

## The Democratic Life of the Union: Toward Equal Voting Participation for Europeans with Disabilities

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*This Article puts forward preliminary legal scholarship on equal political participation by persons with disabilities and what international human rights law requires for its attainment. The goal is to provoke an informed dialogue on the neglected but fundamental human right to enfranchisement by persons with disabilities while also acknowledging that a complete and just resolution requires further information and reflection.*

*The Article argues that the fundamental right to vote cannot be curtailed on the basis of an alleged lack of capacity. Disenfranchisement based on individual assessment unjustly excludes a certain number of voting-capable individuals. Since all those affected are persons with disabilities, this violates the requirement of equality expressed in general international human rights law that recently was explicitly extended to cover disability.*

*The Article also pushes the discussion forward by delving into the controversial and unsettling notion of proxy voting, suggested by philosopher Martha Nussbaum. Although a small number of individuals cannot currently be accommodated in the electoral process, this does not justify their disenfranchisement. Nor does it warrant a more intrusive measure, such as voting by proxy. In no circumstance should their situation justify singling out voting-incapable persons from other individuals or categorizing them differently before the law.*

*Although the focus is often seen through a European lens, the questions raised are pertinent for the exercise of human rights by persons with disabilities around the globe.*

### INTRODUCTION

The right to political participation is so well established by Europe's constitution<sup>1</sup> that the consolidated Treaty of Lisbon proclaims without compro-

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Many thanks to Gerald Neuman, Anita Silvers, and Michael Waterstone for comments; to Kathleen Cornelsen and Alexa Roggenkamp for research assistance; and to participants in workshops held at the Council of Europe and the following universities: American, Davis, and Maryland.

1. Charter of Fundamental Rights of the European Union arts. 39–40, Mar. 30, 2010, 2010 O.J. (C 83/02) 389.

mise: “Every citizen shall have the right to participate in the democratic life of the Union.”<sup>2</sup> Nevertheless, a significant portion of Europe’s eighty million persons with disabilities cannot vote due to prevailing domestic guardianship laws and policies that bar persons with disabilities from exercising their franchise *de jure* or that institute inaccessible voting procedures with similar practical consequences.<sup>3</sup>

Prospects for changing this decidedly undemocratic situation are buoyed by the Convention on the Rights of Persons with Disabilities (“CRPD”),<sup>4</sup> the first United Nations human rights treaty of the twenty-first century and the first international human rights instrument ratified by the European Union (“EU”) as a regional body.<sup>5</sup> The CRPD requires full and equal political participation by persons with disabilities,<sup>6</sup> a fact noted by the European Court of Human Rights (“ECtHR”) in *Kiss v. Hungary* when it declared that a state’s blanket voting restriction imposed upon persons with disabilities placed under guardianship violated their human rights.<sup>7</sup>

*Kiss* is a landmark disability rights decision by the ECtHR. Read broadly, the ruling sets precedent for lifting general voting restrictions against persons with disabilities across Europe—notably, only eight Council of Europe member states have *not* restricted their right to vote—and in state and regional jurisdictions that heed ECtHR jurisprudence.<sup>8</sup> *Kiss* nonetheless leaves unresolved many complex issues relating to equal political participation by persons with disabilities. Judicial guidance is absent on the central questions of whether all disabled persons are entitled to vote despite diminished capabilities, and if not, whether determinations as to which individuals are so entitled can be made in a manner that does not violate those individuals’ human rights. Given the nearly complete dearth of informative jurisprudence or academic writing, as well as the politically controversial nature of these matters—the majority of state reservations against the CRPD focus on legal capacity—ECtHR reticence is neither unwise nor unsurprising.<sup>9</sup> Yet, these are crucial human rights questions in need of resolution. Hungarian

2. Consolidated Version of the Treaty on European Union art. 10(3), Mar. 30, 2010, 2010 O.J. (C 83/01) 20.

3. See generally European Union Agency for Fundamental Rights, *The Right to Political Participation of Persons with Mental Health Problems and Persons with Intellectual Disabilities* (Oct. 2010) [hereinafter EU Fundamental Rights].

4. Convention on the Rights of Persons with Disabilities, G.A. Res. 61/106, U.N. Doc. A/RES/61/106 (Dec. 13, 2006) [hereinafter CRPD].

5. Press Release, European Commission, EU Ratifies U.N. Convention on Disability Rights (Jan. 5, 2011), available at <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/11/4>.

