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# Competency and Voters with Psychiatric Disabilities: Considerations for Social Workers

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*The ability of those with psychiatric disabilities to vote is an important activity impacted by competency issues and potentially overlooked by social workers. The purpose of this article is to assist social workers in making informed decisions about preserving and supporting voter participation among those with psychiatric disabilities. Common issues regarding the voting rights of individuals with psychiatric disabilities within the legal system and other systems of interest to social workers are explored.*

Key words: *voter competency, psychiatric disability, social work*

Voting is defined by, and in turn defines, the democratic process. The Supreme Court deemed voting a “fundamental right” and declared, “no right is more precious” (Harper v. Virginia, 1966; Wesberry v. Sanders, 1964). To exercise one’s right to vote is the manifestation of personal power in the selection of leadership that will represent the values and needs of the individual. The National Association of Social Workers expresses these sentiments by speaking to the right itself, “voting is a basic right, and citizens should be assisted in all possible ways to exercise that right; any action that denies access or discourages any citizen from voting should be prohibited” and by speaking to the responsibilities of the profession ... social workers are encouraged to help educate clients to be informed voters and to mobilize them to vote in elections” (2006, p. 377). Social workers can be instrumental in furthering voter participation and eliminating the barriers that affect it. They act both as agents for empowerment of those with

psychiatric disabilities, helping them move toward normalized and productive community participation and as overseers of the rights for these individuals to take action on their own behalves (Coppock & Dunn, 2009). However, in order to do so, social workers must familiarize themselves with obstacles to voting that lie both inside and outside of the legal system.

Individuals with psychiatric disabilities commonly face voting disenfranchisement because of concerns about their competence to vote (Schur, Adya, & Kruse, 2008). The legal disenfranchisement of those with psychiatric disabilities is achieved, however innocently, through the appointment of a guardian, which results in the person's loss of legal rights (Schriner, Ochs, & Shields, 1997). As informants about consumer functioning in the guardianship process, social workers are often instrumental in determining the outcome of guardianship proceedings to include the preservation of voting rights. The social work role in addressing voter participation also rests in the need for social workers to confront their own perceptions of voter competence. Are these perceptions based on an accurate definition and assessment of voter competency?

The purpose of this article is to assist social workers in making informed decisions about preserving and supporting voter participation among those with psychiatric disabilities. Framed by a socio-legal perspective, contemporary law regarding voting rights and guardianship, a legal definition of competency and a proposed assessment for voter competency are presented. This article then proceeds to examine barriers to voting that occur outside of the legal system and how social workers can advocate in these situations.

At the outset, it is important to note that the literature in the area of voter rights and voter competence primarily addresses cognitive impairments as the disability of concern. Legal writings related to psychiatric disabilities and voting rights are sparse. There are important differences in functional impairments between those with cognitive disabilities and those with psychiatric disabilities. However, the legal system perceives these functional disabilities as similar, thus making the application of this literature to those with psychiatric disabilities credible.

## Competence, Voting Rights & Legal Guardianship

Throughout American history the suffrage struggles of disenfranchised groups, women, persons of color, and most recently, those with disabilities, reflect the importance and power of voting. Withholding the right to vote from certain categories of citizens has been justified as necessary to “maintain the intelligence and integrity of the electorate” (Hurme & Appelbaum, 2007, p. 932). Past suffrage battles were waged to fight the assumption that categorization by color, gender or disability posed an inherent threat to a credible electorate.

The victory for voting rights is reflected in the fifteenth and nineteenth amendments of the United States Constitution, the supreme law of the land and several Acts of Congress. The Fifteenth Amendment reads, “the right of citizens of the United States to vote shall not be denied by the United States or by any State on account of race, color, or previous condition of servitude” (Constitutional Amendment XV, section 1). The Nineteenth Amendment provides the same protections for women, ensuring that women have the right to vote (Constitutional Amendment XIX).

Further protections of voting rights were provided by the United States Congress with the passing of the Voting Rights Act of 1964, the Americans with Disabilities Act of 1990 (ADA), and the National Voter Registration Act of 1993 (Keyssar, 2000; Monk, 2003; Schriener, Ochs, & Shields, 1997). The Voting Rights Act of 1964 supplemented the Fifteenth Amendment’s protection of racial minorities by prohibiting the practice of requiring “otherwise qualified voters to pass literacy tests in order to register to vote” (U.S. Department of Justice, 1965). Voter protection was extended to those with disabilities through The Americans with Disabilities Act by requiring that polling places be physically accessible to people with disabilities when federal elections occur (U.S. Department of Justice, 1984). Individuals with disabilities received additional protection from the National Voter Registration Act, which requires voter registration opportunities to be in place in all offices that provide public assistance and within state funded programs that provide services to individuals with disabilities (U.S. Department of Justice, 1965).

