabilities to actually participate in civic life. In this regard, one legal commentator observed that "[p]eople with disabilities are the ticking time bomb of the electorate."⁹¹ Nationally, it is a group comprising sixty-one million people and counting, it includes people with various types of impairments, from wheelchair users to elderly people with dementia to blind people.⁹² Every person is vulnerable to falling into this category at some point during their lives, but barriers to voting persist.⁹³

***22** Congress has passed laws designed to promote the voting rights of people with disabilities and older adults. In particular, the 1984 Voting Accessibility for the Elderly and Handicapped Act ("VAEHA") requires accessible polling places and registration facilities in federal elections for people with disabilities and elderly voters over the age of sixty-five.⁹⁴ There are no minimum standards for accessibility, however, and that leads to widespread variance across the United States. While Congress listed voting as one of the historic areas of discrimination when enacting the Americans with Disabilities Act in 1990, "[t]he legacy of the ADA with respect to voting protection is mixed. Not all polling places are covered by ADA

accessibility requirements if they are in private spaces, for example. Courts have not required that all polling places be deemed accessible or guarantee a secret and independent vote.”⁹⁵

The National Voter Registration Act of 1993 (“NVRA”), discussed earlier in this article, requires that states provide voter registration materials in all state offices that offer services to people with disabilities; states must also provide assistance in filling out and transmitting the forms.⁹⁶ Unfortunately, the federal government has not prioritized enforcing Section 7, which requires states to provide registration at places such as offices administering public assistance.⁹⁷ These offices reach people with disabilities who do not have driver’s licenses. While the Act succeeded in increasing registration of people with disabilities, it has not affected turnout.⁹⁸

The Help America Vote Act (“HAVA”) was enacted in the wake of the 2000 election debacle and the flawed election procedures in Florida.⁹⁹

*23 Part of the [intent] of HAVA is to ensure that voters, including voters with disabilities, can cast votes without assistance.¹⁰⁰ Thus, voters with disabilities, like their fellow citizens, are entitled to a secret and independent ballot for the first time. Election officials must provide voting opportunities to people with disabilities “in a manner that provides the same opportunity for access and participation (including privacy and independence) as for other voters.” As of 2010, every state had received HAVA funding The statute, however, is not without problems. It does not provide a description of disabled voters and does not provide technical guidelines or minimum national standards for accessibility; thus, states and localities remain a patchwork of standards and practices. Furthermore, it is silent on absentee voting.¹⁰¹

The ABA and scholars promoting policy changes to increase the participation by people with disabilities in the election process have suggested accessible public buildings, leasing private accessible spaces, curbside voting, or absentee voting.¹⁰² “Expanding permanent absentee voter status so that people with disabilities do not have to constantly refile is another solution.”¹⁰³ Several states, including New York,¹⁰⁴ “allow permanent absentee voting status for people with disabilities, which eases the application and registration process for these voters.”¹⁰⁵ At least *24 one scholar suggests that “[a] better solution shifts the burden of casting the ballot from the individual voter onto state and local authorities by bringing the polling place to the voter via mobile polling.”¹⁰⁶ Since 1988, New York has had its own version of “mobile polling.”¹⁰⁷ If twenty-five or more applications originate from the covered facilities, Election Law § 8-407 provides that local election boards must provide on-site absentee balloting.¹⁰⁸ Covered facilities include those licensed by OMH and OPWDD, skilled nursing facilities, adult care facility, and hospitals or other facilities operated by the Veterans Administration.¹⁰⁹ The board may, in its discretion, provide that this procedure applies to all such facilities in the “county or city without regard to the number of absentee ballot applications received from the residents of any such facility.”¹¹⁰

To implement the law, the local board of elections must appoint, in the same manner as other inspectors, one or more bipartisan boards of inspectors, each composed of two such inspectors. These inspectors may be regular employees of the board of elections.¹¹¹ The board of elections must deliver to each board of inspectors all the absentee ballots in the custody of such board of elections which are addressed to residents of the facilities which such board of inspectors is assigned to attend, together with one or more portable voting booths of a type approved by the state board of elections and such other supplies as the board of inspectors will require to discharge its duties properly.¹¹² The board of inspectors must deliver each absentee ballot addressed to a resident of each such facility to the resident. If the resident is physically disabled the inspectors must, if necessary, deliver the ballot to the voter at his or her bedside.¹¹³ Except as otherwise provided, all ballots cast pursuant to these provisions must be cast in the manner provided by the Election Law for the casting of absentee ballots.¹¹⁴ After such ballots have been cast and sealed in the appropriate envelopes, they must be returned to the inspectors, and upon completion of its duties, the *25 board of inspectors must forthwith return all such ballots to the board of elections.¹¹⁵ All ballots cast under these provisions which are received before the close of the polls on election day by the board of elections charged with the duty of casting and canvassing such ballots, may be delivered to the election inspectors in the manner prescribed by the Election Law or retained at the board of elections and cast and canvassed pursuant to the provisions of the Election Law governing the canvass of absentee ballots as such board may, in its discretion, determine pursuant to the statutory procedure.¹¹⁶

While evidence of voter fraud is rare in the United States,¹¹⁷ it was actually such an allegation that prompted the New York

