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The Competence Line in American Suffrage Law: A Political Analysis

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American democracy is notable for many things, not the least of which is the remarkable transformation of the vote. Once the privilege of the propertied white man, voting is now considered the right "preservative of all other rights" (Reynolds v. Sims, p. 562). The transition of the vote from the exclusive privilege of property holders to the exalted status as a right that preserves all others was a tumultuous one characterized by more fits and starts than most of us realize. But eventually the grandiosity of the democratic vision triumphed and now, it is widely claimed, the United States has universal suffrage.

This idea - that everyone who wants to can vote - is unfortunately untrue. In almost every American state, some individuals with disabilities are prohibited from taking part in the electoral process. First instituted in the nineteenth century and continued today, these exclusions are a notable use of the disability category for allocating the values associated with membership in the democratic electorate. Forged in an era of scientific advancement, changing conceptions of democracy and political citizenship, and new segregationist policies affecting people with mental illness and intellectual impairments, these exclusions marked such individuals as undeserving of political equality and unentitled to participation in electoral politics. How this came to pass, and why, is the subject of this paper.

The abandonment of economic distinctions, be they property holding or taxpaying, did not mean that states instituted universal suffrage; quite the contrary. During the nineteenth century, states adopted a number of categorical exclusions based on gender, race, religion, and alien status (Keyssar, 2000). They also began disfranchising some people with disabilities using such terms as "idiots," "insane persons," persons "under guardianship" or "non compos mentis," "lunatics," and so on.1

The first state to adopt such a provision was Maine which in 1819 excluded "persons under guardianship" from voting. Massachusetts followed suit in 1821 with an identical provision. In 1830 Virginia disqualified "persons of unsound mind" and Delaware excluded any "idiot, or insane person" in 1831. In the next several decades, the trend picked up speed. Many more states adopted such provisions, either when joining the Union or by constitutional amendment. By 1850 California, Iowa, Louisiana, Maryland, Minnesota, New Jersey, Ohio, Oregon, Rhode Island, and

Wisconsin had joined in excluding some persons from voting because they were idiots, insane, lunatics, non-compos mentis, or under guardianship. By 1880, eleven more states (Alabama, Arkansas, Florida, Georgia, Kansas, Mississippi, Nebraska, Nevada, South Carolina, Texas, and West Virginia) adopted constitutional provisions prohibiting voting by some disabled individuals. By the end of the century, Idaho, Montana, North Dakota, South Dakota, Utah, Washington, and Wyoming had entered the Union with constitutions disfranchising people on the basis of disability. After 1900, most of the new states joining the Union also had such provisions. Arizona and New Mexico did when they joined the Union in 1912; and Alaska and Hawaii did in 1959. Missouri, which had joined the Union in 1821 without an exclusion, adopted one in 1945 (Schriner & Ochs, 2000). The percentage of states in the union with disfranchising provisions increased from less than 10% in 1820 to a high of 81% in 1940. The percentage of states with constitutional exclusions now stands at 72%.

Unlike the exclusions based on gender and race, disfranchisement based on disability has persisted. The constitutions of the states still include provisions excluding individuals labeled "idiots and insane persons," "lunatics," "persons of unsound mind," and "persons under guardianship." In many states the legislatures have recently interpreted or refined constitutional provisions for example by specifying that persons may be disfranchised if declared legally incompetent or ensuring due process in the disfranchisement procedure. Today all but six states continue to prevent some individuals from voting either by constitutional provision or statute (Schriner, Ochs, & Shields, 2000).

Generally these laws are of little public interest. When they do become a part of the public debate, it is evident that many members of the public support them and believe they are necessary to ensure the intelligence of the electorate and the integrity of elections - as was the case in Maine in 1997 and again in 2000 when voters rejected proposals to repeal the constitutional exclusion of persons under guardianship for mental illness. Very rarely does a state repeal its prohibition.

In hindsight, it seems almost inevitable that states would disfranchise individuals labeled in this way. The break from earlier property holding and taxpaying requirements was a move toward a more democratic arrangement, but states replaced earlier qualifications with categorical exclusions out of concern for the intellectual and moral inferiority of idiots and insane persons as well as other groups. The delegates to the constitutional conventions in which these exclusions emerged believed they were doing what was required to perfect the schematic of representative government. They thought that adopting these exclusions was the proper - and necessary - thing to do.