6. CRPD, *supra* note 4, art. 29.

7. *Kiss v. Hungary*, No. 38832/06 (Eur. Ct. Hum. Rts., May 20, 2010), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-98800> [hereinafter *Kiss*].

8. Exclusion of voters with disabilities is a global phenomenon. See André Blais et al, *Deciding Who Has the Right to Vote: A Comparative Analysis of Election Laws*, 20 ELECTORAL STUD. 41, 51 (2001) (stating that 56 out of 60 countries restricted the right to vote on the basis of disability).

9. Beyond *Kiss*, no regional human rights tribunal has considered these issues to date. One of the few scholarly works on point is Martha C. Nussbaum, *The Capabilities of People with Cognitive Disabilities*, 40 METAPHILOSOPHY 331 (2009).

citizens with intellectual disabilities recently lodged two applications with the ECtHR, six complainants won the consolidated case of *Bujdosó v. Hungary* before the Committee on the Rights of Persons with Disabilities (the CRPD monitoring body) concerning voting prohibitions,<sup>10</sup> and there is reason to believe that aggrieved citizens with disabilities from other states will follow suit. These challenges must be engaged if the fundamental human rights of Europeans with disabilities (and their worldwide counterparts) are to be protected at a level equal to that of non-disabled persons, thereby upholding basic values inherent to democratic societies.

This Article puts forward preliminary legal scholarship on equal political participation by persons with disabilities and what international human rights law requires for its attainment. When doing so, it draws on our collective firsthand experience in generating, supporting, and advancing disability rights issues, including voting, in Europe and elsewhere.<sup>11</sup> The goal is to provoke an informed dialogue on the neglected but fundamental human right to enfranchisement by persons with disabilities while also acknowledging that a complete and just resolution requires further information and reflection. The Article also pushes the discussion forward by delving into the controversial and unsettling notion of proxy voting. Finally, although the focus is often seen through a European lens, the questions raised are pertinent for the exercise of human rights by persons with disabilities around the globe.

By way of background, Part I describes the relevant legal frameworks impacting the right of Europeans with diverse disabilities to vote, the ground-breaking decision in *Kiss*, and some of the contentious issues awaiting resolution in Europe and beyond. Next, Part II argues that even post-*Kiss*, the fundamental human right to vote cannot be overcome by a legitimate state desire to protect the integrity of its political process when the result is wholesale disenfranchisement of entire segments of the disabled population. It also maintains that state attempts to preclude persons with disabilities from voting are in contravention of the CRPD and the European Convention on Human Rights (“ECHR”) and do not meet the proportionality standard set forth by the ECtHR. Although *Kiss* leaves open the theoretic-

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10. *Harmati v. Hungary*, App. No. 63012/10 (*submitted to* Eur. Ct. H.R. Oct. 11, 2010) (on file with authors); *Gajsi v. Hungary*, App. No. 62924/10 (*submitted to* Eur. Ct. H.R. Oct. 11, 2010) (on file with authors); Submission to United Nations Committee on the Rights of Persons with Disabilities, Zsolt Bujdosó, Jánosné Ildikó Márkus, Viktória Márton, Sándor Mészáros, Gergely Polk, and János Szabó v. Hungary (*submitted to* CRPD Committee Sept. 5, 2011) (on file with authors).

11. Stein and Lord participated in the negotiations leading up to the CRPD; Fiala-Butora, Stein, and Lord collectively have implemented disability rights law and policy programs in some forty countries, including some fifteen election access programs implemented by Lord in developing countries; Fiala-Butora represented *Kiss* throughout the proceedings culminating in the ECtHR decision, and Stein intervened with an expert brief to the ECtHR (cited in the opinion); Fiala-Butora and Stein, respectively, as plaintiff's counsel and Court-approved expert have another six cases currently lodged before the ECtHR; finally, Fiala-Butora filed six individual complaints against Hungary to the CRPD Committee, *see supra* note 10, and Stein submitted a consolidated expert's brief on the main issues presented therein.

cal possibility of excluding particular individuals with disabilities from political participation (“persons incapable of voting”),<sup>12</sup> in practice those efforts fail for being empirically unsupported and over-inclusive. Consequently, persons with disabilities must be accorded the same human right as all other humans to political participation, and as a result engender similar challenges and costs to political processes. Part III begins by identifying tensions between how the CRPD and its advocates on one hand, and other core human rights treaties and their implementers on the other, would address the matter of barring persons incapable of voting from exercising their franchise. It contends that the current practice of inaction, whereby those who cannot vote do not vote, is preferable to a proposal by philosopher Martha Nussbaum whereby guardians are appointed to vote as substitutes for persons lacking voting capacity. The Article concludes with some thoughts on the wider issue of ensuring equal legal capacity for persons with disabilities.

