

Voting on The Spectrum: How Judges & Lawyers Can Encourage Enfranchisement & Accessibility for Voters with Autism Spectrum Disorder

ANNA BUTEL*

*You see, a still mind can still have great thoughts, and within even the quietest person, there is a voice.*¹

—Carrie Cariello

INTRODUCTION

People with disabilities make up more than sixteen percent of eligible voters in the United States.² However, this population, particularly those with mental disabilities, remains largely disenfranchised from the ballot box, with turnout percentages lagging well behind those of the general population.³ People with disabilities of all kinds “face more barriers in going to the polls” than those without disabilities;⁴ among them, lack of campaign engagement, “feelings of marginalization,” and accessibility barriers at polling places.⁵

People with Autism Spectrum Disorder (“ASD”), a mental disability that affects the social communication and interaction abilities of nearly 5.5 million

* J.D., Georgetown University Law Center (expected May 2022); B.A., *summa cum laude*, Oklahoma State University (2013). Dedicated to ADG, my perennial inspiration, who lives in this difficult but beautiful ASD reality; to my parents, whose unswerving perseverance carries us all; to my sisters, my empathetic and steady partners in the quest for answers; and to Tyler, the multiplication of every joy and the shoulders to carry every sorrow. © 2021, Anna Butel.

1. Carrie Cariello, *Who Am I? A New Look at Autism*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/ncbddd/autism/features/who-am-i-new-look-at-autism.html> [<https://perma.cc/5VYL-YJJR>]. Ms. Cariello is an author, speaker, and mother of five, including 16-year-old Jack who has autism. See carriecariello.com for more about her life and experience.

2. Elizabeth Pendo, *Blocked from the Ballot Box: People with Disabilities*, 45-3 ABA Human Rights Magazine (June 26, 2020), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/voting-in-2020/blocked-from-the-ballot-box/ [<https://perma.cc/8ZBC-4L4U>].

3. *Id.* In the 2018 midterm elections, people with disabilities were about five percent less likely to vote than those without disabilities. However, among people with mental disabilities, this gap more than triples, meaning people with mental disabilities are about seventeen percent less likely to vote than people without disabilities. See Lisa Schur & Douglas Kruse, *Fact Sheet: Disability and Voter Turnout in the 2018 Elections*, RUTGERS SCHOOL OF MANAGEMENT AND LABOR RELATIONS 2 (2019).

4. Abigail Abrams, *Voter Turnout Surged Among People with Disabilities Last Year. Activists Want to Make Sure That Continues in 2020*, TIME (July 10, 2019 9:00 AM EDT), <https://time.com/5622652/disability-voter-turnout-2020/> [<https://perma.cc/9WT9-KLFR>] (quoting Douglas Krause).

5. *Id.*

adults in the United States,⁶ face unique barriers to the polls. One such barrier occurs when adults with ASD are placed under guardianship. A number of U.S. states require the voting rights of these individuals to be automatically or presumptively stripped during the guardianship adjudication, meaning many adults with ASD never have to opportunity to participate in the franchise.⁷ For adults with ASD who can and do make it to the polls, the realities of a typical polling environment pose their own set of communication and information processing challenges.

Recognizing the opportunity and urgency of enfranchising voters with disabilities like ASD, the American Bar Association twice urged federal and state election officials to take appropriate enfranchising measures to aimed voters with disabilities.⁸ Most recently, the ABA directed election officials and the judiciary to ensure accessibility of “the electoral process and voting methods,” rid polling places of “physical, technological, and administrative barriers,” and “use all appropriate means to improve enforcement of voting rights for persons with disabilities.”⁹ Seven years prior, the ABA provided recommendations designed specifically to enfranchise individuals with mental disabilities.¹⁰

Efforts, like the ABA’s, to enfranchise voters with disabilities appear to be bearing promising results, as turnout of this population increased in the 2018 election.¹¹ But, the work of enfranchisement is far from complete, and judges and lawyers have important roles to play in furthering its extension to the adult ASD community. The ABA’s *Model Code of Judicial Conduct* directs judges to perform their duties “without bias or prejudice,” and expressly prohibits manifestations of bias or prejudice based on disability.¹² Judges may not make decisions based on “negative stereotyping”¹³ or public opinion.¹⁴ Yet, in a number of states, judges are permitted or required to strip people with mental disabilities like ASD of their voting rights based on antiquated guardianship laws that are themselves

6. See *Key Findings: First Estimates of the Number of Adults Living with Autism Spectrum Disorder in the United States*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/ncbddd/autism/features/adults-living-with-autism-spectrum-disorder.html> [<https://perma.cc/ZU3D-7KN8>].

7. See *infra* Part I(e).

8. See AM. BAR. ASS’N. HOUSE OF DELEGATES, Resolution on Accessibility of Electoral Process, Aug. 2014, https://www.americanbar.org/groups/public_interest/election_law/policy/14a113b/ [<https://perma.cc/3ZYJ-G99G>] [hereinafter 2014 Resolution]; AM. BAR. ASS’N. HOUSE OF DELEGATES, Tr. of Proceedings, Aug. 13-14, 2007, https://www.americanbar.org/content/dam/aba/directories/policy/2007_am_121.pdf [<https://perma.cc/Y2AP-JUYV>] [hereinafter 2007 Recommendation].

9. 2014 Resolution, *supra* note 8.

10. See 2007 Recommendation, *supra* note 8, at 1-2.

11. See Abrams, *supra* note 4.

12. MODEL CODE OF JUDICIAL CONDUCT R. 2.3(A), (B) (2004) [hereinafter MODEL CODE].

13. MODEL CODE R. 2.3 cmt 2.

14. MODEL CODE R 2.4.

informed by negative stereotypes, outdated biases, and offensive language.¹⁵ This Note will demonstrate how these laws violate the Voting Rights Act of 1964 and the Twenty-Sixth Amendment, and point out the legal and ethical obligations judges have to not enforce them.

Lawyers, too, are key players in expanding the franchise to include voters with ASD. A number of federal statutes require state and local election officials to implement measures that make the voting process accessible for voters with disabilities, and as this Note will point out, ASD is an included disability under these statutory accessibility mandates. Lawyers, as “public citizen[s] having special responsibility for the quality of justice,”¹⁶ are uniquely positioned to influence implementation of these statutes.

The work of enfranchising voters with ASD is not just for disability rights advocates or civil rights litigators. Rather, the ABA’s *Model Rules of Professional Conduct* emphasize the ethical obligation every lawyer has to provide pro bono legal services, including to “individuals, groups or organizations seeking to secure civil rights, civil liberties or public rights.”¹⁷ For purposes of this rule, legal services encompasses “a full range of activities, including individual and class representation, the provision of legal advice, legislative lobbying, administrative rule making and the provision of free training or mentoring to those who represent persons of limited means.”¹⁸ This Note will argue lawyers should strive to fulfill their pro bono service commitment through advocacy efforts aimed at expanding the franchise to include voters with ASD. Charged with a responsibility to “seek improvement of the law,”¹⁹ lawyers should engage in advocacy that clarifies the application of statutory accessibility requirements to encompass ASD, ensures election officials implement the appropriate accessibility requirements, and educates voters with ASD about their rights.

I. HISTORICAL BACKGROUND AND LEGAL LANDSCAPE

*I wanted to help other people with autism be able to better function in the world. You can change the world. Even if you think that one vote doesn’t count, it does. You never know what vote is going to matter.*²⁰

—Dorothy, a 26-year-old Nebraska voter with ASD.

Part I discusses the prevalence of ASD in the United States, introduces the relevant ethical obligations of judges and lawyers, and provides historical and legal context of the federal and state laws at issue in voting rights for people with ASD.

15. See *infra* Part I(e).

16. MODEL RULES OF PROF’L CONDUCT pmb1 [1] (2018) [hereinafter MODEL RULES].

17. MODEL RULES R. 6.1.

18. MODEL RULES R. 6.1 cmt 2.

19. MODEL RULES pmb1 [6].

20. *Autism POVs: Know Your Voting Rights*, AUTISM SPEAKS (Nov. 2, 2020), <https://www.autismspeaks.org/podcast/autism-povs-know-your-voting-rights> [<https://perma.cc/5X46-KVBH>] [hereinafter *Autism POVs*].