State Legislature to amend [Election Law 8-407](#) in 2001.¹¹⁸ Prior to the 2001 chapter amendment to require boards of elections to require inspectors at facilities housing twenty-five absentee voters, the production of inspectors was discretionary where the board had received five or more absentee voter applications. According to the sponsor's memorandum in support of the 2001 chapter amendment, certain adult care facilities where "elderly or mentally challenged" individuals resided maintained possession of absentee ballots that were sent to residents. This practice led to alleged irregularities described by the sponsor, as follows:

The facilities were found to have maintained possession of absentee ballots which were sent to patients through the U.S. mail. The ballots were not delivered to the addressees. The ballots were handed to partisan individuals, who would then meet with the patient to have person-to-person discussion regarding the completion of the ballot. After completing the ballot, the voter gave the ballot to the outside individual. In the end the voter never really knows if the ballot was actually delivered to the polling place. In certain instances, the patients were instructed to *26 merely sign their name and then the ballot would be completed by the outside individual. Some patients allegedly were not being allowed to complete the ballots on their own initiative. With this bill, inspectors would be made available pursuant to [Section 8-407 of the Election law](#). The patients would be allowed to complete their own ballots. The inspector would deliver the ballot to the patient and thus insure that the patient was making their own decision.¹¹⁹

The Election Law also provides at [Subdivision 8 of Section 8-407](#) that:

It shall be the duty of each such superintendent, administrator or director to assist the board of inspectors attending such facility in the discharge of its duties, including, but not limited to making available to such board of inspectors space within such facility suitable for the discharge of its duties.¹²⁰

In the experience of the authors and in the years preceding the COVID-19 pandemic, local boards of election complied with the requirements of the Election Law. Bipartisan teams of inspectors visited mental hygiene facilities when the boards of election received over twenty-five absentee ballot applications from a facility.¹²¹

*27 III. REFORMING NEW YORK LAW

[Election Law § 5-106](#) and related statutes implementing its provisions should be repealed. The exclusionary test is based upon an adjudication of incompetence that is not consistent with New York's civil statutes governing the appointment of guardians. Further, such broad exclusionary language runs afoul of federal law and the constitution as explained in this article. Outright repeal will cure any ambiguity that arises with respect to suffrage rights of people who may be adjudicated as incapacitated in either civil or criminal proceedings. While OCA has informally determined that [Section 5-106 of the Election Law](#) is obsolete and unenforceable, it remains a law and as such, is subject to misinterpretation and misapplication in the field by local election officials and other administrative bodies, such as OMH and OPWDD.

The public policy implications of repeal lead to the inevitable question of whether the statute should be replaced. If replaced, any statute New York adopts should properly balance the need to ensure the accuracy and legitimacy of every vote cast without disenfranchising people with mental disabilities. The ABA offers a remedy through its resolution endorsing an affirmative guarantee of the voting rights of persons with diminished mental capacities. It states, "[s]tate constitutions and statutes that permit exclusion of a person from voting on the basis of mental incapacity, including guardianship and election laws, should explicitly state that the right to vote is retained," except where there has been a judicial finding that a voter lacks the requisite voting capacity.¹²² This recommendation goes beyond mere silence on the voting rights of persons with diminished mental capacities, which might be interpreted as tacit approval of *28 disenfranchisement. It encourages states to actively protect the voting rights of persons with cognitive disabilities. The resolution goes on to propose the following criteria that must be met to disenfranchise a potential voter:

The exclusion is based on a determination by a court of competent jurisdiction; [a]ppropriate due process protections have been afforded; [t]he court finds that the person cannot communicate, with or without

accommodations, a specific desire to participate in the voting process; and [t]he findings are established by clear and convincing evidence.¹²³

The ABA proposal provides procedural and substantive due process protections to voters who might be disfranchised. While the ABA proposal is not above criticism,¹²⁴ it is preferable to the current New York statute which has the potential to disenfranchise voters by administrative fiat or misinterpretation of what it means to be adjudicated “incompetent.”

In addition to repealing [Election Law § 5-106](#), the guardianship statutes in New York should be subject to conforming amendments. For example, [Section 81.29\(a\) of the Mental Hygiene Law](#) should be amended to read that an “incapacitated person for whom a guardian has been appointed retains all powers and rights except those powers and rights which the guardian is granted, *including the right to vote*” (new language in italics). Similarly, Article 17-A of the Surrogate’s Court Procedure Act should be amended to clarify that the appointment of a guardian for a person with developmental disabilities does not result in the person being disenfranchised. Ultimately, the laws of New York must be clear that adjudications of incapacity or appointments of guardians are not the equivalent of civil death¹²⁵ for persons with mental *29 disabilities.

CONCLUSION

While states, as well as the federal government, have a legitimate interest in preserving the integrity of the ballot, eliminating barriers to suffrage should be a priority among our elected officials and those who administer our election laws. Barriers can be physical or originate in laws that categorically exclude people from voting. It is clear that courts will uphold non-discriminatory voting restrictions, which protect that integrity while also safeguarding the rights of incapacitated individuals. However, New York still maintains an antiquated voting statute that is categorically discriminatory, excluding people “adjudicated incompetent” from suffrage. The statute does nothing to promote intelligent use of the ballot and may violate the equal protection rights of prospective voters. While New York has increased voting opportunities most recently through the expansion of absentee voting, ambiguity regarding the right of people with mental disabilities to vote is entrenched. New York should enact a comprehensive civil rights reform package that reaches the Election Law and related statutes where people labor under the cloud of “incapacity” to eliminate any uncertainty surrounding the exercise of their personal and civil rights.