### I. DISABILITY, GUARDIANSHIP, AND THE RIGHT TO VOTE

Despite enfranchisement guarantees contained in international and regional human rights treaties, Europeans with disabilities, as well as persons with disabilities around the world, face statutory and procedural barriers to voting. Citing the CRPD, the ECtHR in *Kiss* found wholesale voting restrictions arising from guardianship status to be incompatible with the ECHR, while leaving attendant and complex issues unresolved.

#### A. Statutory and Procedural Barriers to Voting

The Universal Declaration of Human Rights (“UDHR”) proclaims “universal and equal suffrage,” the right of “everyone” to participate in his or her state’s governance.<sup>13</sup> Likewise, the International Covenant on Civil and Political Rights (ICCPR) provides that “every citizen shall have the right and the opportunity” to vote “without unreasonable restrictions.”<sup>14</sup> Restrictions under the ICCPR are to be strictly construed; they must be prescribed

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12. Some national level statutes and court decisions use the imprecise and pejorative term “incompetent” to describe these individuals. See, e.g., *Magyarország Alaptörvénye* [Hungary’s Basic Law] art. XX-III(6) (2011) (allowing the disenfranchisement of persons on the basis of their “limited competence” (“*belátási képességének korlátozottsága miatt*”). See also CERMI, Human Rights and Disability, Alternative Report Spain 2010, ¶ 137 (2010) (allowing disenfranchisement of individuals “incapable of exercising their right to vote”), available at [http://www2.ohchr.org/SPdocs/CRPD/5thsession/CERMI\\_Spain\\_5thSession\\_en.doc](http://www2.ohchr.org/SPdocs/CRPD/5thsession/CERMI_Spain_5thSession_en.doc). Instead, we use some variation on “persons incapable of voting” or “persons lacking voting capacity” to reference the small subset of persons with disabilities who, even with the provision of reasonable accommodations, functionally cannot exercise their right to vote. For further discussion, see *infra* Part II.C.

13. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III), art. 21 (Dec. 10, 1948) [hereinafter UDHR].

14. International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. Doc. A/6316, art. 25 (Dec. 16, 1966) [hereinafter ICCPR].

by law, and they must meet objective and reasonable standards.<sup>15</sup> At the European level, the first Protocol to the European Convention on Human Rights guarantees the right to free elections.<sup>16</sup>

Yet notwithstanding these assurances, disabled persons remain outside the universe of individuals whose suffrage is protected by international and regional human rights instruments.<sup>17</sup> In contrast to these exclusionary practices, the CRPD requires states parties to “ensure that persons with disabilities can effectively and fully participate in political and public life on an equal basis with others,” including the right to vote.<sup>18</sup> When doing so, the CRPD admits no exception on the basis of disability. That mandate has been strongly advanced by the treaty monitoring committee’s initial concluding observations, perhaps even beyond the CRPD’s text.<sup>19</sup>

Within individual member states, explicit and implicit exclusionary practices can be classified into three categories. The first group includes laws that allow the disenfranchisement of persons with disabilities in connection with their placement under guardianship or other restrictions on legal capacity, irrespective of whether any diminished function they possess is related to the ability to vote. This approach was permitted fifteen years ago by a Human Rights Committee General Comment<sup>20</sup> and is codified in the national legislation of sixteen member states, including Bulgaria and other post-Communist countries, where disenfranchisement is an automatic conse-

15. See Human Rights Committee, General Comment 25, *The right to participate in public affairs, voting rights, and the right of equal access to public service*, ¶ 4, U.N. Doc. CCPR/C/21/Rev.1/Add.7, 1510th Sess. (Jul. 12, 1996) (“Any conditions which apply to the exercise of the rights protected by article 25 should be based on objective and reasonable criteria.”) [hereinafter General Comment 25].