A. AUTISM SPECTRUM DISORDER

Autism Spectrum Disorder (“ASD”) is myriad mysteries and precious few answers. It consists of developmental delays, communication difficulties, subject-matter obsessions, savant-like brilliance, and social deficiencies.²¹ It is seemingly still minds, filled with great thoughts, sometimes stifled by quiet mouths, as described by Ms. Cariello.²² It is a fixation on the paranormal for comedian Dan Aykroyd,²³ “debilitating shyness” for actress Daryl Hannah,²⁴ and a multi-colored fantasy world for Pokémon-creator Satoshi Tajiri.²⁵ ASD “does not discriminate,”²⁶ occurring across demographic and socioeconomic lines, while affecting four times more males than females.²⁷

The Centers for Disease Control and Prevention (“CDC”) estimates about one in fifty-four U.S. children live with ASD.²⁸ Though “environmental, biologic, and genetic factors” are all thought to increase a child’s risk of ASD, the disorder’s actual causes remain unknown.²⁹ Individuals with ASD often experience social, communicative, and behavior challenges, but as the name “spectrum disorder” implies, ASD affects individuals’ cognitive and developmental abilities in markedly different ways.³⁰ Classified as a mental disorder by the American Psychiatric Association,³¹ common ASD symptoms include “trouble relating to” or disinterest in others, avoidance of eye contact, aversion to physical touch, repetition of actions and words, and insistence on routine.³² Though no cure exists for ASD, speech, occupational, and behavioral therapies may help children with

21. See generally, *What is Autism Spectrum Disorder?*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/ncbddd/autism/facts.html> [<https://perma.cc/3JEB-WVTT>].

22. Cariello, *supra* note 1.

23. Sarah Ewing, *‘I have Asperger’s – One of My Symptoms Included Being Obsessed with Ghosts’: Under the Microscope with Dan Aykroyd*, DAILY MAIL (Dec. 9, 2013).

24. Emily Willingham, *‘Wall Street’ Actress Daryl Hannah Is an Autistic Woman*, FORBES (Sept. 23, 2013).

25. Lani Lane, *Pokémon Go: Original Creator Satoshi Tajiri Has Autism*, PARENT HERALD (Aug. 15, 2017).

26. *Are You An Autism Friendly Business?*, AUTISM SOCIETY, <https://www.autism-society.org/living-with-autism/community-inclusion/autismfriendly/#:~:text=Autism%20is%20a%20spectrum.&text=Currently%2C%20according%20the%20Centers%20for,sex%2C%20race%2C%20or%20religion> [<https://perma.cc/44JB-LFYZ>] (last visited Dec. 17, 2020).

27. *Autism Spectrum Disorder (ASD): Data & Statistics*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/ncbddd/autism/data.html> [<https://perma.cc/9FGL-NGRG>] (last visited Dec. 17, 2020).

28. *Id.* Since 2000, reported ASD prevalence in children has tripled. See *id.*

29. *What is Autism Spectrum Disorder?*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/ncbddd/autism/facts.html> [<https://perma.cc/3JEB-WVTT>] (last visited Dec. 17, 2020).

30. See *id.* (“The learning, thinking, and problem-solving abilities of people with ASD can range from gifted to severely challenged. Some people with ASD need a lot of help in their daily lives; others need less.”).

31. *Autism Spectrum Disorder*, NAT’L INST. OF MENTAL HEALTH, <https://www.nimh.nih.gov/health/topics/autism-spectrum-disorders-asd/index.shtml> [<https://perma.cc/BKL2-RJHP>] (citing the *Diagnostic and Statistical Manual of Mental Disorders (DSM-5)*).

32. *Id.*

ASD overcome cognitive challenges and develop social and communication skills, especially when initiated between birth and thirty-six months.³³

Although research about ASD has typically focused on its effects and treatment in children, a growing body of scholarship aims to uncover the prevalence of ASD among adults and improve outcomes for this large population.³⁴ In May 2020, the CDC released its first estimate of ASD prevalence among U.S. adults, finding the disorder affects nearly 5.5 million individuals age eighteen or older—about 2.21 percent of the U.S. adult population.³⁵ This number is likely to increase exponentially in the coming decades, as cultural familiarity with ASD grows and affected adults seek diagnoses later in life, and as children diagnosed with ASD in the 2000s reach age eighteen.³⁶ Recent estimates show about 50,000 individuals with ASD turn eighteen each year, but considering dramatic increases in ASD prevalence among children from 2000 to present, this number will likely increase by 123 percent by 2026.³⁷

Despite ASD's growing prevalence and recognition in U.S. adults, little is known about effective treatment interventions for this population,³⁸ due in part to its "vast heterogeneity."³⁹ Like children with ASD, adults with ASD experience diverse social difficulties, ranging from extreme introversion to misunderstanding social cues; communication difficulties, ranging from complete lack of verbal skills to extraordinary vocabularies; and fixation on certain topics or behaviors, ranging from self-soothing hand flapping or rocking to deep and sustained expertise on a specific subject.⁴⁰ ASD often co-occurs with medical and psychiatric conditions, compounding treatment prognoses for adults.⁴¹

Currently available research agrees on one thing: there is no one-size-fits-all approach to best meeting the needs of adults with ASD.⁴² Unfortunately, long-

33. See *id.* (describing "early intervention" treatments); *Treatment*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/ncbddd/autism/facts.html> [<https://perma.cc/QY7U-ATCX>] (last visited Dec. 17, 2020).

34. Interagency Autism Coordinating Committee, *Strategic Plan for Autism Spectrum Disorder*, U.S. DEP'T OF HEALTH & HUMAN SERVS., at 73 (Oct. 2017) [hereinafter *IACC Strategic Plan*].

35. *First Estimates of the Number of Adults Living with Autism Spectrum Disorder in the United States*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/ncbddd/autism/features/adults-living-with-autism-spectrum-disorder.html> [<https://perma.cc/ZU3D-7KN8>] (last visited Dec. 17, 2020).

36. *IACC Strategic Plan*, *supra* note 34, at 73.

37. *Id.*

38. *Treatment*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/ncbddd/autism/facts.html> [<https://perma.cc/QY7U-ATCX>] (last visited Dec. 17, 2017).

39. *IACC Strategic Plan*, *supra* note 34, at 73.

40. David Beversdorf et al., *Is It Autism and If So, What Next? A Guide for Adults*, AUTISM SPEAKS, at 5 (Spring 2015) [hereinafter *Autism Speaks Guide*].

41. *Id.* at 6–9. See also Eric Fombonne, LeeAnne Green Snyder, Amy Daniels, Pamela Feliciano, & Wendy Chung, *Psychiatric and Medical Profiles of Autistic Adults in the SPARK Cohort*, 50 J. OF AUTISM & DEVELOPMENTAL DISORDERS 3679 (2020) (examining psychiatric and medical co-morbidities in a research cohort of 2,917 U.S. adults with ASD).

42. See, e.g., *Autism Speaks Guide*, *supra* note 40, at 3 ("It is sometimes said that if you know one person with autism, you know one person with autism.").

standing research prioritization on children with ASD created a gap in evidence needed to begin to develop best treatment practices and community-based supports for the adult ASD community.⁴³ Eighteen-year-olds with ASD tend to fall into this gap, severely disadvantaged in making a successful transition into adulthood.⁴⁴ Turning eighteen often means termination of important public services, lack of accommodations in secondary education, lack of consensus about appropriate behavioral and medical therapies, and difficulty securing employment.⁴⁵ This reality leads many parents of children with ASD to seek guardianship when their child turns eighteen.⁴⁶ In a world largely unfriendly to those with ASD, guardianship provides parents an important means of protection over their child's physical health and financial well-being.⁴⁷ In the absence of evidence-based recommendations for improved employment outcomes, independence, and social flourishing in this population,⁴⁸ guardianship allows parents to encourage their young adult toward independence, while retaining a voice in medical, financial, housing, and other important life decisions.⁴⁹ Self-advocates in the adult ASD community, even those under guardianship, remain integral to advancing service offerings and fostering public understanding of ASD's many faces.⁵⁰

Few greater opportunities for self-advocacy exist than the right to vote. Conferral of the right at age eighteen is an integral part of the American coming-of-age experience, and its acknowledgement and exercise enforces individual autonomy, promotes civic engagement, bestows dignity, and enfranchises individuals into the community.⁵¹ Unfortunately, the right of adults with ASD to vote may be compromised during guardianship proceedings due to outmoded state statutory regimes and lack of awareness of, or respect for, federal voting rights safeguards for individuals with disabilities like ASD.⁵² Even where the right is

43. *IACC Strategic Plan*, *supra* note 34, at 73-74.

44. *Id.* at 73-77.

45. *Id.* at 73-74.