Footnotes

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¹ See [Kramer v. Union Free Sch. Dist. No. 15](#), 395 U.S. 621, 626 (1969); [Harper v. Va. State Bd. of Elections](#), 383 U.S. 663, 667 (1966); [Reynolds v. Sims](#), 377 U.S. 533, 561-62 (1964) (“[T]he right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.”).

² See [Lassiter v. Northampton Cty. Bd. of Educ.](#), 360 U.S. 45, 50 (1959).

³ [Harper](#), 383 U.S. at 665.

⁴ N.Y. MENTAL HYG. LAW §§ 33.01, § 41.41(2)(p) (McKinney 2021). Other states that have similar statutory prohibitions against disenfranchising citizens based on their receipt of services or hospitalization for mental disabilities include Alabama (ALA. CODE §§ 22-56-4(a)(5), 38-9C-4(7) (2021)); Colorado (COLO. REV. STAT. §27-65-120 (2021)); Connecticut (CONN. GEN. STAT. § 17a-541 (2021)); Florida (FLA. STAT. § 393.13(3)(j) (2020)); Hawaii (HAW. REV. STAT. § 334-61 (2021)); Idaho (IDAHO CODE §§ 66-346(a)(6), 66-412(3)(j) (2021)); Louisiana (LA. STAT. ANN. § 28:171(A) (2020)); Maine (ME. REV. STAT. ANN. tit. 34-B, § 3803(A-C) (2019)); Maryland (MD. CODE ANN., HEALTH-GEN. §§ 7-1004, 10-704 (2021)); Massachusetts (104 MASS. CODE REGS. 27.13(1) (2021); Minnesota (MINN. STAT. § 253B.23(2)(a) (2021)); Mississippi (MISS. CODE ANN. § 41-21-101 (2021)); New Hampshire (N.H. REV. STAT. ANN. §§ 135-C:56(II), 171-A:14(1) (2020)); New Jersey (N.J. STAT. ANN. §§ 30:4-24.2(a), 30:6D-4(a) (2021)); North Carolina (N.C. GEN. STAT. § 122C-58) (2020)); North Dakota (N.D. CENT. CODE § 25-01.2-03(1) (2021)); Ohio (OHIO REV. CODE ANN. §§ 5122.301, 5123.62(W) (2021)); Oregon (OR. REV. STAT. § 430.210(2) (2020)); Rhode Island (40 R.I. GEN. LAWS §§ 40.1-24.5-5(f)(10), 40.1-24.5-5 (2020)); South Dakota (S.D. CODIFIED LAWS §§ 27A-12-1.2, 27B-7-44 (2021)); Tennessee (TENN. CODE ANN. § 33-3-102(a) (2021)); West Virginia (W. VA. CODE § 27-5-9(a) (2021)); and Wisconsin (WIS. STAT. ANN. § 51.59 (1) (2019)).

⁵ N.Y. ELEC. LAW § 5-106 (McKinney 2021).

⁶ As this article will explain, the 1992 chapter amendments to the Mental Hygiene Law repealed New York's former committee statute. *See* 1992 N.Y. Laws ch. 698.

⁷ *See, e.g.*, N.Y. CRIM. PROC. LAW § 730.10 et seq. (2021). *See* further discussion, *infra*, Part III.

⁸ *See generally* Jennifer A. Bindel, *Equal Protection Jurisprudence and the Voting Rights of Persons with Diminished Mental Capacities*, 65 N.Y.U. ANN. SURV. AM. L. 87 (2009). *See also* *Voting*, BAZELON CENTER FOR MENTAL HEALTH LAW, www.bazon.org/our-work/voting [https://perma.cc/GK7Y-V4V9] (last visited Apr. 16, 2021).

⁹ U.S. CONST. art. I, §§ 2, 4. *See also* *Burdick v. Takushi*, 504 U.S. 428, 433 (1992); *Bullock v. Carter*, 405 U.S. 134, 140-41 (1972).

¹⁰ 52 U.S.C.A. § 20507 (West 2021).

¹¹ Bindel, *supra* note 8, at 92. *See also* sources cited *supra* note 4.

¹² *State Laws Affecting the Voting Rights of People with Mental Disabilities*, BAZELON CTR. FOR MENTAL HEALTH L., <http://www.bazon.org/wp-content/uploads/2020/10/Survey-of-State-Laws-Affecting-Voting-Rights-of-People-with-Disabilities-2020-Update-FINAL.pdf> [https://perma.cc/6BKM-4U4P] (last visited Apr. 10, 2021) (summarizing each state's statutory and constitutional provisions impacting the voting rights of individuals with mental disabilities). *See also* Bindel, *supra* note 8, at 92-97 (categorizing various state laws addressing disenfranchisement on the basis of mental disability as utilizing (1) "a general determination of incompetence"; (2) "a specific judicial determination"; or

(3) some combination of the two).