Regardless of the progress that has been made in the protection of voting rights, those with developmental disabilities, cognitive impairments, and psychiatric disabilities face voting disenfranchisement based on concerns about their competence to vote, or lack thereof. The states rule in this regard; the federal laws, which address voting rights, do not preempt the states' authority to disqualify voters based on their competency, or lack thereof.

### Voting Rights & Guardianship Reforms

Competency is an issue at the center of all guardianship laws, which are generally constructed and enforced by the separate states. Reforms in guardianship laws have begun to address the right to vote. One contributor to this wave of reform is found in the 2001 Maine case of *Doe v. Rowe*. In this case, the plaintiffs, three women with psychiatric disabilities who were denied the right to vote, claimed that, "Maine's disenfranchisement of those under guardianship by reason of mental illness failed to provide adequate procedural due process" (*Doe and the Disability Rights Center of Maine v. Rowe*, 2001). The court that placed the women under guardianship did not specifically consider the right to vote as a distinct aspect of its decision and failed to notify each woman that her right to vote would be automatically suspended when the guardianship order was given. One of the women obtained a modification to her guardianship order and subsequently voted in the 2000 state and federal elections. The other women's orders were not modified and they sued the state, asserting that the state's guardianship law amounted to a constitutional disenfranchisement in violation of the 14<sup>th</sup> Amendment of the U.S. Constitution (*Doe and the Disability Rights Center of Maine v. Rowe*, 2001).

The 14th Amendment grants citizens "equal protection under the law" (U.S. Constitutional Amendment XIV). Within this amendment are The Due Process Clause and Equal Protection Clause, both of which having bearing on voting rights. The Due Process clause prohibits the states from "depriving any person of life, liberty, or property without due process of law" (U.S. Constitutional Amendment XIV) and requires that "the content of the law, not just the procedures,

must be fair" (Substantive Due Process) (Monk, 2003, p. 215) and asserts that the government cannot, "deny a citizen a benefit without notice and a hearing" (Procedural Due Process) (Monk, 2003, p. 171). Further, the Equal Protection Clause prohibits unreasonable discrimination; if the effects of a law are that similarly situated people are treated differently, the state must demonstrate a legitimate reason for the differential treatment (Monk, 2003).

In the case of *Doe v. Rowe*, the court found that the court's ruling, which resulted in the women being denied the right to vote, violated the due process provisions of the 14<sup>th</sup> Amendment because "the practice of probate courts failed to ensure uniformly adequate notice regarding the potential disenfranchisement effect of being placed under guardianship" (*Doe and the Disability Rights Center of Maine v. Rowe*, 2001). This is clearly a procedural due process argument. In the same case, substantive due process issues were addressed when the court found that "the Equal Protection Clause was violated because guardianship for reasons of mental illness was an inadequate proxy for the capacity to vote" (*Doe and the Disability Rights Center of Maine v. Rowe*, 2001). In other words, just because one is subject to a guardianship order does not mean that her competence to vote has been disproved.

In the context of overall guardianship reform, *Doe v. Rowe* gave legal teeth to the right of individuals to have their voting rights specifically addressed during guardianship proceedings and to be informed of the outcome. As a result, 18 states now specifically provide for judicial determination of the capacity of the individual to vote. In seven states, when deemed to be incompetent, the individual still continues to lose his or her right to vote without having the opportunity for the specific determination of voting capacity (Hurme & Appelbaum, 2007). An alternative approach to resolving this competency-voting rights issue is the automatic retention of voting rights unless the right is specifically challenged, a seemingly just approach (Sabatino & Spurgeon, 2007). A number of states have incorporated this alternative by amending their laws: Alaska, Arkansas, California, Connecticut, the District of Columbia, Georgia, Iowa, Kentucky, Minnesota, New Mexico, North Dakota, Ohio, Oklahoma, Oregon, South Dakota, Tennessee,

Vermont, and Washington State (Hurme & Appelbaum, 2007). Of course, it may well be that the most just approach is that of a voter qualification process that does not take into consideration psychiatric disability or guardianship. The laws of Idaho, Illinois, Indiana, Colorado, Kansas, Michigan, New Hampshire, North Carolina, and Pennsylvania contain no statutes that allow the disqualification of voters due to psychiatric disability or guardianship (Hurme & Appelbaum, 2007).