46. See Fombonne et al, *supra* note 41, at 3681 (noting that of 8,713 adults with ASD in the SPARK cohort, 5,025, approximately 57.7 percent, were under guardianship or another form of legal dependence); Tyler Cowen, *Too Many Autistic Adults Are Denied Basic Rights*, BLOOMBERG (July 11, 2020 8:00AM EDT), [bloomberg.com/opinion/articles/2020-07-11/too-many-autistic-adults-are-denied-basic-rights-in-america?smd=opinion&sref=htOHjx5Y](https://www.bloomberg.com/opinion/articles/2020-07-11/too-many-autistic-adults-are-denied-basic-rights-in-america?smd=opinion&sref=htOHjx5Y) [https://perma.cc/AY8C-24C7].

47. See Priya Khatkhate, *Taking Away the Vote*, A.B.A.J. 9 (Oct. 2018).

48. *IACC Strategic Plan*, *supra* note 34, at 73. See also *Autism Speaks Guide*, *supra* note 40, at 5 (discussing strengths and challenges for adults with ASD in employment).

49. See Matt Vasilogambros, *Thousands Lose Right to Vote Under 'Incompetence' Laws*, PEW CHARITABLE TRUSTS (Mar. 21, 2018), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2018/03/21/thousands-lose-right-to-vote-under-incompetence-laws> [https://perma.cc/8P6Y-KWZN].

50. Cf. *IACC Strategic Plan*, *supra* note 34, at 73 (highlighting the "increasingly influential voice" of self-advocates with ASD).

51. See generally Hillary May, Note, *The Last Frontier of Disenfranchisement: A Fundamental Right for Individuals with Cognitive Disabilities*, 59 WM. & MARY L. REV. 693, 698-99 (2017); Ryan Kelley, Note, *Toward an Unconditional Right to Vote for Persons with Mental Disabilities: Reconciling State Law With Constitutional Guarantees*, 30 B.C. THIRD WORLD L.J. 359, 360-61 (2010).

52. See *infra* Part I(e) & Part II.

not stripped during guardianship, voting jurisdictions may lack appropriate accessibility provisions to enfranchise and empower voters with ASD throughout the election process.⁵³

B. ETHICAL RESPONSIBILITIES OF JUDGES AND LAWYERS IN VOTING ENFRANCHISEMENT

In a 2007 Recommendation, the ABA House of Delegates acknowledged the role guardianship proceedings may play in disenfranchisement of voters with mental disabilities and established four criteria that must be met before the voting right could be deprived.⁵⁴ These criteria are:

(1) [t]he exclusion is based on a determination by a court of competent jurisdiction; (2) [a]ppropriate due process protections have been afforded; (3) [t]he court finds that the person cannot communicate, with or without accommodations, a specific desire to participate in the voting process; and (4) [t]he findings are established by clear and convincing evidence.⁵⁵

In addition, the ABA's *Model Code of Judicial Conduct* prohibits judges from "manifest[ing] bias or prejudice" on the basis of a person's disability,⁵⁶ requires "fair[] and impartial[]" performance of judicial duties,⁵⁷ and instructs judges to accord every interested person in a particular proceeding "the right to be heard according to law."⁵⁸

The ABA's *Model Rules of Professional Conduct* for lawyers recognize the unique role lawyers play in the American polity as "public citizen[s] having special responsibility for the quality of justice,"⁵⁹ who "play a vital role in the preservation of society."⁶⁰ Within the context of these responsibilities, lawyers are called upon to provide fifty hours of pro bono legal services annually, a "substantial majority" of which should be rendered to "persons of limited means" or organizations working to meet the needs of such persons.⁶¹ The ABA also directs lawyers to provide pro bono services to "individuals, groups or organizations seeking to secure or protect civil rights, civil liberties or public rights," and for "participation in activities for improving the law, the legal systems or the legal profession."⁶²

53. Cf. Abrams, *supra* note 4 (discussing "inaccessible polling places" as a barrier to voters with disabilities).

54. See 2007 Recommendation, *supra* note 8, at 1.

55. *Id.*

56. MODEL CODE R. 2.3(B).

57. MODEL CODE R. 2.2.

58. MODEL CODE R. 2.6(A).

59. MODEL RULES pmb1. [1].

60. MODEL RULES pmb1. [13].

61. MODEL RULES R. 6.1 (a).

62. MODEL RULES R. 6.1 (b) (1), (3).

C. THE VOTING RIGHTS ACT

The Voting Rights Act of 1965 (“VRA”) prohibited the use of literacy tests, poll taxes, and other intimidation tactics that had served as de facto voting prohibitions on Black Americans throughout the Reconstruction and Civil Rights Eras.⁶³ Initially, the VRA allowed use of literacy tests, defined as any “test of the ability to read, write, understand, or interpret” any matter, to determine voting eligibility of blind or “otherwise physically handicapped” persons in accordance with State law, so long as such tests were administered evenly throughout the relevant jurisdiction.⁶⁴ In 1970, amendments to the VRA expanded its prohibition on “tests or devices” beyond instances of discriminatory application based on race or color, adopting a broad definition that bars requiring:

(1) demonstra[tion] [of] the ability to read, write, understand, or interpret any matter, (2) demonstra[tion] [of] any educational achievement or [] knowledge of any particular subject, (3) possess[ion] [of] good moral character, or (4) pro [of] [of] [] qualifications by the voucher of registered voters or members of any other class.⁶⁵

Courts have frequently interpreted the 1970 VRA’s bar on tests and devices to preclude language proficiency exams in voter registration and require balloting in languages other than English.⁶⁶ Further expanding the franchise, recent amendments to the VRA allow blind, disabled, and illiterate voters to receive assistance through the person of their choice.⁶⁷

The 1970 VRA Amendments also represented Congress’s first attempt to enfranchise eighteen-year-old voters, recognizing the pivotal role this population played in the “Second Reconstruction” and other activist movements of the 1960s.⁶⁸ The Amendments struck down requirements that voters be twenty-one years of age, and attempted to broadly enfranchise eighteen-year-olds in order to fully realize the due process and equal protection guarantees of the Fourteenth Amendment.⁶⁹ However, the Supreme Court disallowed application of the voting age provisions of the 1970 Amendments to state elections, deciding on federalism grounds that, in absence of a Constitutional Amendment altering the age of voting

63. U.S. DEP’T OF JUSTICE CIVIL RIGHTS DIV., *Introduction to Federal Voting Rights Laws* (Aug. 16, 2018), <https://www.justice.gov/crt/introduction-federal-voting-rights-laws> [https://perma.cc/UMR7-2TPY].

64. *Compare* Voting Rights Act, 52 U.S.C.A. § 10101 (a)(2)(C) (West 2020), with 52 U.S.C.A. § 10302 (b) (West 2020) (suspending use of “test[s] or device[s]” to abridge voting rights based on “race or color”).

65. 52 U.S.C.A. § 10501(a), (b) (West 2020).

66. *See, e.g.*, *Madera v. Detzner*, 325 F. Supp. 3d 1269 (D. Fla. 2018) (granting preliminary injunction requiring the state of Florida to provide bilingual English-Spanish election material).

67. 52 U.S.C.A. § 10508 (West 2020).

68. Yael Bromberg, *Youth Voting Rights and the Unfulfilled Promise of the Twenty-Sixth Amendment*, 21 UNIV. PA. J. CONST. L. 1105, 1121–27 (May 2019).

69. *Id.* at 1126.

eligibility, states could not be forced to allow eighteen-year-olds to vote in their own elections.⁷⁰

D. THE TWENTY-SIXTH AMENDMENT

Congress and the States responded quickly to the Supreme Court's call for a constitutional amendment to uniformly enfranchise eighteen-year-olds. On March 23, 1971, Congress passed the future Twenty-Sixth Amendment and referred it to the States, noting the Amendment was a "general recognition of the nation's expansion toward a more inclusive suffrage."⁷¹ In light of the approaching 1972 Presidential election, the States quickly ratified the Amendment on July 1, 1971.⁷² The Amendment remains largely unchallenged,⁷³ and state court interpretations tend to emphasize that the Amendment moved beyond granting bare voting permission to eighteen-year-olds to "affirmatively [] encourag[ing] their voting through the elimination of unnecessary burdens and barriers."⁷⁴ In 1975, Congress again amended the VRA to give the Attorney General the right to enforce the Twenty-Sixth Amendment against the States.⁷⁵

E. STATE STATUTES AND CONSTITUTIONS

The Federal Constitution expressly delegates power to the States to determine the "Times, Places and Manner" of elections, while reserving Congress's right to "make or alter" state election decisions "at any time."⁷⁶ Under their Elections Clause power, all but twelve states adopted constitutional provisions prohibiting persons with mental impairments or disabilities from voting.⁷⁷ These provisions often use degrading and outdated language such as "idiots or insane," "persons of unsound mind," or not of "quiet and peaceable behavior" to describe persons

70. *Oregon v. Mitchell*, 400 U.S. 112, 134–35 (1970) ("Our judgments today give the Federal Government the power the Framers conferred upon it, that is the final control of the elections of its own officers. Our judgments also save for the States the power to control state and local elections which the Constitutional originally reserved to them and which no subsequent amendment has taken from them.").