¹³ See, e.g., [HAW. REV. STAT. § 11-23\(a\)](#) (2021) (authorizing elections clerk to investigate and make determination as to whether a person deemed to have a “mental incapacity” is “incapacitated to the extent that the person lacks sufficient understanding or capacity to make or communicate responsible decisions concerning voting.”).

¹⁴ For example, Utah and Vermont both permit the director of a hospital in which an individual is receiving treatment for a mental illness to restrict patients’ right to vote if they believe that such restrictions are necessary for the welfare of the patients. See [UTAH CODE ANN. §62A-15-641\(1\)](#) (2021). See also [VT. STAT. ANN. tit. 18, § 7705\(a\)\(3\)](#) (2021).

¹⁵ See, e.g., [ALA. CONST. art. 5 § 2](#) (“No person may vote who has been judicially determined to be of unsound mind unless the disability has been removed.”); [ARK. CONST. amend. 51 § 11\(a\)\(6\)](#) (voter registration may be cancelled if person has “been adjudged mentally incompetent by a court of competent jurisdiction.”); [CAL. ELEC. CODE § 2208\(a\)](#) (Deering 2021) (person who is under guardianship or has been found not guilty by reason of insanity may be disqualified from voting if a court “finds that the person cannot communicate, with or without reasonable accommodations, a desire to participate in the voting process.”); [DEL. CODE ANN. tit. 15, § 1701](#) (2020) (a person may not vote if there has been “a specific finding in a judicial guardianship or equivalent proceeding, based on clear and convincing evidence, that the individual has a severe cognitive impairment which precludes exercise of basic voting judgment.”).

¹⁶ See Bindel, *supra* note 8, at 95-96 (noting that guardianship hearings may be “focused on other, more immediately pressing aspects of the person’s capabilities, such as the ability to secure food and housing, [rather] than on his or her capacity to vote.”).

¹⁷ [Bullock v. Carter](#), 405 U.S. 134, 140-41 (1972) (“Although we have emphasized on numerous occasions the breadth of power enjoyed by the States in determining voter qualifications and the manner of elections, this power must be exercised in a manner consistent with the Equal Protection Clause of the Fourteenth Amendment.”); [Harper v. Va. State Bd. of Elections](#), 383 U.S. 663, 665 (“[O]nce the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment.”).


¹⁸ [Dunn v. Blumstein](#), 405 U.S. 330, 337 (1972) (emphasis omitted) (quoting [Kramer v. Union Free Sch. Dist.](#), 395 U.S. 621, 627 (1969)). Subsequent decisions of the Supreme Court have evaluated Equal Protection challenges to statutes that burden citizens’ right to vote as a balancing test, under which “the rigorosity of [the] inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights.” [Burdick v. Takushi](#), 504 U.S. 428, 434 (1992). Nevertheless, where a challenged statute completely bars a class of citizens from voting (rather than, for example, regulating the way citizens may exercise that right), such restrictions must be necessary to promote a compelling state interest. *Id.* But see Bindel, *supra* note 8, at 111 (arguing that “there is no guarantee that a state law or constitutional provision excluding persons with diminished mental capacities from voting would be evaluated under strict scrutiny by a modern court.”).

¹⁹ [52 U.S.C.A. § 20507\(a\)\(3\)\(B\)](#) (2021) (allowing states to remove voters from rolls based on “mental incapacity,” though not requiring them to do so).

²⁰ [Doe v. Rowe](#), 156 F. Supp. 2d 35, 51 (D. Me. 2001) (offering this justification for a state’s decision to

disenfranchise some voters with mental disabilities, which the parties agreed was a “compelling” asserted interest).



21 Pamela S. Karlan, *Framing the Voting Rights Claims of Cognitively Impaired Individuals*, 38 MCGEORGE L. REV. 917, 924-25 (2007).

22 *Id.* at 925 (quoting  *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006)). See also Naomi Doraisamy, *Out of Mind, Out of Sight: Voting Restrictions Based on Mental Competency*, 56 IDAHO L. REV. 135, 140-41 (2020).

23 See Karlan, *supra* note 21, at 925. For case studies of instances in which individuals have been found to have fraudulently cast ballots on behalf of individuals with physical or mental disabilities without those individuals’ full participation and consent, or in contravention of their stated wishes, see Jessica A. Fay, Note, *Elderly Electors Go Postal: Ensuring Absentee Ballot Integrity for Older Voters*, 13 ELDER L.J. 453, 454-55 (2006).



24  *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (quoting  *Eu v. S.F. Cty. Democratic Cent. Comm.*, 489 U.S. 214, 231 (1989)).


25 Doraisamy, *supra* note 22, at 145.

26  *Doe v. Rowe*, 156 F. Supp.2d 35, 50-52 (D. Me. 2001). On the other hand, even statutes that may pose some additional burdens to individuals with mental disabilities may withstand equal protection challenges so long as the state provides some mechanism to “carve out” voting rights for individuals within the class who are deemed to have sufficient capacity to vote. See  *Mo. Prot. and Advocacy Servs., Inc. v. Carnahan*, 499 F.3d 803, 808-09 (8th Cir. 2007) (finding that state statute prohibiting voting by individuals appointed a guardian “by reason of incapacity” did not violate equal protection because, in fact, “probate courts retain the authority to preserve a ward’s right to vote as part of the statutory mandate to minimize deprivation of a ward’s liberty.”).