Including a separate adjudication of one's capacity to vote within limited guardianship proceedings is a significant advancement in protecting the rights of those with psychiatric disabilities, but still one which is bittersweet. While decisions are made about limiting the rights of the individual due to incompetence, the preservation of voting rights is explicitly being addressed, the finding of incompetence means that certain other rights are limited. And, the determination of voting capacity within a limited guardianship is not a fool-proof guarantee against voter disenfranchisement. In *Missouri Protection and Advocacy Services v. State of Missouri* (2007), a claim was made against the state of Missouri for categorically barring the voter, Mr. Prye, from exercising his right to vote, even though the probate judge had expressly found him competent to vote and did not limit his right to vote at the time of his guardianship proceeding. On appeal, the Court affirmed the district court's decision for the plaintiffs, finding "while Missouri law generally bans voting by citizens who are incapacitated, that ban is not absolute because probate courts have explicitly preserved the voting rights of some individuals when appointing guardians for them" (*Missouri Protection v. Missouri*, 2007, 1078, 1081).

### Categorical Versus Functional Determination of Voter Competency

The Maine and Missouri decisions reviewed above highlight the dangers of state laws that rely on categorical rather than functional determinations of voter capacity. If voting capacity is treated as something that falls within the range of human functions for which guardianship might be required, then the right to vote is subject to a general, rather than

specific or functional, determination. Still, progress has been made since changes in many state laws have mandated the specific determination of voter competency. This represents a victory for the rights of those with psychiatric disabilities while at the same time raising new challenges. Categorical suspension of voter rights did not require that courts specify a definition of and criteria for voter competency; consideration of individual functioning requires that these specificities be determined.

### *Legal Standards for Determining Voter Competency*

The express rationale for the disenfranchisement of certain groups of voters has historically been the same: the need to maintain an intelligent electorate. An intelligent electorate has been viewed as essential to the well-being of democracy throughout U.S. history and has served as the rationale for limiting suffrage based on specific demographic criteria, such as gender, race and socio-economic status. The white, male property owner was presumed to have the necessary intelligence to protect the validity of our political system. Thus, as the thinking went, to have only the most “qualified” individuals participate in the democratic process would result in intelligent and productive selections for the leadership of our society (Keyssar, 2000).

The criteria used to determine one’s capacity to participate in an intelligent electorate have all been deemed unconstitutional when challenged in the courts—land ownership, civics tests, and intelligence tests have all been eliminated (Schriner, Ochs, & Shields, 1997). The last remaining means of legally preventing a citizen from voting is the determination of one’s mental incompetency to do so. Of course the state has a vested interest in protecting the integrity of the voting process (Hurme & Appelbaum, 2007). If the voting public were to perceive that incompetent individuals routinely cast ballots, the credibility with which the competent voter views the process of selecting leaders and issues for their support might be diminished. Competent adults may wonder if the electoral process is that important if anyone, including those perceived as incompetent, are allowed to participate in it (Hurme & Appelbaum, 2007).



*Current Competency Standards*

The avenue for protecting the integrity of the process while allowing all capable individuals the opportunity to vote lies in the establishment of clear criteria for determining voting capacity. This complex and difficult task requires that there be agreement on criteria by each state for each state. As a remedy for this complexity, a federal competency standard for all elections has been proposed, although the specific competency criteria to be used have yet to be determined. But the proponents of federalism argue that states should have the ability to determine their own competency standards (Karlan, 2007).

As a result of these tensions, a compromise proposal was offered by a group of policy scholars who suggested that universal standards for federal elections be enacted and then the states be allowed to devise and maintain their own standards for state and local elections. Not surprisingly, the logistical complications of trying to maintain and enforce two sets of competency standards were thought to be unrealistic and the proposal was dropped (Karlan, 2007). In the end, the devising of standards for determining voter competence has remained the responsibility of each individual state.