71. Bromberg, *supra* note 68, at 1132. *See also* H.R. REP. NO. 92-37, at 2 (1971) ("The proposed new article of amendment is part of a constitutional tradition of enlarging participation in our political processes.").

72. *The 26th Amendment*, HIST., ART & ARCHIVES: U.S. H.R., <https://history.house.gov/Historical-Highlight/Detail/37022> [<https://perma.cc/5ZB5-557D>] (last visited Dec. 17, 2020).

73. Bromberg, *supra* note 68, at 1134.

74. *Worden v. Mercer County Board of Elections*, 61 N.J. 325, 345 (N.J. 1972). *See also* *Colorado Project-Common Cause v. Anderson*, 178 Colo. 1, 8 (Colo. 1972) (striking down a Colorado law that prohibited circulating and signing petitions until age twenty-one because the "recurring theme" in the 1970 VRA Amendments and Twenty-Sixth Amendments was "Congress' distress with youths' alienation").

75. 52 U.S.C.A. § 10701(a)(1) (West 2020).

76. U.S. CONST. ART I, § 4.

77. Elizabeth R. Schlitz, *The Ties That Bind Idiots and Infamous Criminals: Disenfranchisement of People with Cognitive Impairments*, 13 U. OF ST. THOMAS L.J. 100, 104 (2016). According to Schlitz, only California, Connecticut, Illinois, Indiana, Maine, New Hampshire, New York, North Carolina, Oklahoma, Pennsylvania, Tennessee, and Vermont have not adopted disenfranchising constitutional provisions. *See id.*

barred from voting in the state.⁷⁸ Election statutes or regulations in these states sometimes diverge from their relevant constitutional prohibitions and language to allow some mentally disabled persons to vote, which causes inconsistency in interpretation, all while leaving intact painful artifacts of bygone eras where those adjudged mentally incompetent were assigned to asylums, forced sterilization procedures, and other horrors.⁷⁹

In light of these constitutional and statutory provisions, and lack of understanding (or ignorance) of federal prohibitions on disenfranchisement, states have taken four approaches to determine voting eligibility of the mentally disabled, all of which tie the voting right to guardianship proceedings.⁸⁰ Eighteen states and the District of Columbia automatically strip the voting right when a person is placed under guardianship.⁸¹ Other states maintain a presumption of voting ineligibility for those under guardianship, which may be rebutted by the guardian or her ward's presentation of competency evidence, such as judicial review of the ward's ability to complete a voter registration form, during the guardianship hearing.⁸² Still other states maintain a presumption of voting *eligibility* for those under guardianship, with the voting right stripped only by presentation of specific evidence that the person under guardianship cannot make a voting decision.⁸³ Twenty-one states adopt the second or third approach.⁸⁴ Finally, nine states extend the voting franchise to every resident, "regardless of mental capacity."⁸⁵

Part II of this Note will argue the VRA and the Twenty-Sixth Amendment create a presumption of voting eligibility for U.S. adults, including those with ASD, that is unconstitutionally shifted to a presumption of *ineligibility* in state guardianship proceedings that automatically or presumptively strip adults with ASD of

78. Kelley, *supra* note 51, at 372 (citing constitutions of Arkansas, Iowa, Kentucky, Minnesota, Mississippi, New Mexico, Ohio, Alabama, Montana, and Vermont).

79. See Sally Balch Hurme & Paul S. Appelbaum, *Defining and Assessing Capacity to Vote: The Effect of Mental Impairment on The Rights of Voters*, Symposium, 38 MCGEORGE L. REV. 931, 936–46 (2007). See *id.* for an in-depth discussion of the interaction between state constitutional and statutory provisions regarding voting by those with mental impairments. See also Kelley, *supra* note 51, at 372–78; Schlitz, *supra* note 77, at 104.

80. Tiffany Yates, *A First Amendment Analysis of Voting Rights of the Mentally Incapacitated*, 15 FIRST AMEND. L. REV. 121, 130 (2016).

81. *Id.* at 131–32 (citing constitutions and statutes of Arizona, D.C., Georgia, Hawaii, Mississippi, Missouri, Montana, Nebraska, Nevada, New Jersey, New York, Ohio, Rhode Island, South Carolina, Utah, Virginia, West Virginia, and Wyoming).

82. *Id.* at 133–36 (citing, among other state statutes, California's requirements to prove voting competence in a guardianship proceeding).

83. See *id.* at 132–36. An example of such evidence is a showing that the person under guardianship is in a vegetative state. *Id.*

84. *Id.* at 133–34 (citing constitutions and statutes of Alabama, Alaska, Arkansas, California, Connecticut, Delaware, Florida, Iowa, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, New Mexico, North Carolina, North Dakota, Oklahoma, Oregon, South Dakota, Tennessee, Texas, Washington, and Wisconsin).

85. *Id.* at 136 (citing constitutions and statutes of Colorado, Idaho, Illinois, Indiana, Kansas, Maine, New Hampshire, Pennsylvania, and Vermont).

their voting right. Part II will then demonstrate the ethical obligation judges have to not deprive adults with ASD of their voting right in such a way. Recognizing the illegitimacy of these guardianship-driven devices to disenfranchise voters with ASD, Part III will argue the VRA, Help America Vote Act (“HAVA”), and the Americans with Disabilities Act (“ADA”) create an affirmative responsibility for state election officials to provide accessibility resources for voters with ASD, and recommend that attorneys engage in appropriate advocacy to see this responsibility carried out. Drawing from the work of ASD advocacy groups, Part IV makes recommendations for accessibility measures lawyers should encourage state election officials to adopt to best serve voters with ASD and meet their statutory obligations.

II. THE TWENTY-SIXTH AMENDMENT AND VRA CREATE A PRESUMPTION OF VOTING ELIGIBILITY

Greg Demer, a 30-year-old man who works three part-time jobs and is passionate about military aircraft, lost his right to vote at age eighteen.⁸⁶ Demer has ASD, and his mother sought a form of guardianship to protect him and stay involved in his health and financial care.⁸⁷ At the judicial proceeding, Demer was declared “mentally incapacitated.”⁸⁸ Under California law, as in thirty-eight other states and the District of Columbia, a judicial determination of mental incapacity automatically strips a person of their right to vote.⁸⁹ Ten years later, another judge reinstated Demer’s voting right, and he voted for the first time in the 2016 presidential election.⁹⁰

Demer’s story is typical for eighteen-year-olds, and other adults under guardianship due to mental disorders like ASD, who, at the hands of a singular judicial figure, find themselves banished to the “last frontier” of disenfranchisement,⁹¹ without forewarning or prior knowledge that voting rights are “even on the table” during their guardianship adjudications.⁹² Part II argues the Twenty-Sixth Amendment and VRA create a presumption of voting eligibility which some states illegitimately distort into a presumption of voting *ineligibility* during guardianship adjudications concerning individuals with ASD, like Demer, particularly eighteen-year-olds.

A. THE VRA

The VRA’s prohibition on literacy tests, enacted as a temporary measure to eradicate racial discrimination in the voting franchise, was made permanent in

86. Vasilogambros, *supra* note 49.

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. May, *supra* note 51, at 693.