But the apparent ease with which exclusions could be justified is deceptive. Underlying the adoption process is a myriad of social, economic, and political factors that structured and gave meaning to the deliberations. It was not inevitable that individuals would be labeled as "idiotic" or "insane," that "idiots" and "insane" individuals would be thought of as morally and intellectually unfit for democratic citizenship, or that formal exclusion of a more-or-less discrete group of individuals

with intellectual or emotional impairments would be the only or best alternative for protecting the integrity of the electoral process and ensuring the intelligence of the electorate.

Instead, the adoption process demonstrates how new suffrage laws both reflected the social construction of mental illness and intellectual impairment that were emerging in the nineteenth century and shaped these constructions with the result being the political marginalization and stigmatization of persons with these impairments. The history of the disability exclusion thus illustrates the relationship between public policy and the social construction of certain groups as deserving and entitled. Indeed, it tells us as much about the nature of American political thought and public policy as it does about the nature of disabled Americans.

The Essence of the Democratic Citizen

Having turned their back on the prior reliance on property and taxpaying qualifications to sort the worthy from the unworthy, but still unable to provide for true universal adult suffrage, the nineteenth century constitution writers reconsidered the characteristics of those who deserved to vote. Again and again, they debated the necessary competencies of the electorate, framing much of the discussion in terms of moral and intellectual qualities. Clearly, they believed that some restrictions on voting rights were required. Even when phrases like "universal suffrage" were used, they more often referred to white manhood suffrage than true universal adult suffrage. To these men in these times, it was also a natural thing that idiots and insane persons be excluded from the electorate. The idea was so readily accepted that in some states it was barely discussed at all.

Exclusions based on race or gender, or in the post-Civil War South the potential exclusion of Confederate rebels, produced the most contentious debates. For the most part, delegates were more ready to adopt exclusions based on disability, criminality, and pauper status than those based on other characteristics and statuses.2 When delegates did address the disability exclusion, its necessity was rarely if ever questioned.

Commenting on the proposal to keep idiots and insane persons from the polls, one Louisiana delegate said in 1845, "[a]s to the utility of this provision, it was apparent on its face. ...It was manifest that they ought to be excluded from this right" (State of Louisiana, 1845, p. 852). And the certainty with which such proclamations were made was matched only by the strength of the rationale. In the cases of these individuals, intellectual competence was often the sole reason advanced for their disfranchisement. A Nebraska delegate put it this way: "Why do not you permit them to vote? ...Simply because, in the case of the child, of immature intellect; and in the case of the lunatic and idiot, because they have no intellect at all" (Nebraska State Historical Society, 1871, p. 80).

To some delegates in these conventions the legal tradition of excusing a person from some civil rights and responsibilities due to intellectual or moral incompetence (as for instance in contract and property law) represented a sound basis for disfranchising them as well. In this respect, the liability of

idiocy and insanity was similar to that imposed on individuals who committed criminal acts. Just as criminals were driven to the fringe of civil society so too were idiots and insane persons. With disfranchisement, the liability was newly applied to political citizenship. As a Nebraska delegate put it, the exclusion of some disabled individuals and criminals was justified because "They have no consent to give. A fool has no consent; the lunatic has none, and the child has none, and the man who is guilty of infamous crime, has forfeited his right, and hence we take it from him as a matter" (Nebraska State Historical Society, 1871, p. 80). And in Massachusetts, a delegate said, "Idiots and insane, and those excluded from society by infamous crimes, are manifestly not a part of the acting society, and can make no contract" (State of Massachusetts, 1853, p. 221).

The exclusions of idiots and insane persons thus was easily and quickly justified in the constitutional conventions of the nineteenth century based primarily on the theory that they did not possess the intellectual competence necessary for political participation. This criterion was perhaps in first place on the list of those making someone worthy of political equality. Above all, the citizen must be capable of rational thought and action. The democratic citizen was rational, reliable, and trustworthy, and these were characteristics that were thought to be beyond the scope of the idiot and insane person. The labels worn by these persons made them the antithesis of the democratic citizen.

The delegates had little doubt of the ability of elected officials to represent the interests of persons who were labeled as idiotic or insane. Even though those individuals were unable to represent themselves, their interests would be protected, just as the interests of other disfranchised groups were. This also was a form of guardianship. In this formulation, elected officials would exercise political guardianship over the interests of those who did not actually take part in elections just as legal guardians looked after their business and personal affairs.