Few state laws provide clear and specific criteria for who has and does not have the capacity to vote (Hurme & Appelbaum, 2007). Only four states give specific direction to their judges as to what should be considered when determining voter competency. In Delaware, the direction provided to judges does not include clear criteria for determining competency; instead, the direction sets out the standard of proof required to prove incompetence. That standard calls for clear and convincing evidence of "severe cognitive impairment, which precludes exercise of basic voting judgment" (Del. Code Ann. Tit. 15, secs. 1701 as cited in Hurme & Appelbaum, 2007). Iowa courts may find a voter to be incompetent only when "the individual lacks sufficient mental capacity to comprehend and exercise the right to vote" (Iowa Code Ann. secs. 633.556[1] as cited in Hurme & Appelbaum, 2007). In Washington state, the law provides criteria for voter competency requiring that courts determine "that the person is incompetent for 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" (Wash. Rev. Code Ann. secs. 11.88.010[5] as cited in Hurme & Appelbaum, 2007). Wisconsin courts must find that the person "is incapable of understanding the objective of the elective process" (Wis. Stat. Ann. secs. 54.25[2][c] 1.g as cited in Hurme & Appelbaum, 2007).

The above standards represent earnest efforts toward establishing fair criteria in assessing voter competence, however all but one standard remains difficult to apply when making a competency and voting rights determination. Washington state criteria call for the determination of the person's ability to make decisions and his or her awareness of the effect and the nature of voting. These more specific criteria imply an actual assessment of the voter's understanding of the process. As such, it avoids some of the limits found in other proposed criteria. For example, another proposed set of criteria called for an assessment of the level of a person's knowledge of the issues and the candidates listed on a given ballot. Aside from the very real and common problem of perfectly competent voters walking into the booth on election day only to find a name or a referendum about which they know or have heard nothing, two additional and related problems exist. First, it is difficult to determine what amount or level of knowledge regarding candidates and election issues is required to cast an intelligent ballot (Schriner, Ochs, & Shields, 1997). Second, if these criteria for voting capacity could not be met by many in the electorate because most voters only possess a superficial knowledge of major ballot issues and candidates (Watkins, 2007; Schriner, Ochs, & Shields, 1997), would it not be a violation of the 14<sup>th</sup> Amendment to exclude one group of people simply because of their disability while allowing another group of individuals with the same level of voter incompetence to cast its vote? The Washington state criteria that relate to decision-making ability, an understanding of the process and the effect of voting were adopted by the Maine Federal District Court in *Doe v. Rowe* as the functional standards for determining voter competency (Hurme & Appelbaum, 2007). These criteria not only lend themselves to assessment, but acceptable means of accomplishing this assessment already exist.

*Proposed Competency Standards*

The assessment of competency to make decisions on one's own behalf is regularly required for medical consent. Research has produced a number of possible standards to use in this assessment. In recent years, the courts have recognized a limited number of standards to determine decision-making capacity. Four standards are found in the law, each addressing a different aspect of decision-making ability: (1) to express a choice; (2) to understand information relevant to the decision about treatment; (3) to appreciate the significance for one's own situation of the information disclosed about the illness and possible treatments; and (4) to manipulate the information rationally (or reason about it) in a manner that allows one to make comparisons and weigh options (Grison & Appelbaum, 1995). These four standards reflect a rigorous set of requirements for decision-making capacity.

Based on the potential for harm if an individual makes an erroneous decision about medical treatment, this rigor is justified. But when considering these standards in the context of voting, the need for this level of rigor falters. In reality, the potential for harm done to the individual or society is minimal if the individual's vote is contrary to how she would have voted if not impaired. Hurme and Appelbaum (2007) posit that due to the lesser potential for harm, the reasoning and appreciation standards found in the medical consent criteria provide unnecessary rigor for voting competency.

Two of the standards, the ability to make a choice and to understand information relevant to the decision are similar to the criteria found in the Washington/Doe standard. These two criteria are believed to provide a level of rigor in keeping with the gravity of decisions made by voters. Thus, the use of an adapted version of established decision-making criteria seems sensible. The perspective of voting as a decision-making process and the realistic assessment of the substantive requirements of the decision is more accurate, realistic, and inclusive. The perspective of voting as an intellectual exercise that must be performed by individuals well-versed in the specific issues and platforms of each candidate is an ideal still used to distinguish competent and incompetent voters. This is neither realistic, reflective of the typical voter, nor something that reflects the

legitimacy of the individual vote. Having an understanding of the office to be held by the candidate and the general duties of that office reflect an informed decision and require a realistic level of voter knowledge. The rigorous requirement that the voter have an in-depth knowledge of issues and of candidates has been used historically to disenfranchise the voter.