27 CAL. ELEC. CODE § 2208(a) (West 2021).


28 WIS. STAT. ANN. § 54.25(2)(c)(1)(g) (2021).

29 E.g., IOWA CODE § 633.552(3) (2021) (in a guardianship proceeding, court must make a separate determination regarding person’s capacity to vote and “shall find a protected person incompetent to vote only upon a determination that the person lacks sufficient mental capacity to comprehend and exercise the right to vote.”); KY. REV. STAT. ANN. § 387.590(7) (West 2021) (“A ward shall only be deprived of the right to vote if the court separately and specifically makes a finding on the record.”);  OKLA. STAT. tit. 30, § 3-113(B)(1) (2021) (“The court shall make specific determinations regarding the capacity of the subject [under guardianship].”);  WASH. REV. CODE § 11.88.010(5) (2021) (“Imposition of a guardianship ... shall not result in the loss of the right to vote unless” the court has specifically determined that the person “lacks the capacity to understand the nature and effect of voting such that she or he cannot make an individual choice.”).

30 Laws that prohibit people from voting based on categorical assumptions about their mental capabilities, rather than individualized determinations, may also violate Title II of the Americans with Disabilities Act (“ADA”). See  42 U.S.C.A. § 12132 (2021). See also U.S. DEP’T OF JUSTICE, CIVIL RIGHTS DIV., THE AMERICANS WITH

DISABILITIES ACT AND OTHER FEDERAL LAWS PROTECTING THE RIGHTS OF VOTERS WITH DISABILITIES 1, https://www.ada.gov/ada_voting/ada_voting_ta.pdf [<https://perma.cc/EPA4-MVFN>] (last visited Apr. 11, 2021) (“People with intellectual or mental health disabilities have been prevented from voting because of prejudicial assumptions about their capabilities Title II of the ADA requires state and local governments (“public entities”) to ensure that people with disabilities have a full and equal opportunity to vote.”).

31  N.Y. ELEC. LAW § 5-106 (McKinney 2021).

32 N.Y. COMP. CODES R. & REGS. tit. 9, § 6217.10 (2020). “NYS Voter” is the statewide voter registration list. It is maintained by the State Board Elections. *See also*  N.Y. ELEC. LAW § 5-708 (McKinney 2021) (“It shall be the duty of every court having jurisdiction over such matters or the office of court administration to transmit to the appropriate board of elections or, in the discretion of the office of court administration, to the state board of elections, at least quarterly, of the name, residence address and birthdate of any person of voting age who has been adjudicated as incompetent.”).

33 1909 N.Y. Laws 175.

34  N.Y. ELEC. LAW § 5-106(6) (McKinney 2021).

35 *Manhattan State Citizens’ Grp., Inc. v. Bass*, 524 F. Supp. 1270, 1271 (S.D.N.Y. 1981).

36 *See*  N.Y. CONST. art. II §§ 1,  3.

37 *Manhattan State Citizens’*, 524 F. Supp. at 1273-74 (internal citations omitted).

38 *Manhattan State Citizens’*, 524 F. Supp. at 1274.

39 *Manhattan State Citizens’*, 524 F. Supp. at 1274-75 (citations omitted).

40 *Manhattan State Citizens’*, 524 F. Supp. at 1274-75 (emphasis added).

41 *See Doraisamy, supra* note 22, at 152 (noting that “differences between judges’ use of full and limited guardianships” were not understood and consequently “Missouri purged more than 10,000 registered voters during the 2008-2016 election cycles because these voters had been legally determined as ‘mentally incompetent.’”).

42 *See* Rose Mary Bailly & Charis B. Nick Torok, *Should We Be Talking? - Beginning a Dialogue on Guardianship for the Developmentally Disabled in New York*, 75 ALB. L. REV. 807, 812 (2012).

43 The foundational concepts comparing Article 17-A of the Surrogate’s Court Procedure Act and Mental Hygiene Law Article 81 proceedings is partially drawn from an earlier article by co-author Sheila Shea, with Carol Pressman. *See* Sheila E. Shea & Carol Pressman, *Guardianship: A Civil Rights Perspective*, 90 N.Y. ST. B. ASS’N. J. 19, 19 (2018).

44 Jean Callahan, Raquel Malina Romanick & Angela Ghesquiere, *Guardianship Proceedings in New York State: Findings and Recommendations*, 37 BIFOCAL 83, 84 n.1 (2016).

45 See Bailly & Torok, *supra* note 42, at 817; *In re Fisher*, 552 N.Y.S.2d 807, 810 (N.Y. Sup. Ct. 1989).

46 *In re Fisher*, 552 N.Y.S.2d at 810. See also Shea & Pressman, *supra* note 43, at 19, 21.

47 See Nora von Stange & Gary von Stange, *Guardianship Reform in New York: The Evolution of Article 81*, 21 HOFSTRA L. REV. 755, 759 (1993).

48  N.Y. MENTAL HYG. LAW § 77.01 (repealed 1992).

49  N.Y. MENTAL HYG. LAW § 78.02 (repealed 1992).

50  N.Y. MENTAL HYG. LAW § 77.19 (repealed 1992).

51 G. Oliver Koppell & Kenneth J. Munnely, *The New Guardian Statute: Article 81 of the Mental Hygiene Law*, N.Y. ST. B. ASS'N. J., Feb. 1993, at 16, 16.