16. Protocol No. 1 of the European Convention on Human Rights art. 3, Mar. 20, 1952, 213 U.N.T.S. 226 (requiring state parties “to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of legislature”) [hereinafter ECHR]. Although the wording of Article 3 is suggestive of only an institutional guarantee of free elections, jurisprudence clarifies the guarantee of a representative legislature and attendant voting rights. See, e.g., *Hirst v. United Kingdom* (No. 2) App. No. 74025/01, 42 Eur. H.R. Rep. 41, ¶ 56 (2005) (reaffirming the guarantee in Article 3 of Protocol No. 1 of the right to vote and to stand for election); *Mathieu-Mohin & Clerfayt v. Belgium*, App. No. 9267/81, 10 Eur. H.R. Rep. 1, 16 (1988) (interpreting Article 3’s provision of free elections to include a right to vote); *Denmark, Norway, Sweden & Netherlands v. Greece*, App. Nos. 3321–3167; 3344/67, 12 Y.B. Eur. Conv. H.R. 179 (1969) (European Comm’n Human Rights) (stating that the wording of Article 3 implies a representative legislature, recognition of the principle of universal suffrage, the right to vote, and the right to stand for election).

17. See generally Blais, *supra* note 8.

18. CRPD, *supra* note 4, art. 29.

19. Committee on the Rights of Persons with Disabilities, *Concluding Observations of the Committee on the Rights of Persons with Disabilities*, Spain, ¶ 48, U.N. Doc. CRPD/C/ESP/CO/1 (Oct. 19, 2011) available at <http://www.ohchr.org/EN/HRBodies/CRPD/Pages/Session6.aspx> [hereinafter CRPD Committee Concluding Observations, Spain] (“The Committee recommends that all relevant legislation be reviewed to ensure that all persons with disabilities, regardless of their impairment, legal status or place of residence, have the right to vote and participate in public life on an equal basis with others. The Committee requests the [s]tate party to amend article 3 of Organic Act 5/1985, which allows the denial of the right to vote based on individualized decisions taken by a judge. The amendment should ensure that all persons with disabilities have the right to vote.”).

20. See General Comment 25, *supra* note 15 (“established mental incapacity *may* be a ground for denying a person the right to vote”) (emphasis added).

quence of placement under guardianship.<sup>21</sup> The second category permits disability-based voting bans to follow from specific findings of incapacity to vote, rather than on determinations of general legal incapacity. Two Council of Europe instruments condone this method,<sup>22</sup> as do a pair of state constitutional courts,<sup>23</sup> and the practice prevails in four member states, most prominently Spain.<sup>24</sup> The third grouping prohibits any limitation on the right to vote on the basis of disability. Two recent Council of Europe instruments<sup>25</sup> (that seemingly are at odds with the pair of Council Recommendations cited above) exemplify this last mandate.<sup>26</sup> Eight member states provide for universal suffrage in which all persons, including those under guardianship, can vote; the Netherlands exemplifies this model.<sup>27</sup>

### B. Kiss v. Hungary

Alajos Kiss was diagnosed with manic-depression in 1991, but he was only placed under partial guardianship fifteen years later after engaging in property disputes with his stepfather.<sup>28</sup> A Hungarian court found that Kiss lived alone and “took care of himself adequately,” yet it restricted his legal capacity on the ground that he “sometimes wasted money in an irresponsi-

21. *Guardianship and Human Rights in Bulgaria*, MENTAL DISABILITY ADVOCACY CENTER 45 (2007), available at [http://www.mdac.info/sites/mdac.info/files/English\\_Guardianship\\_and\\_Human\\_Rights\\_in\\_Bulgaria.pdf](http://www.mdac.info/sites/mdac.info/files/English_Guardianship_and_Human_Rights_in_Bulgaria.pdf).

22. See Council of Europe Committee of Ministers, *Recommendation R(99)4 on Principles Concerning the Legal Protection of Incapable Adults*, principle 3(2) (1999), available at [http://www.coe.int/t/dg3/healthbioethic/texts\\_and\\_documents/Rec\(99\)4E.pdf](http://www.coe.int/t/dg3/healthbioethic/texts_and_documents/Rec(99)4E.pdf) (placement under guardianship or other measures of protection “should not automatically deprive the person concerned of the right to vote”); Council of Europe Committee of Ministers, *Recommendation R(2004)10 Concerning the Protection of Human Rights and Dignity of Persons with Mental Disorder*, art. 4(2)(2004), available at <https://wcd.coe.int/ViewDoc.jsp?id=775685&Site=CM> (requiring that “[a]ny restrictions to the exercise of those rights should be in conformity with the provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms and should not be based on the mere fact that a person has a mental disorder”).

23. See *Nález Ústavního soudu zed ne 12.07.2010 (ÚS)* [Decision of the Czech Constitutional Court of July 12, 2010] no. IV. ÚS 3102/08, available at <http://nalus.usoud.cz/>; Decision of the Slovenian Constitution Court no. U-I-346/02 from July 10, 2003, available at <http://www.us-rs.si/>.