92. Khatkhate, *supra* note 47, at 9.

1975, with Congress aiming to encourage voting turnout and registration in areas where it was historically low and where “concentrations of minorities with native languages other than English reside.”⁹³ Echoing Justice Douglas in *Oregon v. Mitchell*, Congress stressed the “insufficienc[y] of the relationship between literacy and responsible voting to justify” the use of literacy tests under the Fourteenth Amendment’s Equal Protection guarantee.⁹⁴ Ultimately, Congress grounded its decision to permanently bar tests and devices in three rationales: (1) eradication of the historical employment of tests and devices to deny minorities their voting rights, (2) the “patent[] unfair[ness]” of requiring the electorate to demonstrate achievement of a certain education level where educational opportunities have historically been denied, and (3) the invalidity of tests and devices under the Fourteenth Amendment.⁹⁵

These same rationales apply forcefully to an argument that the practices of states that automatically or presumptively strip the voting rights of individuals placed under guardianship violate the VRA. While comprehensive examination of guardianship procedures, which vary from state to state, is beyond the scope of this Note, the Uniform Guardianship and Protective Proceedings Act⁹⁶ is a useful proxy to demonstrate how guardianship proceedings incorporate the kind of “test or device”⁹⁷ the VRA aimed to eliminate. In a typical guardianship proceeding, an “incapacitated person or *any* person interested in [the allegedly incapacitated person’s] welfare” may file a petition for judicial appointment of a guardian and the court will set a hearing date to determine the person’s capacity.⁹⁸ Prior to this hearing, the allegedly incapacitated person “must be examined by a physician or other qualified [court-appointed] person,” who then submits a written report to the court of the person’s physical and mental competence.⁹⁹ The allegedly incapacitated person must also be interviewed by a Court-appointed “visitor,” who visits the person’s home or future residence.¹⁰⁰ The visitor submits a written report of his findings and observations of the person’s competency to the Court.¹⁰¹ The presiding judge then renders a guardianship decision based on these reports and any other evidence presented by any party to the hearing.¹⁰²

Recall the VRA’s definition of “test or device” as a mechanism requiring a demonstration of any of the following: (1) “ability to read, write, understand, or interpret any matter,” (2) “educational achievement or [] knowledge of any particular subject,” (3) “possess[ion] [of] good moral character,” or (4) “qualifications by the

93. S. REP. NO. 94-295, at 9 (1975).

94. *Id.* at 23 (citing 116 CONG. REC. 5221 (1970)).

95. *Id.*

96. UNIF. GUARDIANSHIP & PROTECTIVE PROCEEDINGS ACT §§ 2-201–212, 84 U.L.A. 479 (1989).

97. 52 U.S.C.A. § 10501(a), (b) (West 2020).

98. UNIF. GUARDIANSHIP & PROTECTIVE PROCEEDINGS ACT § 2-203(a), 84 U.L.A. 479 (1989).

99. UNIF. GUARDIANSHIP & PROTECTIVE PROCEEDINGS ACT § 2-203(b), 84 U.L.A. 479 (1989).

100. *Id.*

101. *Id.* (emphasis added).

102. UNIF. GUARDIANSHIP & PROTECTIVE PROCEEDINGS ACT § 2-206(b), 84 U.L.A. 479 (1989).

voucher of registered voters or members of any other class.”¹⁰³ Although the specific content of each guardianship proceeding will vary, at bottom, every guardianship proceeding incorporates a “test or device” vis a vis the use of a physical examination, formal interview, and their accompanying reports to evaluate the subject’s mental and physical competence, including his or her “ability to . . . understand or interpret any matter.”¹⁰⁴ Using the tests and devices involved in a guardianship proceeding to presumptively strip any person, but especially eighteen-year-olds with ASD, of their voting right is a bald violation of the VRA.

This violation becomes particularly apparent when considered in light of the reasons Congress cited for permanently applying its prohibition on literacy tests: the lack of relationship between literacy and meaningful voting, the “patent unfairness” of requiring a population that has faced historical discrimination (as individuals with mental disabilities certainly have)¹⁰⁵ to demonstrate a level of educational attainment, and the “constitutional tradition” of extending the franchise.¹⁰⁶ Guardianship evaluations also are not and cannot be applied equally to all “prospective voters”¹⁰⁷ in a specific jurisdiction or even with consistency to all mentally disabled persons in a jurisdiction. This further brings the automatic or presumptive termination of voting rights for someone placed under guardianship outside the permissions of the VRA.¹⁰⁸

B. THE TWENTY-SIXTH AMENDMENT

Couple this with the spirit of the Twenty-Sixth Amendment, which built on the energy of the youth-driven Disability Rights, LGBTQ+ Rights, Women’s Liberation, and Anti-War movements in seeking to enfranchise as many young people as possible.¹⁰⁹ It is hardly within the spirit of this widely enfranchising Amendment to automatically revoke the voting right of an eighteen-year-old merely because he or she is placed under guardianship without a showing of something more. States should honor the franchise, and the shared decision of

103. 52 U.S.C.A. § 10501(a), (b) (West 2020).

104. 52 U.S.C.A. § 10501(b) (West 2020).

105. See Benjamin O. Hoerner, Note, *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, 106 (2015) (noting only 30% of voters with mental disabilities currently vote, the lowest turnout of all major disability groups).

106. See S. REP. NO. 94-295, at 24 (1975) (“It is difficult to see why citizens who cannot read or write should be prevented from participating in decisions that directly affect their environment . . .”).

107. *Id.*

108. See 52 U.S.C.A. § 10101(a)(2)(A) (West 2020); Hurme & Appelbaum, *supra* note 79, at 964–74 (noting the lack of uniform standards in judging voting competency for voters with mental disabilities). One may argue that automatically or presumptively stripping the voting right during a guardianship proceeding is permissible under the National Voter Registration Act (NVRA), which allows states to enact statutory provisions authorizing removal of voters from registration rolls on the basis of “mental incapacity.” 52 U.S.C.A. § 20501 (West 2020). However, the NVRA incorporates the VRA’s requirement that any such removal laws be “uniform” and “nondiscriminatory,” applying to all voters in the jurisdiction. 52 U.S.C.A. § 20507 (b)(1) (West 2020). Elimination of the voting right during a guardianship proceeding cannot meet this standard.

109. See *supra* notes 71–75.

Congress and the States to broadly extend it via the Twenty-Sixth Amendment.¹¹⁰ Considering the disproportionate number of eighteen-year-olds with ASD who are placed under guardianship compared to their peers, presumptively viewing this population as unable to vote is in direct contradiction to the Twenty-Sixth Amendment's determination that eighteen-year-olds on the whole should be permitted to vote.¹¹¹

C. THE ETHICAL OBLIGATION OF JUDGES IN STATE GUARDIANSHIP PROCEEDINGS

Judges in guardianship proceedings have an ethical obligation not to automatically or presumptively strip individuals with ASD of their voting right during guardianship proceedings. The ABA's 2007 Recommendation urges explicit recognition that the voting right is retained during guardianship, unless the court finds, "by clear and convincing evidence" that the person "cannot communicate, with or without accommodations, a specific desire to participate in the voting process."¹¹² Automatic or presumptive deprivation of the right cannot meet this standard, especially considering individuals participating in guardianship proceedings are often wholly unaware that voting rights will even be affected.¹¹³

Compliance with the ABA's *Model Code of Judicial Conduct* should also encourage judges to adopt a presumption of voting eligibility in guardianship proceedings. The *Model Code* requires "fair[] and impartial[]" performance of judicial duties¹¹⁴ "without bias or prejudice,"¹¹⁵ ensuring the right of those with legal interests in a given proceeding to be heard.¹¹⁶ Since state statutes permitting or requiring judges to strip the voting right during guardianship adjudications often include outmoded and offensive language informed by improper stereotypes about people with disabilities,¹¹⁷ judges' ethical commitments preclude applying them.¹¹⁸ Judges can avoid the appearance of impropriety in their adherence to these rules by presuming that all individuals under guardianship are eligible to vote, and requiring an explicit showing of clear and compelling evidence of a wholesale lack of desire to participate in the franchise before terminating the right.

110. See H.R. REP. NO. 92-37, at 2 (1971) ("The proposed new article of amendment is part of a constitutional tradition of enlarging participation in our political processes.").

111. U.S. CONST. amend. XXVI.

112. 2007 Recommendation, *supra* note 8, at 1.

113. Khatkhate, *supra* note 47, at 9.

114. MODEL CODE R. 2.2.

115. MODEL CODE R. 2.3.

116. MODEL CODE R. 2.6.

117. See *supra* Part I(e).

118. See MODEL CODE R. 2.3 cmt [2] ("Examples of manifestations of bias or prejudice include but are not limited to: epithets; slurs; demeaning nicknames; [and] negative stereotyping.").