Other standards have been proposed that provide guidance to the courts in determining one's competency to vote. The American Bar Association posits that,

any person who is able to provide the information, whether orally, in writing, through an interpreter or interpretive device or otherwise, which is reasonably required of all persons seeking to register to vote and allowed to cast a ballot in any election held in the election precinct where the voter is registered, shall be considered a qualified voter of this state..." (American Bar Association, as cited in Schriener, Ochs, & Shields, 2000, p. 451)

This standard has been adopted by the state of California to determine voter competency (Schriener, Ochs, & Shields, 2000). It represents a threshold of capacity that is somewhat lower than that of the Washington/Doe standard. This standard does not require the cognitive machinations of decision-making and awareness of effects but only the ability to communicate minimal demographic information. It would allow more individuals to be determined competent to vote, as it would not take into account one's decision-making ability, and that ability that may vary depending on time, place and situation. The question remains however, whether this standard applies the appropriate level of rigor required to uphold the legitimacy of the election process. Perhaps not. The ability to make a decision is inherent in the ability to cast a vote. If one is not able to make a decision, then he or she will not be able to vote without another making the decision for him or her. That kind of scheme does not lend itself to a credible election process.

Therein lies another level of complexity in determining competency standards, balancing the needs of the electorate with standards of competency that allow the most

competent individuals to vote. Each state is left to decide how to find this balance. Unfortunately, many still have not begun to examine specific, applicable standards for determining voter competence. They continue to rely on the opinions of professionals, including social workers, who make voter competency determinations based on the individual's overall ability to care for themselves and manage their affairs (Karwalish et al., 2008).

### *Barriers to Voting Outside of the Legal System*

The determination of voter capacity has been appropriately maintained in the legal system. The obvious barriers to voting faced by citizens who have psychiatric disabilities and the progress toward their resolution have been discussed thus far. However, in reality, individuals outside of the legal system present additional barriers to voting. This occurs when professionals, caretakers, and others outside of the judicial setting make judgments, typically outside of the law, about who is competent to vote. One study of three long-term care facilities found that two of the three facilities assessed voter capacity and the assessments were performed exclusively by individual staff members in a non-systematic manner. Each staff created his or her own individual standards for voter competency without the benefit of training on the election laws of their state (Karlawish et al., 2008). Social workers are among the most common service providers of psychiatric services and so are likely to participate in and perhaps even perform this type of uninformed assessment.

Of particular concern is the body of evidence that suggests that election officials make independent, ad hoc decisions regarding voter competency. Individuals who present to register to vote or cast a ballot may be denied on the basis of their appearance, behavior, or the personal knowledge of the election official about the individual's diagnosis (Karlan, 2007).

The illegality of this behavior was determined in 1976 when an individual with mental retardation who was not permitted to register to vote by election officials brought a case. In this case, *Carroll v. Cobb*, the court ruled that election officials were not permitted to assess individuals for competency to vote (*Carroll v. Cobb*, 1976). While the court long ago determined that determinations by election officials are illegal,

they do continue. The Public Advocate in New Jersey took an aggressive and thorough approach to the problem. Prior to the 2006 election, Ronald Chen sent a letter to each disabled individual in the state that laid out their rights to vote, the voting laws, voting accommodations under the ADA, and resources for redress if they experienced difficulties registering or at the polls. With emphasis, Mr. Chen encouraged the recipients to take the letter with them to the polls "in case any questions arise while you are there" (New Jersey Department of the Public Advocate, 2006). This effort represents a proactive and dedicated response to the voting needs of the disabled, including those with psychiatric disabilities, and a useful source of education for election officials. Social workers also have an opportunity to support voter participation through advocacy efforts with election officials. This can occur by accompanying consumers throughout the voting process (registration, polls) and/or by contacting election officials as an agency to ensure that proper voting laws will be followed.

### Conclusion

The voting rights of those with psychiatric disabilities under guardianship, the standards by which voter competency may be established, and other barriers to voting have been explored. However, the corollary of the above issues is the voter participation of those with psychiatric disabilities who do not have guardians and barriers to voting that they face. Social workers are in a unique position to address the barriers to voter participation and the competency issues confronting this population. The next step in addressing these issues likely requires that we as a profession examine how supporting the voting rights of those with psychiatric disabilities can become a greater priority.

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