24. See CRPD Committee Concluding Observations Spain, *supra* note 19, at ¶¶ 47–48. The African Commission on Human Rights took a similar position by rejecting as a violation of human rights the denial of voting rights to persons detained in a psychiatric hospital. See *Purohit & Moore v. The Gambia*, Communication No. 241/2001, ¶ 76 (African Comm’n Hum. Rts., May 29, 2003) (“[I]t is very clear that there are no objective bases within the legal system of the Respondent State to exclude mentally disabled persons from political participation.”).

25. Council of Europe Committee of Ministers, *Recommendation R(2006)5 on the Council of Europe Action Plan to Promote the Rights and Full Participation of People with Disabilities in Society: Improving the Quality of Life of People with Disabilities in Europe 2006–2015* (2006), available at <https://wcd.coe.int/ViewDoc.jsp?id=986865>; Council of Europe Committee of Ministers, *Recommendation CM/Rec(2011)14 on the Participation of Persons with Disabilities in Political and Public Life* (2011), available at <https://wcd.coe.int/ViewDoc.jsp?id=1871285&Site=CM>.

26. For the Council of Europe Committee of Ministers Recommendations, see *supra* note 22.

27. See Stanley S. Herr, *Self-Determination, Autonomy and Alternatives for Guardianship*, in *THE HUMAN RIGHTS OF PERSONS WITH INTELLECTUAL DISABILITIES: DIFFERENT BUT EQUAL* 435, 446 (Stanley S. Herr et al eds., 2003); see also *Grondwet voor het koninkrijk der Nederlanden* [Constitution of the Kingdom of the Netherlands], art. 54 § 2(b) (amended 1983).

28. Kiss, *supra* note 7, ¶ 7.

ble fashion and was occasionally aggressive.”<sup>29</sup> According to the then-Hungarian Constitution—a seminal example of the first exclusionary category described above—only persons with full legal capacity were permitted to participate in political processes.<sup>30</sup> Consequently, Kiss was struck from the electoral list and barred from voting in the ensuing national elections as an automatic consequence of his placement. Unsuccessful in challenging this disenfranchisement at a local district court, Kiss brought an application to the ECtHR.<sup>31</sup>

Neither party disputed the underlying facts; thus, the central issue was whether disenfranchisement arising from guardianship was compatible with the manifest human and civil right to vote. According to the ECtHR’s established interpretation, suffrage is not absolute and can be restricted by measures that pursue a legitimate state aim and are proportional in effect.<sup>32</sup> The Court accepted Hungary’s argument that devising a rule to exclude those incapable “of assessing the consequences of their decisions” protected the integrity of the electoral system,<sup>33</sup> but did not address the underlying assumption that individuals under guardianship were incapable *per se* of responsible political choices.

In assessing the proportionality of the interference, the ECtHR established a number of factors to be considered. As an initial matter, it rejected Hungary’s assertion that states should enjoy a wide margin of appreciation in regulating electoral affairs.<sup>34</sup> Instead, the ECtHR ruled that under the European Convention on Human Rights the “mentally disabled” comprised a “particularly vulnerable group” such that restrictions on their rights must be justified by “very weighty reasons.”<sup>35</sup> Moreover, because a “significant” proportion of the Hungarian population of voting age was under guardianship at the relevant time and adversely impacted by the measure,<sup>36</sup> Hungary was not entitled to a wide margin of appreciation in its application.<sup>37</sup>

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29. *Id.*

30. *Id.* ¶ 11 (citing A Magyar Köztársaság Alkotmánya [Constitution of the Republic of Hungary], art. 70(5)).

31. *Id.* ¶ 8.

32. *Mathieu-Mohin & Clerfayt v. Belgium*, App. No. 9267/81, 10 Eur. H.R. Rep. 1, ¶ 52 (1988) 18 (“[States] have a wide margin of appreciation in this sphere, but it is for the Court to determine in the last resort whether the requirements of Protocol No. 1 have been complied with; it has to satisfy itself that the conditions . . . are imposed in pursuit of a legitimate aim; and that the means employed are not disproportionate.”).

33. *Kiss*, *supra* note 7, ¶ 38 (“The Government submitted that the measure complained of pursued the legitimate aim of ensuring that only citizens capable of assessing the consequences of their decisions and making conscious and judicious decisions should participate in public affairs . . . . The applicant accepted this view and the Court sees no reason to hold otherwise.”).