Political participation itself was considered to be a troublesome thing for some and this was certainly thought to be the case for some of the disfranchised groups. Women were disfranchised in part because politics was too rough and tumble for their delicate natures and idiots and insane persons may have been thought of in a similar way as when a Louisiana delegate said:

> Let us say to the large class of the people of Louisiana who will be disfranchised under any of the proposed limitations of the suffrage, that what we seek to do is undertaken in a spirit, not of hostility to any particular men or set of men, but in the belief that the State should see to the protection of the weaker classes; should guard them against the machinations of those who would use them only to further their own base ends; should see to it that they be not allowed to harm themselves. We owe it to the ignorant, we owe it to the weak, to protect them just as we would protect a little child and prevent it from injuring itself with sharp-edged tools placed in its hands. (State of Louisiana, 1898, p. 10)

The Accuracy and Potential Misuse of the Competence Line

The difficulty of knowing who was and who was not competent to vote was seldom discussed, but when it was the points made have an eerily contemporary feel. This concern, which is often expressed when contemporary disability exclusions are discussed, was also a prominent issue during the nineteenth century. It was well stated by a Massachusetts delegate who noted that

> Well, it will often be found equally difficult to ascertain who are insane persons, paupers, or idiots; and yet these several classes of persons are usually excluded, the difficulty of determination, not being regarded as a sufficient reason for making no disqualifying provision respecting them. The distinction or difference between an idiot and person with just enough of intellect to render him a responsible being and capable of exercising the civil rights of a citizen, is very slight. The dividing limit is an extremely narrow one. It is very difficult to tell exactly where daylight ends and where night and darkness begin. (State of Massachusetts, 1853, p. 278)

This did not deter the delegates from attempting to devise a fool proof scheme. Indeed, what little trouble the delegates had in adopting the disability exclusion arose primarily from the question of how exactly to do it. A simple reliance on the labels - no matter what they were or how firmly they were planted in the minds of some - was bothersome. In reconsidering their "under guardianship" exclusion in 1853, Massachusetts delegates debated the mechanism by which it would be implemented. The committee on suffrage had proposed that the original 1820-1821 language be changed to "no idiot or insane person," but the terms were objected to by a delegate, who said

> My difficulty in reference to this resolve is, that the only criterion that I know of, or that any one can know of, by which to settle this question of insanity or idiocy, is the judgment of a tribunal that is [fit] to pass upon that matter. I would not, by any means, be willing to leave it to the selectmen, when the day of voting comes, to pass upon the question whether I was idiotic or insane. I should think that was a miserable tribunal to judge of this question, as regards myself, to say nothing about any other gentleman in reference to this matter...I would not deprive any person of the right to vote upon the judgment of the selectmen, and because they might believe a person to be idiotic or insane who was not so, and the only evidence that they should consider as sufficient to deprive any voter of his rights was a solemn adjudication, by a competent tribunal of law or probate, that the person was so, and that he was incompetent to vote. (State of Massachusetts, 1853, p. 274)3

It was also the case that delegates were troubled by the potential for misusing the category for personal or political reasons. It would be unacceptable to permit the decision as to mental competency to be made by election officials or other

voters. In comments that reflected the common usage of phrases such as "madness" and "insanity," a Louisiana delegate raised this possibility:

> In times of high excitement, the voters of political parties would accuse each other reciprocally of unsound mind. Who was to decide? The commissioners of election? They would be influenced by like political feelings, and an election might be arrested, and great disorders prevail, arising out of this question of sanity. A man may deem another that differs with him in opinion insane. (State of Louisiana, 1845, p. 852)

The competence line thus presented the possibility that it could be inaccurately drawn or used for nefarious purposes. Delegates seemed to understand that the competence line was an inherently difficult one. Part of the reason was the lack of consensus (then and now) on what constitutes competent voting. What did it mean for a voter to choose from candidates? Was it simply a selection based on some inchoate impression of the candidate's qualities and abilities or was it based on a searching inquiry into candidates' standings on issues of personal importance to the voter or perhaps the general welfare?

A further complication, also understood by the delegates, was that a line based on the intangible criterion of competence could be abused, especially if it rested on labels such as "idiocy" and "insanity." To some degree, these problems were more relevant to the competence distinction than others. It might be that a voter's race would be questioned, but probably not the voter's gender. A voter's status as a felon might also be difficult to know at a glance, and as apt to carry the negative connotations of idiocy and insanity, but criminal conviction had the advantage of clarity which would apply also to the competence line only if it were reliably drawn as, for example, by the use of legal status as being under guardianship.