D. RESISTANCE TO ENFRANCHISEMENT FOR VOTERS WITH ASD

Opponents of presumptive enfranchisement for individuals with mental impairments typically ground their opposition in concerns about voter fraud, ballot harvesting, or maintenance of an “intelligent electorate.”¹¹⁹ These concerns are born out of stereotypes and presumptions about individuals with differing mental abilities, and the VRA largely answered them by disallowing use of literacy tests to assess voter competence, and by expressly allowing disabled voters to use human assistants.¹²⁰

Prior studies have failed to demonstrate that voter fraud is a substantial risk in any population, occurring at a “miniscule 0.00000132 percent.”¹²¹ No data exists showing a substantial amount or increased risk of voting fraud by people considered mentally incompetent.¹²² Forbidding states from automatically or presumptively deprive an individual under guardianship of their voting right does nothing to expand possibilities of voter fraud as participants in guardianship hearings could still be permitted to present record evidence to rebut the presumption of voting eligibility where there may be a legitimate concern that impaired individual’s identity could be used to submit a second ballot.¹²³

Concerns about ballot harvesting from mentally incapacitated populations are largely moot with the continued shift away from large-scale institutionalization toward community integration and care.¹²⁴ Although some eighteen-year-olds with ASD live in group homes or long-term care facilities,¹²⁵ ballot harvesting concerns no more justify presumptive deprivation of the voting right in these settings than they would in other group living settings such as college dorms, sorority or fraternity homes, or assisted living facilities. Furthermore, studies have shown mentally disabled voters living in group care settings mirror the voting choices of the general population in their jurisdiction, suggesting their residence scenario does not uniquely affect their voting choice compared to other factors affecting the voting decisions of their locational peers.¹²⁶

119. See May, *supra* note 51, at 727; Schlitz, *supra* note 77, at 119–26; Yates, *supra* note 80, at 136–38.

120. 52 U.S.C.A. §§ 10501(a)(2)(C), 10508 (West 2020).

121. Yates, *supra* note 80, at 137–38.

122. *Id.*

123. This concern may be present when the person under guardianship is in a vegetative or similar state. Other safeguards throughout the election process also work to prevent voter fraud in such scenarios. For example, it is likely impracticable for persons in such states to meet generally applicable requirements for voter registration or ballot casting, such as presentation of identification or signature verification. See *id.*

124. Schlitz, *supra* note 77, at 121.

125. A recent study of post-high school outcomes in young adults with ASD found that 11.8 percent lived in a “supervised living situation” like a group home, while 87.1 percent continued to live with a parent or guardian. Kristy A Anderson, Paul T. Shattuck, Benjamin P. Cooper, Anne M. Roux, & Mary Wagner, *Prevalence and Correlates of Postsecondary Residential Status Among Young Adults with an Autism Spectrum Disorder*, 18 *AUTISM* 562, 566 (July 2014).

126. Schlitz, *supra* note 77, at 121.

Finally, concerns about an “intelligent electorate” are answered decisively by the VRA.¹²⁷ As discussed, Congress found no meaningful connection between literacy and voting competence when it barred use of literacy tests and devices to establish voting eligibility.¹²⁸ And, to insist that the electorate show its “intelligence” by demonstrating a certain level of knowledge about the relevant election or current political events would be to impose a requirement that many neuro-typical American voters could not meet.¹²⁹ It is unfair to exact a showing of informational intelligence from any voting population, let alone from a historically disenfranchised population like voters with ASD and other mental disabilities.

To comply with the VRA’s prohibition on use of tests or devices to establish voting eligibility and to advance the Twenty-Sixth Amendment’s aim to enfranchise all eighteen-year-old voters, states who automatically or presumptively strip adults with ASD of their voting rights during guardianship proceedings should cease to do so. At minimum, these states should shift to a presumption of voting eligibility for adults under guardianship, rebuttable only by presentation of record evidence that the enfranchisement of a particular individual creates a demonstrable risk of voter fraud. To extend the franchise in furtherance of the Nation’s longtime goals, states should ultimately seek to eliminate altogether the connection between voting rights and guardianship adjudications.

III. EXTENDING HAVA AND THE ADA’S ACCESSIBILITY REQUIREMENTS TO VOTER’S WITH ASD

Having established the VRA and Twenty-Sixth Amendment create a presumption of voting eligibility for adults with ASD, including those under guardianship, Part III will argue that the accessibility promises of the Help America Vote Act (“HAVA”) and Americans with Disabilities Act (“ADA”) require state election officials to provide appropriate accessibility resources for voters with ASD.

Enfranchisement efforts after the VRA have built on the VRA’s foundation by increasing registration, polling place, and ballot accessibility for disabled voters.¹³⁰ In 1984, Congress enacted the Voting Accessibility for the Elderly and Handicapped Act (“VAEHA”) “to promote the fundamental right to vote by improving access for handicapped and elderly individuals.”¹³¹ The Act required states to provide “reasonable” numbers of accessible registration and polling places, as well as registration and voting aids tailored to handicapped and elderly

127. See *supra* Part I(a).

128. See *supra* notes 92-94 and accompanying discussion.

129. Charles Angelucci & Andrea Prat, *Measuring Voters’ Knowledge of Political News*, 6-7 (MIT Sloan & Columbia University, Working Paper Aug. 11, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3593002 [<https://perma.cc/42J7-5YU4>].

130. See 52 U.S.C.A. § 20101 (West 2020); 52 U.S.C.A. § 20902 (West 2020); 42 U.S.C.A. § 12101(a)(3) (West 2020).

131. 52 U.S.C.A. § 20101 (West 2020).

voters.¹³² Notably, the Act barred states from requiring handicapped voters to present notarization or medical certification to establish voting eligibility, except where required to prove eligibility for automatic absentee ballot receipt or a late absentee ballot.¹³³ However, the Act limited its definition of “handicapped” to “temporary or permanent *physical* disability.”¹³⁴

In 2002, Congress built on VAEHA, enacting the Help America Vote Act as a vehicle to eliminate lever and punch card voting systems, which had caused the infamous hanging chads debacle of the 2000 presidential election.¹³⁵ HAVA allocated funds for states to purchase non-lever, non-punch card voting machines in compliance with established federal standards, and required provision of at least one accessible voting machine per polling place to serve individuals with disabilities.¹³⁶ HAVA, though referring in places to visual impairment and blindness, did not expressly define disability.¹³⁷ Its final provision may provide a clue to Congress’s intended definition, noting the statute has “no effect” on voting rights provided by a list of other laws, including the VRA, VAEHA, and, particularly relevant to individuals with ASD, the Americans with Disabilities Act of 1990.¹³⁸ By including this list, HAVA’s authors likely intended the statute’s definition of “disability” to encompass the definitions included in each of these statutes.¹³⁹

The Americans with Disabilities Act, aiming to eliminate “persist[ent]” discrimination against individuals with disabilities in “such critical areas as . . . voting,”¹⁴⁰ defined disability broadly as “a physical or mental impairment that substantially limits one or more major life activities,” including, but not limited to self-care, performance of “manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentration, thinking, communicating, and working” as well as “operation of a major bodily function.”¹⁴¹ Read alone, the ADA mandates eradication of discrimination against individuals with disabilities at the ballot box, a mandate HAVA reinforced.¹⁴² Together the two statutes suggest the ADA provides the substance of a presumptive right of individuals with disabilities to vote, while HAVA provides processes by which states should encourage their exercise of the right.

132. *Id.*

133. 52 U.S.C.A. § 20104(b) (West 2020).

134. 52 U.S.C.A. § 20107(4) (West 2020) (emphasis added).

135. *See* 52 U.S.C.A. § 20902 (West 2020).

136. 52 U.S.C.A. § 20902 (a)(1)-(3) (West 2020).

137. Hoerner, *supra* note 105, at 104.

138. 52 U.S.C.A. § 21145(a) (West 2020). *See also* Hoerner, *supra* note 105, at 104.

139. *See* Hoerner, *supra* note 105, at 104.

140. 42 U.S.C.A. § 12101 (a)(3) (West 2020). The ADA Amendments of 2008 updated the statute to include this definition, with the goal of broadening coverage.

141. 42 U.S.C.A. § 12102 (1)(A), (2)(A)-(B) (West 2020).

142. 52 U.S.C.A. § 21145(a) (West 2020). *See also* Hoerner, *supra* note 105, at 104.

Administrative guidance and judicial interpretation confirm that ASD is a disability within the ADA's ambit.¹⁴³ Recent ADA implementation regulations from the Equal Employment Opportunity Commission note the ADA's coverage is "generous," and expressly list "autism" as a disability that "substantially limits brain function."¹⁴⁴ Judges applying the ADA also recognize these regulations "clearly indicate that ASD now qualifies as a disability under the [2008] amended version of the ADA."¹⁴⁵

Tying HAVA's accessibility promise for voters with disabilities to the ADA's definitional parameters creates an imperative for state election officials to provide accessible registration and voting locations, and voting information and equipment for voters with ASD. State election officials must provide voters with ASD "the same opportunity for access and participation (including privacy and independence) as other voters" by providing voting machines, informational literature, and ballots designed with the accessibility needs of voters with ASD in mind.¹⁴⁶

Considering their unique role as public citizens specially responsible for the quality of justice by virtue of their important role in the "preservation of society,"¹⁴⁷ lawyers should engage in pro bono advocacy with individual litigants and voting rights advocacy organizations that seek to remedy accessibility deficiencies in the voting process. The next Part will recommend accessibility measures lawyers should encourage state election to adopt to fully realize HAVA and the ADA's promise of equal access and participation for voters with ASD.