34. *Id.* ¶ 42 (“Indeed, while the Court reiterates that this margin of appreciation is wide, it is not all-embracing . . . if a restriction on fundamental rights applies to a particularly vulnerable group in society, who have suffered considerable discrimination in the past, such as the mentally disabled, then the [s]tate’s margin of appreciation is substantially narrower . . . .”).

35. *Id.*

36. *Id.* ¶ 39 (citing a figure of 0.75%).

37. *Id.* ¶ 41.

Next, the ECtHR drew on an earlier decision wherein it criticized the United Kingdom for indiscriminately removing the right of all prisoners to vote.<sup>38</sup> In *Hirst v. the United Kingdom*, the Court had stressed that disenfranchisement is a “severe measure” such that proportionality requires a strong correlation between state action and the affected individual’s circumstances.<sup>39</sup>

Applying this requirement, the *Kiss* court found that the applicant “lost his right to vote as the result of the imposition of an automatic, blanket restriction on the franchise of those under partial guardianship.”<sup>40</sup> The ECtHR concluded that “an indiscriminate removal of voting rights, without an individualized judicial evaluation” predicated solely on guardianship status “cannot be considered compatible with the legitimate grounds for restricting the right to vote.”<sup>41</sup>

### C. After Kiss

The ruling in *Kiss* is significant on several grounds. As an initial matter, the ECtHR condemned the automatic disenfranchisement of individuals with disabilities due to their guardianship status.<sup>42</sup> Consequently, the ECtHR declared this practice to be contrary to European human rights law, with consequences for Hungary and also for other Council of Europe member states, the majority of which currently disenfranchise people with disabilities under guardianship.<sup>43</sup> Hungary has changed its laws as a result, and it currently maintains a system of disenfranchisement based on individualized assessment of capacity to vote.<sup>44</sup> The decision also sparked off reforms at

38. *Id.* ¶ 43.

39. *Hirst v. United Kingdom* (No. 2), App. No. 74025/01, ¶ 77 Eur. Ct. H.R. (2005).

40. *Kiss*, *supra* note 7, ¶ 43.

41. *Id.* ¶ 44.

42. The Court was thus in harmony with earlier judgments rejecting all-or-nothing conceptions of legal capacity. See, e.g., *Salontaji-Drobnjak v. Serbia*, No. 36500/05, ¶ 134 (Eur. Ct. Hum. Rts., Oct. 13, 2008), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-94985> (“[T]here has been no comprehensive psychiatric examination of the applicant undertaken in this context . . . legislation does not seem to provide for a periodical judicial reassessment of the applicant’s condition . . . .”); *X v. Croatia*, No. 11223/04, ¶ 53 (Eur. Ct. Hum. Rts., Jul. 17, 2008), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-87644> (“[T]he Court has difficulty in accepting that every person divested of capacity to act should be automatically excluded from adoption proceedings concerning his or her child . . . .”); *Shtukaturov v. Russia*, No. 44009/05, ¶ 95 (Eur. Ct. Hum. Rts., Mar. 27, 2008), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-85611> (stating that Russian legislation did not provide for a more tailored evaluation of legal capacity, resulting in an overly strict limitation on the applicant’s rights).

43. Countries with plenary or partial guardianship in place which deny voting rights on that basis include Belgium, Bulgaria, Czech Republic, Denmark, Estonia, Germany, Greece, Ireland, Latvia, Lithuania, Luxembourg, Portugal, and Romania. See EU Fundamental Rights, *supra* note 3, at 16.

44. Act CCI of 2011 on the Amendment of Certain Acts Related to the Fundamental Law, which amended, among others, Act IV of 1959 on the Civil Code, Act C of 1997 on the Elections Procedure, and Act III of 1952 on Civil Procedure.



the EU and national level as well.<sup>45</sup> In 2012, Croatia extended the franchise to all persons with disabilities, including to all persons under guardianship, who up to that point had been disenfranchised.<sup>46</sup>

In addition, *Kiss* marks the first occasion where the ECtHR declared persons with disabilities to be a protected group under the ECHR. In doing so, the Court determined that future review of state-imposed limitations on the rights of disabled individuals, both within and beyond the context of political participation, will be accorded a narrow margin of appreciation. Finally, *Kiss* is the first occasion on which the ECtHR explicitly endorsed the CRPD's salience for engaging with the issue of guardianship, a prevailing legal device amongst European countries.<sup>47</sup>

More generally, the ruling in *Kiss* raises the standards for the application of human rights to persons with disabilities beyond Europe. By endorsing the CRPD's treatment of equal access to voting, the ECtHR implicitly forces a reconsideration of now-outdated norms and practices. This is as true for General Comments—such as that of the Human Rights Committee on voting<sup>48</sup>—as it is for domestic constitutional courts heeding ECtHR jurisprudence and for regional bodies (for example, the Inter-American Commission for Human Rights) seeking to apply the most advanced standards to human rights areas.