52 See  *In re Grinker*, 573 N.E.2d 536 (N.Y. 1991).

53 *See id.*

54  *In re Grinker*, 573 N.E.2d at 537.

55 Law Revision Comm'n, Memorandum of the Law Revision Commission Relating to Article 81 of the Mental Hygiene Law Appointment of a Guardian for Person Needs and/or Property Management (1992).

56 See N.Y. MENTAL HYG. LAW §§ 81.21,  81.22 (McKinney 2021).

57 N.Y. MENTAL HYG. LAW § 81.01 (McKinney 2021).

58  N.Y. MENTAL HYG. LAW § 81.29 (a) (McKinney 2021).

59  N.Y. SURR. CT. PROC. ACT §§ 1750, 1750-a (McKinney 2021).

60  N.Y. SURR. CT. PROC. ACT §§ 1750, 1750-a (McKinney 2021).

61 *Id. But see In re Derek*, 821 N.Y.S.2d 387, 390 (N.Y. Surr. Ct. 2006) (holding that in a contested Article 17-A proceeding, “the physician-patient privilege applies” and certificates obtained in violation of the privilege would not be considered by the court).

62 *See Bailly & Torok*, *supra* note 42, at 821-25 (stating that (1) the standard for determining guardianship is the “best interest of the individual,” (2) “the statute [only] requires the presence of the individual for whom the guardian is sought ... [and if the court determines their presence would not be in his or her best interest] the court may appoint a guardian ad litem,” and (3) “the statute mandates that a hearing be held unless waived by the court.”).

63 N.Y. SURR. CT. PROC. ACT § 1750-A (McKinney 2021).

64 *In re Chaim A.K.*, 885 N.Y.S.2d 582, 587 (N.Y. Surr. Ct. 2009).

65 *Voting in New York State for People with Disabilities*, N.Y. OFFICE FOR PEOPLE WITH DEVELOPMENTAL DISABILITIES, <https://opwdd.ny.gov/access-supports/frequently-asked-questions-about-voting> [<https://perma.cc/T2W8-TKFL>] (last visited Apr. 9, 2021). Care managers are employed by Care Coordination Organizations and assist people with developmental disabilities in accessing Medicaid-funding services.

66 Kristin Booth Glen, *Not Just Guardianship: Uncovering the Invisible Taxonomy of Laws, Regulations, and Decisions that Limit or Deny the Right of Legal Capacity for People with Intellectual and Developmental Disabilities*, 13 ALB. GOV'T L. REV. 25, 49 (2020).

67  N.Y. CRIM. PROC. LAW § 730.10 (McKinney 2021).

68 *See*  *Drope v. Missouri*, 420 U.S. 162, 171-72 (1975).

69  *Pate v. Robinson*, 383 U.S. 375, 377-78 (1966).

70 N.Y. PENAL LAW § 40.15 (McKinney 2021).


71 *See* N.Y. CRIM. PROC. LAW § 220.15(1) (McKinney 2021).

72 *See*  N.Y. CRIM. PROC. LAW § 330.20(2) (McKinney 2021).

73  *Dusky v. United States*, 362 U.S. 402, 402 (1960).

74 *People v. Mendez*, 801 N.E.2d 382, 384 (N.Y. 2003) (citing *People v. Christopher*, 482 N.E.2d 45, 49 (N.Y. 1985)).

75  N.Y. CRIM. PROC. LAW § 730.50(1) (McKinney 2021).

76  N.Y. CRIM. PROC. LAW § 730.50(1) (McKinney 2021). A 2012 amendment permits outpatient commitment, but only with the consent of the District Attorney. 2012 N.Y. Sess. Laws ch. 56.

77 Memorandum from Michael Colodner, Counsel for Office of Court Administration, to Judge Ann Pfau (November 13, 2009) (on file with author).

78 As a provider of service, OMH operates 24 inpatient facilities for civil, forensic, and research purposes. There are approximately 3,000 inpatient beds operated by OMH. *See About OMH*, OFFICE OF MENTAL HEALTH, <https://omh.ny.gov/omhweb/about/> [<https://perma.cc/6ERW-93RR>] (last visited Apr. 10, 2021).

79 Memorandum from Amanda Saake, Dir., Office of Consumer Affairs to Exec. Dirs. Office of Mental Health (Oct. 1, 2020) (on file with author).

80 *Id.*

81  N.Y. CRIM. PROC. LAW § 730.10(1) (McKinney 2021).

82 Seven states, California, Delaware, Iowa, Maryland, Nevada, Washington, and Wisconsin, make some attempt to define the quantum of capacity that would make an individual eligible to vote. However, two of these states-- Delaware and Iowa--do so only in vague terms. DEL. CODE ANN. tit. 15, § 1701 (2021) (explaining disqualification to vote where established by “clear and convincing evidence that the individual has a severe cognitive impairment which precludes exercise of basic voting judgment.”); IOWA CODE § 633.552 (2020) (explaining incompetence of an individual to vote “upon determining that the person lacks sufficient mental capacity to comprehend and exercise the right to vote.”). There is no case law in Delaware or Iowa that further elucidates the intended meaning of these terms.