IV. ACCESSIBILITY RECOMMENDATIONS TO ENFRANCHISE VOTERS WITH ASD

*It's best for every person with autism to vote because, just think about it, our life does matter.*¹⁴⁸

—Jimi, an eighteen-year old voter with ASD

Part IV describes how lawyers can fulfill their ethical obligations as lawyers and public citizens by engaging in voting rights advocacy for individuals with ASD, and recommends accessibility measures lawyers can encourage local election officials to implement to meet HAVA and the ADA's statutory requirements.

143. See, e.g., 29 C.F.R. § 1630.2(j)(3)(i)-(iii) (West 2020); *Latson v. Clarke*, 249 F. Supp. 3d 838, 854 (W.D. Va. 2017).

144. 29 C.F.R. § 1630.2(j)(ix)(3)(i)-(iii) (West 2020).

145. *Latson v. Clarke*, 249 F. Supp. 3d 838, 854 (W.D. Va. 2017); see also *A.L. v. Walt Disney Parks*, Case No. 6:14-cv-1544-Orl-22GJK, 2020 WL 3415008 at *14 (June 22, 2020) (recognizing that ASD "substantially limits one or more of the major life activities of caring for one's self, learning, performing manual tasks, walking, and speaking").

146. See 52 U.S.C.A. § 21081(a)(3)(A)-(B) (West 2020).

147. MODEL RULES pmb1. [13].

148. *Autism POVs*, *supra* note 20.

The ABA's *Model Rules* describe lawyers as "public citizen[s] having special responsibility for the quality of justice."¹⁴⁹ In this public citizen capacity, lawyers should "seek improvement" and "cultivate knowledge" of the law.¹⁵⁰ Lawyers are to use such knowledge "in reform of the law" and "to strengthen legal education," including "the public's understanding of and confidence in the rule of law."¹⁵¹

One specific way lawyers are called upon to fulfill their unique position as public citizens with knowledge of the law is through voluntary pro bono publico service.¹⁵² Under the *Model Rules*, every lawyer is called upon to render at least fifty pro bono hours each year.¹⁵³ The *Model Rules* expressly direct lawyers to consider providing pro bono services "to individuals, groups or organizations seeking to secure or protect civil rights, civil liberties or public rights,"¹⁵⁴ and in "participation in activities for improving the law."¹⁵⁵ The pro bono services imagined by the *Model Rules* include "the provision of legal advice, legislative lobbying, [and] administrative rule making,"¹⁵⁶ as well as activities like "serving on bar association committees, [or] legislative lobbying to improve the law."¹⁵⁷

Engaging in voting rights advocacy for individuals with ASD allows lawyers to fulfill their unique public citizen responsibility and to provide meaningful pro bono contributions to a disenfranchised community. Informed by the existing work of ASD advocacy groups, lawyers should advocate state election officials implement accessibility measures to honor HAVA and the ADA's mandates for voters with ASD including: increased voting rights education aimed toward the ASD community; recognition of ASD as an allowable qualification for absentee voting; creation of image-heavy, easy to understand voter guides and ballot submission instructions; allowance for human assistants; provision of noise-cancelling headphones and private voting rooms; and compatibility with assistive communication devices throughout the voting process. These recommendations are by no means exhaustive, and lawyers should also seek guidance and partnership with local ASD advocates and treatment experts in tailoring their advocacy to accessibility measures that would best serve the needs of their respective population, particularly as research about the adult ASD population grows and technology advances.¹⁵⁸

149. MODEL RULES pmb1 [1].

150. MODEL RULES pmb1 [6].

151. MODEL RULES pmb1 [6].

152. MODEL RULES R. 6.1.

153. MODEL RULES R. 6.1.

154. MODEL RULES R. 6.1 (b)(1).

155. MODEL RULES R. 6.1(b)(3).

156. MODEL RULES R. 6.1 cmt [2].

157. MODEL RULES R. 6.1 cmt [8].

158. As a starting point, state and local election administrators can consult local chapters of autism advocacy organizations like the Autistic Self Advocacy Network, Autism Speaks, and the Autism Society. See *Affiliate Groups*, AUTISTIC SELF ADVOC. NETWORK, <https://autisticadvocacy.org/get-involved/affiliate-groups/>

A. RIGHTS EDUCATION

Some voters with ASD, like many voting-eligible individuals with disabilities, are unaware of their right to vote and the accessibility measures legally required to encourage their exercise of this right.¹⁵⁹ State election officials should make materials explicating the voting rights of adults with ASD widely available, and work with state and local chapters of advocacy groups to distribute these materials to the ASD community. Such efforts could include distribution of informative literature (designed with the assistance of ASD advocates) to advocacy chapters, presentations at chapter meetings of advocacy groups, use of public service announcements, and inclusion of such materials on the state election officials' website.¹⁶⁰

B. ABSENTEE VOTING

Adults with ASD may experience symptoms that make the in-person voting experience overwhelming, unpleasant, and paralytic to navigate.¹⁶¹ Waiting in long lines, surrounded by strangers who may vehemently disagree with you, in an unfamiliar place, to complete a task you may have never done before, is a stress-inducing experience for anyone. The heightened sensory awareness, communication differences, and social discomfort adults with ASD often experience make the in-person voting experience particularly difficult.¹⁶² And, during a global pandemic, as in 2020, the elevated occurrence of co-morbidities in adults with ASD makes the in-person voting experience not only unwise, but dangerous.¹⁶³ Considering this, states that require reason in order to qualify for an absentee

[<https://perma.cc/9LSR-Z37X>] (last visited Dec. 17, 2020); *Chapters & Local Offices*, AUTISM SPEAKS, <https://www.autismspeaks.org/chapters> [perma.cc/X83S-G7AP] (last visited Dec. 17, 2020); *Affiliate Network*, AUTISM SOC'Y, <https://www.autism-society.org/about-the-autism-society/affiliate-network/> [perma.cc/F3H6-N7U7] (last visited Dec. 17, 2020).

159. See, e.g., *Autism POVs*, *supra* note 20; Khatkhate, *supra* note 47.

160. Many advocacy organizations compile their own "know your rights" resources for voters. See, e.g., Bazelon Center for Mental Health Law, Autistic Self Advocacy Network, National Disability Rights Network, Schulte Roth & Zabel LLP, & Akin Gump Strauss Hauer & Feld LLP, *Vote. It's Your Right: A Guide to the Voting Rights of People with Mental Disabilities* (2020); #AutismVotes: *Vote on Tuesday, November 3rd (or earlier, if you have the option!)*, AUTISM SPEAKS (Sept. 25, 2020), <https://www.autismspeaks.org/vote2020> [perma.cc/2KQF-BC46]. State election officials can build on these resources by making them publicly available through their own websites, or by incorporating the concepts into their own literature.

161. Cf. *What is Autism Spectrum Disorder?*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/ncbddd/autism/facts.html> [<https://perma.cc/3JEB-WVTT>] (last visited Dec. 17, 2020); *Autism Spectrum Disorder*, NAT'L INST. OF MENTAL HEALTH, <https://www.nimh.nih.gov/health/topics/autism-spectrum-disorders-asd/index.shtml> [<https://perma.cc/BKL2-RJHP>] (discussing common symptoms of ASD, including "want[ing] to be alone," difficulty relating to others, trouble expressing needs, dependence on routine, and sensory sensitivity).

162. See *supra* notes 1–27 and accompanying discussion. See also Clare Cummins, Elizabeth Pellicano, & Laura Crane, *Autistic Adults' Views of Their Communication Skills and Needs*, 55 INT'L J. OF LANGUAGE & COMM. DISORDERS 678, 683–84 (Oct. 2020).

163. *IACC Strategic Plan*, *supra* note 34, at 77–79.

ballot should explicitly recognize ASD as a qualifying reason, and allow voters with ASD to permanently opt-in to automatic absentee balloting.¹⁶⁴

C. IMAGE-HEAVY INSTRUCTIONS

Use of images in tandem with or in lieu of text can help individuals with ASD understand and appropriately communicate information and concepts.¹⁶⁵ Common versions of State-produced registration materials, voter guides, and ballot-casting instructions, are text-heavy, lengthy, and often difficult to follow.¹⁶⁶ Adults with ASD, who often prefer to perfect a routine and can execute such with incredible precision, may find standard versions of these materials overwhelming and frustratingly difficult to understand.¹⁶⁷

Just as state election officials provide these materials in alternate languages, they should provide them in an image-heavy, minimal text format to help voters with ASD understand the processes of registration and ballot-casting.¹⁶⁸ Doing so will allow voters with ASD a seamless experience leading up to and at the polls.