However, although clearly a groundbreaking decision, the ruling in *Kiss* leaves more issues unresolved than it answers.<sup>49</sup> *Kiss* categorically forbids disenfranchisement without an individualized assessment of each person's capacity to vote, but can a state nonetheless lawfully restrict disabled citi-

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45. On the EU level, the EU's Fundamental Rights Agency took the lead by commissioning a study of human rights requirement related to voting rights of persons with disabilities. See European Fundamental Rights, *supra* note 3.

46. The Act on Registers of Voters (*Zakon o registru birača*, NN 144/12) was adopted on 14 December 2012.

47. The Harvard Law School Project on Disability, which intervened as a third party in the case, raised the relevance of the CRPD, and argued that the European Court should take it into account when developing its standards for persons with disabilities. *Kiss*, *supra* note 7, ¶ 34 (“The intervener emphasized that the prohibition in question was . . . not in compliance with Articles 12 and 29 of the CRPD . . .”). It is important that the first application of the CRPD as a controlling standard was raised in the sensitive area of guardianship. *Glor v. Switzerland*, No. 13444/04 (Eur. Ct. Hum. Rts., Apr. 30, 2009), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-92525>, is the first time the European Court referred to the CRPD.

48. See General Comment 25, *supra* note 15, ¶ 4. The HRC's General Comment, adopted in 1996, is now under consideration for revision due to the apparent conflict between its sweeping denials of voting rights based upon guardianship status and CRPD provisions explicitly protecting political participation by persons with disabilities.

49. This is not an uncommon phenomenon. See, e.g., MICHAEL J. KLARMAN, *BROWN V. BOARD OF EDUCATION AND THE CIVIL RIGHTS MOVEMENT* 79 (2007) (stating that while *Brown* invalidated school segregation, it did not address the important issue of the process of desegregation). Within the disability law field, commentators have similarly criticized the U.S. Supreme Court decision in *Olmstead* requiring that persons with disabilities be placed in their communities in the most integrated settings. See, e.g., Laura F. Rothstein, *Reflections on Disability Discrimination Policy—25 Years*, 22 U. ARK. LITTLE ROCK L. REV. 147, 156–57 (2000) (opining that the *Olmstead* Court left unresolved issues such as how the cost-based defense is to be applied and how states are to prioritize service provision).

zens after such a particularized examination? And if so, on what ground can states legitimately base such a decision? Consequently, states, disabled people's organizations, and human rights advocates have been left to grapple with crucial and complex issues directly impacting the fundamental human right of voting.<sup>50</sup> The remainder of this Article provides insight for addressing these key issues.

## II. EQUAL ACCESS TO VOTING

Political participation is acknowledged as a fundamental human right, but one that historically has not been realized due to social conventions about the perceived inabilities of various groups of individuals. Under the CRPD, persons with disabilities must be accorded the same access to political participation as all other persons, and so their capacity must equally be presumed. States also have an affirmative duty to accommodate and support persons with disabilities in the realization of the right to political participation. At the same time, international human rights law generally requires that interference with individual rights, including voting, be strictly construed. Thus, taking disability into account, even in the narrowest possible manner—as would be the case of disenfranchisement on the basis of individual assessments of “voting capacity”—is equally prohibited because these assessments invariably lead to unjustified exclusions of some number of disabled persons with voting capacity. Indeed, due to embedded societal prejudices, all currently available assessments produce distorted and disproportionate outcomes that violate international law. Hence, states may not legally disenfranchise persons on the basis of disability, guardianship, individual assessments of capacity or other similar proxy.

### A. Voting and Social Constructs

Voting is an axiomatic and fundamental human right, as acknowledged by the UDHR,<sup>51</sup> the ICCPR,<sup>52</sup> the ECHR<sup>53</sup> and numerous human rights instruments, monitoring bodies, and commentators.<sup>54</sup> Indeed, the routine

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50. Another crucial issue—and one that goes beyond the scope of this article—is the positive obligation placed by the CRPD on states to enable political participation by persons with disabilities through facilitative mechanisms.