The Origins of the Competence Line in American Society

One important basis for the emergence of the competence line in American suffrage law was its existence in law more generally. A long tradition in English law, and American law as well, allowed for individuals to be designated as incompetent based on insanity, idiocy, sickness, or drunkenness. Once so designated, the individual could then be placed under legal guardianship (Jimenez, 1987). The purpose of this practice was clear. It was to "protect the property of a mentally incompetent person and to apply it primarily for his and his family's benefit and enjoyment, and incidentally to preserve it for his heirs...." (Woerner, 1897, p. 376).

The reason for unsoundness of mind was of little importance. What mattered was the necessity of saving that person's financial resources from being squandered. Legal traditions were part of the foundation on which the disability exclusions were built, but the nineteenth century also brought change that confounded and disturbed many people, especially those who occupied positions of social and political influence. Economic conditions were being transformed by the forces of capitalism and many more men (and

increasingly women) were earning their families' income in industrial settings through wage labor. Poverty was of increasing concern to the public, who saw in the poor a potential threat to the social order. In the view of some, the poor behaved badly and did little or nothing to improve their status or living conditions. Their failure to embrace the dominant social values of diligence, frugality, and virtue made them suspect (Trautman, 1999). In fact, poverty itself came to be suspect. During colonial times, poverty was looked on as God's will, a perfect reflection of the natural order. Some were meant for a grand existence and some for a meaner one. Those ideas were changing, though, and poverty was beginning to be thought of as a moral failing.

For persons with mental and cognitive impairments, the events of the nineteenth century had profound effects. Increasing regimentation in industrial workplaces made their participation in the labor force more difficult. Concerns about moral degeneracy, dependency, and crime made others view them with scorn. Thus they maintained their positions at the bottom of the economic and social ladder, but with perhaps greater stigma than in earlier times. They were increasingly likely to be labeled as among the deserving poor, but such designation meant only that they were given easier access to public assistance and were blamed less than others for their absence from the labor force (Stone, 1984).

The advent of science and nineteenth century developments in education and medicine also influenced the status of people with emotional and intellectual impairments. Insanity and idiocy were increasingly the province of educators and physicians whose expertise was relied on by state legislatures as they struggled with the pressing problems of the day. Indeed, motivated both by altruistic intent and self-interest, these men became effective propagandists seeking the attention of lawmakers and using strategies that seem second nature to us today.4

For the most part, legislators were convinced by the arguments that insane persons could be treated and perhaps cured, and idiots could be educated well enough that they could occupy a "respectable mediocrity" (quoted in Trent, 1994, p. 58). Beginning in the first half of the century, insane asylums were built and later, institutions for idiots were established (Grob, 1994; Trent, 1994).

Having secured public funding for asylums and institutions, their superintendents formed national associations the purposes of which included keeping for themselves the position of experts on which policy makers and the public depended. Using proclamations, the publication of photographs and reports from their association meetings, and pleas for higher funding, they exercised considerable control over the language used to describe idiots and insane persons (McGovern, 1985). The superintendents were joined by a contingent of social reformers, who seconded the professionals' preference for separate institutions for these populations.

Virtually all those who were voicing concern about insanity and idiocy appealed to both idealism and fear to press their claims. Describing the insane and idiots in terms designed to provoke sympathy was a common tactic. Complementing these more pathetic portrayals were those emphasizing the pathology and

deviancy of idiots and insane people (Trent, 1994). But professionals could make a difference. Insanity was believed to be curable, at least in the first half of the century before exploding populations and a more severely impaired clientele made the asylums' promises of cures seem unrealistic and ultimately unattainable (Grob, 1994).

Idiocy too had a good prognosis, especially in the heyday of educators' innovative experimentation. It was not until the latter half of the century that idiocy came to seen as "hopeless degeneracy" (Trent, 1994, p. 87). These changing social constructions had profound political overtones.

Assessing the Competence Line: (Un)worthy and (Un)entitled

The institution of the competence line in the suffrage laws of the various states was thus firmly rooted in the conditions of the time. The legal concepts of incompetence, dependency, and guardianship offered principles that could be readily adapted to the political sphere as nineteenth century Americans shaped their evolving notions of political participation, representative government, and citizenship. In the context of suffrage, the increasingly distinct groups of idiots and insane persons were characterized as politically incompetent and untrustworthy. Like criminals and paupers, they were not equal.