83 Based upon the increasing numbers of Americans with cognitive disorders and the prevalence of elderly voters among the American electorate, as well as the narrow margin of victory by which many elections are won, the University of the Pacific’s McGeorge School of Law convened a 2007 symposium on facilitating voting as people age. The American Bar Association’s Commission on Law and Aging was a sponsoring organization, and subsequently the American Bar Association’s House of Delegates approved a resolution from the Association’s Commission on Law and Aging, as well as its Standing Committee on Election Law and Commission on Mental and Physical Disability Law, embodying the symposium’s recommendations. A.B.A., VOTING BY INDIVIDUALS WITH DISABILITIES (2007), https://www.americanbar.org/groups/public_interest/election_law/policy/07a121/ [<https://perma.cc/YG8H-BTGX>].

84 *Id.*

85 *See* Benjamin A. Hoerner, *Unfulfilled Promise: Voting Rights for People with Mental Disabilities and the Halving of HAVA’s Potential*, 20 TEX. J. ON C.L. & C. R. 89, 127 (2014) (arguing that the ABA standard “does not mirror the level of cognition necessary to understand the effect of the vote,” and proposing the adoption of federal standard that would encourage specific consideration of the individual’s understanding of the voting process).

86 CAL. ELEC. CODE § 2208(a) (Deering 2021); MD. CODE ANN., ELEC. LAW § 3-102(b)(2) (West 2021);
NEV. REV. STAT. § 293.540(2)(b) (2021).

87 CAL. ELEC. CODE § 2208(b) (Deering 2021).

88 WIS. STAT. § 54.25(2)(c)(1)(g) (2021).

89 WASH. REV. CODE § 11.88.010(5) (2021).

90 2005 Wash. Sess. Laws 776.

91 Rabia Belt, *Contemporary Voting Rights Controversies through the Lens of Disability*, 68 STAN. L. REV. 1491, 1493 (2016).

92 Press Release, Ctrs. for Disease Control and Prevention, CDC: 1 in 4 US Adults Live With a Disability (Aug. 16, 2018), <https://www.cdc.gov/media/releases/2018/p0816-disability.html> [<https://perma.cc/ZJH8-L3MF>].

93 According to a 2017 report by the U.S. Government Accountability Office, “Voters with Disabilities: Observations on Polling Place Accessibility and Related Federal Guidance,” roughly two-thirds of the examined polling places had at least one potential barrier such as lack of accessible parking, poor paths to the building, steep ramps, or lack of a clear path to the voting area. Although most polling places had at least one accessible voting system, roughly one-third had a voting station that did not afford an opportunity for a private and independent vote. The report also noted that Department of Justice guidance does not clearly state the extent to which federal accessibility requirements apply to early in-person voting. People with disabilities also continue to report barriers including a lack of accessible election and registration materials prior to elections, lack of transportation to polling places, and problems securing specific forms of identification required by some states. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-18-4, VOTERS WITH DISABILITIES: OBSERVATIONS ON POLLING PLACE ACCESSIBILITY AND RELATED FEDERAL GUIDANCE (2017). See Elizabeth Pendo, *Blocked from the Ballot Box: People with Disabilities*, A.B.A. HUM. RTS. MAG. (Jun. 26, 2020), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/voting-in-2020/blocked-from-the-ballotbox/ [<https://perma.cc/DXF2-G4M4>].

94 52 U.S.C. § 20104(a) (2021).

95 Belt, *supra* note 90, at 1502.

96 National Voter Registration Act of 1993, 52 U.S.C. §§ 20501(b), 20506(a) (2021).

97 Belt, *supra* note 90, at 1503 (pointing to minimal enforcement activity by the United States Department of Justice (DOJ)). The DOJ websites reports six settlements under the Act. *Voting Section Litigation*, U.S. DEP'T OF JUSTICE (last updated Mar. 3, 2021), <https://www.justice.gov/crt/voting-section-litigation#nyracases>

[<https://perma.cc/KLX2-BZPG>].

98 Belt, *supra* note 90, at 1503.


99 Help America Vote Act of 2002, Pub. L. No. 107-252, 116 Stat. 1666 (2002). See  52 U.S.C. § 21081 (2021).

100 Arlene Kanter & Rebecca Russo, *The Right of People with Disabilities to Exercise Their Right to Vote under the Help America Vote Act*, 30 MENTAL & PHYSICAL DISABILITY L. REP. 852, 852 (2006).

101 Belt, *supra* note 90, at 1504.

102 See *id.* at 1516-17; VOTING BY INDIVIDUALS WITH DISABILITIES: RECOMMENDATION AND REPORT (A.B.A. 2007).

103 Belt, *supra* note 90, at 1517.

104 See  N.Y. ELEC. LAW § 8-400(5) (McKinney 2021) (providing that “[a] voter who claims permanent illness or physical disability may make application for an absentee ballot and the right to receive an absentee ballot for each election thereafter as provided herein without further application, by filing with the board of elections an application which shall contain a statement to be executed by the voter. Upon filing of such application, the board of elections shall cause the registration records of the voter to be marked ‘Permanently Disabled’ and thereafter shall send an absentee ballot for each succeeding primary, special or general election to such voter at his or her last known address by first class mail with a request to the postal authorities not to forward such ballot but to return it in five days in the event that it cannot be delivered to the addressee. The mailing of such ballot for each election shall continue until such voter’s registration is cancelled.”).