D. HUMAN ASSISTANTS

Some voters with ASD may be unaware of their VRA right to voting assistance from the person of their choice or may feel that exercising this right will subject them to unwanted stigma or attention. State election officials should make the right to a human assistant explicit in voting rights materials and instructions to all voters, with the goal of eliminating the stigma currently inherent in the use of an assistant, as well as to dispel the unfounded concern that use of a human assistant increases risk of voter fraud.¹⁶⁹

E. NOISE-CANCELLING HEADPHONES OR PRIVATE VOTING ROOMS

Many adults with ASD experience discomfort, stress, and debilitating overstimulation in crowded areas or when presented with scenarios and people outside

164. Sixteen states currently require voters to qualify for an absentee ballot by providing a reason they cannot vote on Election Day: Alabama, Arkansas, Connecticut, Delaware, Indiana, Kentucky, Louisiana, Massachusetts, Mississippi, Missouri, New Hampshire, New York, South Carolina, Tennessee, Texas, West Virginia. *Voting Outside the Polling Place: Absentee, All-Mail and Other Voting at Home Options*, NAT'L CONF. OF ST. LEGISLATURES (Sept. 24, 2020), <https://www.ncsl.org/research/elections-and-campaigns/absentee-and-early-voting.aspx> [perma.cc/LCW5-VH28].

165. See generally Alyssa Hillary Zisk & Elizabeth Dalton, *Augmentative and Alternative Communication for Speaking Autistic Adults: Overview and Recommendations*, 1 AUTISM IN ADULTHOOD 93, 95–96 (2019).

166. See, e.g., *Voter Information Pamphlet*, CITY & CTY. OF S.F. (Nov. 2016), https://webbie1.sfpl.org/multimedia/pdf/elections/November8_2016.pdf [perma.cc/W6DR-HWRC].

167. See generally *Autism Speaks Guide*, *supra* 40, at 5.

168. For examples developed by ASD advocacy groups, see *Voting in the 2020 Election*, PAAUTISM.ORG (Oct. 2020), <https://paautism.org/wp-content/uploads/2020/10/SS-Voting.pdf> [perma.cc/849B-QQNY]; *Your Vote Counts: A Self-Advocate's Guide to Voting in the U.S.*, AUTISTIC SELF ADVOC. NETWORK (Dec. 2019), <https://autisticadvocacy.org/wp-content/uploads/2019/12/ER-Your-Vote-Counts-main-content.pdf> [perma.cc/YL62-6JWY].

169. See generally Schlitz, *supra* note 77, at 123–26.

their typical routine.¹⁷⁰ In-person voting, which involves each of these stress-triggers, can overwhelm people with ASD in ways that hamper decision-making capabilities.¹⁷¹ Noise-cancelling headphones offer a means for individuals with ASD to quite literally “block out the noise” of overstimulating environments to focus on the task at hand.¹⁷² To create an optimal, non-intimidating environment for voters with ASD, state election officials should provide at least one pair of noise-cancelling headphones per polling location that voters with ASD may use while waiting in line and while completing and casting their ballot. Officials should also expressly allow voters with ASD to bring a personal pair of noise-cancelling headphones that they may wear while waiting and voting.

Similarly, some people with ASD may be better able to enjoy the voting experience if able to cast their ballot in a personal, quiet space without the stimulation of crowds and other voters nearby. State election officials should provide a private voting room in each precinct’s accessible polling place to best serve these voters and comply with HAVA’s assurance of privacy and independence in voting.¹⁷³

F. ALTERNATIVE AND AUGMENTATIVE COMMUNICATION DEVICES

Individuals with ASD often find Alternative and Augmentative Communication devices (AAC) helpful to communicate with the outward world.¹⁷⁴ Different forms of AACs exist, but frequently, they involve a use of a keyboard interface on a tablet.¹⁷⁵ The keyboard may be a standard QWERTY layout, or provide a glossary of words, common phrases, or photos that the user selects to form the sentence or idea he or she wishes to communicate.¹⁷⁶ The device then “speaks” the user selections through a computer-generated voice output through the device speaker.¹⁷⁷ Simple versions of AAC involve physical charts or whiteboards with words, often

170. Cummins, Pellicano, & Crane, *supra* note 162, at 683–84.

171. *Cf. What is Autism Spectrum Disorder?*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/ncbddd/autism/facts.html> [<https://perma.cc/3JEB-WVTT>] (last visited Dec. 17, 2020) (discussing sensory sensitivity as a common symptom of ASD); *Autism Spectrum Disorder*, NAT’L INST. OF MENTAL HEALTH, <https://www.nimh.nih.gov/health/topics/autism-spectrum-disorders-asd/index.shtml> [<https://perma.cc/BKL2-RJHP>] (discussing sensory sensitivity and dependence on routine as symptoms of ASD); Ingrid Holmquist, *Going to the Polls Stresses Voters, Study Finds*, CHICAGO TRIBUNE (Nov. 10, 2015) (discussing stress triggers in the voting experience).

172. See Beth Pfeiffer, Leah Stein Duker, AnnMarie Murphy, & Chengshi Shu, *Effectiveness of Noise-Attenuating Headphones on Physiological Responses for Children with Autism Spectrum Disorders*, 13 FRONTIERS IN INTEGRATIVE NEUROSCIENCE 65 (Nov. 2019).

173. See 52 U.S.C.A. § 21081(a)(3)(A)-(B) (West 2020).

174. See generally Zisk & Dalton, *supra* note 165, at 93 (2019).

175. See Fairfax Network – Fairfax County Public Schools, *Augmentative and Alternative Communication (AAC) Devices*, YOUTUBE (June 5, 2019), <https://www.youtube.com/watch?v=qB2Fk0KdUuo> for an overview of different AACs and their capabilities [perma.cc/Q6AX-HHDR].

176. See *id.*; Zisk & Dalton, *supra* note 165, at 93.

177. Fairfax Network – Fairfax County Public Schools, *Augmentative and Alternative Communication (AAC) Devices*, YOUTUBE (June 5, 2019), <https://www.youtube.com/watch?v=qB2Fk0KdUuo> [perma.cc/Q6AX-HHDR].

paired with expressive images, that the user or a human assistant points to in the order of the idea he or she wishes to communicate. A human assistant often speaks these selections simultaneously.¹⁷⁸ The iPhone's accessibility features allow for its use as a basic AAC, and a host of applications add functionality that makes the iPhone a robust and portable option for adults with ASD.¹⁷⁹

Voters with ASD, particularly those unaccompanied by a human assistant, may need to communicate via AACs with election staff during the registration or voter check-in processes. State election officials should include instruction about how to communicate with a person using an AAC in their poll worker training materials to ensure voters with ASD do not feel intimidated or misunderstood if they need to use an AAC during the registration or voting process.

V. CONCLUSION

*Beyond the fact that there's the civic duty of voting and the ability to elect people who hopefully reflect my points of view and my important issues in Congress and what not, I'm trying to create an America that I think is appropriate for my family.*¹⁸⁰

—Dorothy

Dorothy and her fellow voters with ASD quoted throughout this Note express what every American adult should strive for in their exercise of the voting franchise: movement toward an America that represents our ideals and acts in response to our needs. Presumptively excluding a group of voters on the basis of an incapacity adjudication is antithetical to the statutory dictates discussed in this Note as well as the ideal America has been striving for since her birth: that all people, including those with ASD, will one day be treated as equals. Judges can bring us one step closer to realization of this goal by eliminating the practice of automatically or presumptively stripping adults with ASD of their voting right during guardianship proceedings. Lawyers can leverage their unique position as public citizens with a special responsibility to create a more just and inclusive society by committing to advocate for adoption of accessibility resources to better serve voters with ASD. Doing so will only serve to make our great nation a more holistic reflection of the spectrum she contains.

178. *Id.*

179. Carrie Clark, SLP Solution, *Turn Your iPhone Into an AAC Device (Augmentative-Alternative Communication for Non-Verbal)*, YOUTUBE (Oct. 9, 2019), <https://www.youtube.com/watch?v=OTUI2xZiFUw> [perma.cc/T4K9-R2HB]; *Accessibility: Cognitive*, APPLE, <https://www.apple.com/accessibility/cognitive/> [perma.cc/PS7G-YDUN] (last visited Dec. 18, 2020).

180. *Autism POVs*, *supra* note 20.