The consequence was that persons with mental illness and intellectual impairments were forced to the margins of American political life. While they probably had never been involved in politics in large numbers, neither had they specifically been told they could not participate. While the economic qualifications of earlier periods had undoubtedly kept many such individuals from taking part in electoral politics, it was not until the nineteenth century that they took on a specific identity as the antithesis of the democratic citizen.

The exclusion of these groups confirmed the political philosophies of the emerging republican order. The logic of social contract theory rested on assumptions that every man was rational and free. Those individuals who were not could not enter into this most fundamental arrangement. The natural incapacities of the idiotic and insane placed them outside the realm of political agreement.5 The legal disabilities imposed on persons with such impairments were but one mark of their inferiority and they were now rendered politically disabled as well. Just as they could not enter into civil contracts neither could they take part in the political contract.

When a democracy decides that some citizens are worthy of participation and others are not, it says a great deal about the assumptions on which notions of citizenship rest. In the case of the American states deciding on the qualifications for full democratic citizenship, the determination was rooted in long-held ideas about the purpose of political representation and the structural necessities for ensuring its realization. Legislatures made up of the people's representatives, elected fairly from qualified contenders for office, were of central concern. To ensure that these representatives were responsive to both the common good and the particular interests of individuals and groups, they must be elected by those who possessed the intellectual competence and moral grounding on which sound

political judgements were made.

This situating of "incompetent" individuals as unworthy and unentitled to political citizenship illustrates how policies can create seemingly objective distinctions that affirm broader political values (Edelman, 1988; Schneider & Ingram, 1993; Stone, 1993). Once "insanity" and "idiocy" were defined as social problems (Spector & Kitsuse, 1987), the forces of professionalism and politics added to the burden of "idiots" and "insane" persons by hardening the negative social constructions of their conditions. Based as much in political rhetoric and practicalities as in any verifiable knowledge about the necessary capacities of the democratic citizen or the (in)abilities of those targeted for disfranchisement, the suffrage laws of the nineteenth century both confirmed and shaped popular images of these groups.

The proclaimed reasonableness and necessity of the disfranchisement apparently never were subjected to searching scrutiny. The social constructions of idiocy and insanity, so evident in the terms themselves, were sufficient grounds for the exclusion. Inevitably, though, the new exclusion of people labeled mentally ill and those with intellectual impairments from the electorate also further stigmatized and marginalized these individuals. The policies that specifically identified these groups as undeserving and unentitled only made them seem more so.

Endnotes

1. Several important histories of suffrage law have been written, none of which has much to say about the disability disfranchisements discussed here. Some ignore them altogether. The most notable works on suffrage law include Chute, 1969; Keyssar, 2000; Porter, 1918; and Williamson, 1960.

2. It is not always clear what happened during deliberations at the conventions. Not all states published their debates and others published minutes of the proceedings with only sketchy information. Space considerations require me to focus here on a few states where the historical record strongly suggests the delegates' motivations for adopting the disability exclusion. Published debates from other state constitutional conventions generally support the findings discussed in this chapter.

3. At times delegates considered allowing juries to make the determination. Maryland considered amending its provision excluding any "person under guardianship as a lunatic, or as a person "non compos mentis" to exclude any "person under guardianship as a lunatic, or as a person non compos mentis, or found to be a lunatic or non compos mentis by the verdict of a jury," but the suggestion was rebuffed.

4. For accounts of developments in disability policy affecting persons with mental illness and intellectual impairments, see generally Dain, 1964; Davies, 1959; Deutsch, 1949; Fox, 1978; Grob, 1994; Scull, 1989,Trent, 1994; and Tomes, 1984.

5. In Locke's Second Treatise (1969-2), the relationship between reason and contract was clearly stated: "But if through defects that may happen out of the ordinary course of nature, anyone comes not to such a degree of reason wherein he might be supposed capable of knowing the law, and so living within the

rules of it, he is never capable of being a free man, he is never let loose to the disposer of his own will, because he knows no bounds to it, has not understanding, its proper guide; but is continued under the tuition and government of others all the time his own understanding is incapable of that charge. And so lunatics and idiots are never free from the government of their parents: Children who are not as yet come unto those years whereat they may have; and innocents, which are excluded by a natural defect from ever having...."

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