105 Belt, *supra* note 90, at 1517.

106 Belt, *supra* note 90, at 1517.

107 See *id.*

108  N.Y. ELEC. LAW § 8-407(1) (McKinney 2021).

109  N.Y. ELEC. LAW § 8-407(1) (McKinney 2021).

110  N.Y. ELEC. LAW §8-407(1) (McKinney 2021).

111  N.Y. ELEC. LAW § 8-407(2) (McKinney 2021).

112  N.Y. ELEC. LAW § 8-407(5) (McKinney 2021).

113  N.Y. ELEC. LAW § 8-407(8) (McKinney 2021).

114  N.Y. ELEC. LAW § 8-407 (11) (McKinney 2021).



115  N.Y. ELEC. LAW § 8-407(12)-(13) (McKinney 2021).


116  N.Y. ELEC. LAW § 8-407 (15) (McKinney 2021).

117 *See* Belt, *supra* note 90, at 1505. Despite allegations of pervasive voter fraud, studies have not found it to be a widespread phenomenon. For example, one study found thirty-one cases of voter fraud out of over one billion ballots cast between 2000 and 2014. *Id. See* Jessica A. Fay, *Elderly Electors Go Postal: Ensuring Absentee Ballot Integrity for Older Voters*, 13 *ELDER L. J.* 453, 461 (2005). Commentators have recognized, however, that people in long term care facilities may suffer voter fraud due to interference by third parties. *Id.* at 461-62.

118 2001 N.Y. Laws 1470.

119 S.B. 4807-B, 224th Leg., Reg. Sess. (N.Y. 2001).

120  N.Y. ELEC. LAW § 8-407(8) (McKinney 2021). Executive Orders issued by Governor Andrew Cuomo during the height of the COVID-19 pandemic in 2020 suspended mobile polling. *See, e.g.*, Executive Order No. 202, *N.Y. COMP. CODES R. & REGS. tit. 9, § 8.202.26 (2020)* (barred inspectors from attending or visiting facilities, or “physically deliver[ing] ballots to residents of facilities,” and required they “instead mail or deliver absentee ballots to [facility] voters.”). At the same time, absentee ballot eligibility was expanded as a pandemic response for any election held on or before June 23, 2020. Chapter 139 of the Laws of 2020 amended  *Election Law § 8-400* to codify the pandemic response and expand absentee voting. *See* 2020 N.Y. Sess. Laws 1 (expanded definition of “illness” to include a “risk of contracting or spreading a disease that may cause illness to the voter or to other members of the public.”). The law became effective August 20, 2020 and expires January 1, 2022. *Id.*

121 For example, during the 2012 election cycle the Mental Hygiene Legal Service for the Third Judicial Department canvassed local boards of election in counties where facilities licensed or operated by OMH or OPWDD were present to determine compliance with  *Election Law § 8-407*. Response was uniform by the local boards who informed the Service of the number of absent ballots requested and in counties where requests exceeded twenty-five or more ballots, inspectors visited the facilities. *See, e.g.*, Letter from the Comm’rs of the Franklin Cty. Bd. of Elections, to Sheila Shea, Dir., Mental Hygiene Legal Serv. (Oct. 24, 2012) (on file with author); Letter from the Comm’rs of the Chenango Cty. Bd. of Elections, to Sheila Shea, Dir., Mental Hygiene Legal Serv. (Oct. 22, 2012) (on file with author); Letter from the Deputy Comm’rs of the Chemung Cty. Bd. of Elections, to Sheila Shea, Dir., Mental Hygiene Legal Serv. (Oct. 22, 2012) (on file with author); Letter from the Comm’rs of the St. Lawrence Cty. Bd. of Elections, to Sheila Shea, Dir., Mental Hygiene Legal Serv. (Oct. 18, 2012) (on file with author); Letter from the Comm’rs of the Albany Cty. Bd. of Elections, to Sheila Shea, Dir., Mental Hygiene Legal Serv. (Oct. 17, 2012) (on file with author).

¹²² VOTING BY INDIVIDUALS WITH DISABILITIES: RECOMMENDATION AND REPORT 07A121 (A.B.A. 2007).

¹²³ *Id.*

¹²⁴ See Bindel, *supra* note 8, at 132. As stated by the author, “[r]equiring the involvement of a court, as opposed to election officials or an administrative body, consumes prized judicial resources.” *Id.* Moreover, the ABA recommendation does not address when a judicial disenfranchisement decision should be made if the person is not subject to a guardianship proceeding. *Id.*

¹²⁵ Former Congressman Claude Pepper famously said of guardianships, “[t]he typical [person subject to guardianship] has fewer rights than the typical convicted felon It is, in one short sentence, the most punitive civil penalty that can be levied against an American citizen, with the exception, of course, of the death penalty.” H. COMM. ON AGING, ABUSES IN GUARDIANSHIP OF THE ELDERLY AND INFIRM: A NATIONAL DISGRACE, 100TH CONG. H.R. REP. NO. 100-641, at 4 H.R. REP. NO. 100-641, at 4 (Comm. Print 1987).

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