51. UDHR, *supra* note 13, art. 21.

52. ICCPR, *supra* note 14, art. 25.

53. ECHR, Protocol 1, *supra* note 16, art. 3. *See also* Denmark, Norway, Sweden & Netherlands v. Greece, App. Nos. 3321-3167; 3344/67, 1968 Y.B. Eur. Conv. on H.R. 690 (Eur. Comm'n on H.R.) (clarifying the content of Article 3 of Protocol 1 as including the right to vote).

54. *E.g.*, American Convention on Human Rights art. 23(1), *opened for signature* Nov. 22, 1969, 1144 U.N.T.S. 123; DECLARATION OF PRINCIPLES FOR INTERNATIONAL ELECTION OBSERVATION 2 (2005), available at [http://www.ndi.org/files/1923\\_declaration\\_102705\\_0.pdf](http://www.ndi.org/files/1923_declaration_102705_0.pdf) (stating that the presence of universal and equal suffrage is a fundamental democratic right); *International Electoral Standards: Guidelines for reviewing the legal framework of elections*, INTERNATIONAL INSTITUTE FOR DEMOCRACY AND ELECTORAL

assumption is that when persons reach a specific age they are expected (and even in some jurisdictions, required) to exercise their franchise.<sup>55</sup>

Nevertheless, nearly every state has at some time in its history restricted the basic human right of voting for women, ethnic and racial minorities, immigrants, persons with low literacy levels, and/or persons with disabilities.<sup>56</sup> Common to these exclusions are justifications that are grounded in deeply embedded but empirically unfounded social constructs as to the lesser ability of the given category of individuals.<sup>57</sup> For example, recent discussions in the Slovakian Parliament revealed strong support for disenfranchising Roma voters or, at a minimum, those who are illiterate.<sup>58</sup> With time, most of these unsupported exclusions have been eliminated.<sup>59</sup>

People with disabilities, however, are among the last identity groups to have been acknowledged as a protected human rights population by the in-

ASSISTANCE 34 (2002), available at <http://www.idea.int/publications/ies/> (“One clear international standard which must be provided for is the guarantee of universal and equal suffrage to each adult citizen.”).

55. See Janet E. Lord & Michael Ashley Stein, *Contingent Participation and Coercive Care: Feminist and Communitarian Theories Consider Disability and Legal Capacity*, in COERCIVE CARE; RIGHTS, LAW AND POLICY (Bernadette McSherry & Ian Freckelton eds. 2013). Some twenty states have in place compulsory voting procedures, including Argentina, Australia, Brazil, Singapore, Ecuador and Peru, among others. See *Compulsory Voting Around the World*, ELECTORAL COMMISSION (June 2006), available at [http://www.electoralcommission.org.uk/\\_data/assets/electoral\\_commission\\_pdf\\_file/0020/16157/ECCCompVotingfinal\\_22225-16484\\_E\\_N\\_S\\_W\\_.pdf](http://www.electoralcommission.org.uk/_data/assets/electoral_commission_pdf_file/0020/16157/ECCCompVotingfinal_22225-16484_E_N_S_W_.pdf) [hereinafter Electoral Commission].

56. See Adam Przeworski, *Conquered or Granted? A History of Suffrage Extensions*, 39 B.J. POL. S. 291, 291 (2009) (stating that many representative governments began with greatly restricted political rights, only gradually extending suffrage to women, minorities, and lower and middle class). Such restrictions on the franchise continue to be present even in the modern era. See, e.g., Aoife Nolan, ‘Aggravated Violations’, *Roma Housing Rights and Forced Expulsions in Italy: Recent Development under the European Social Charter Collective Complaints System*, 11 HUM. RTS. L. REV. 343, 355 (2011) (detailing how Italy’s failure to facilitate access to identification for the nation’s Roma minority often leads to discriminatory treatment and exclusion from the right to vote); Hassan M. Fattah, *Kuwait Grants Political Rights to Its Women*, N.Y. TIMES, May 17, 2005, at A9 (“Kuwait’s Parliament granted full political rights to women on Monday, making way for them to vote and run for office . . . for the first time in the country’s history.”).

57. The modern avatar posits genetically-based justifications. See, e.g., Michael Ashley Stein & Anita Silvers, *Essentially Empirical: The Role of Biological and Legal Classification in Effectively Prohibiting Genetic Discrimination*, in SCIENCE AND OTHER CULTURES: ISSUES IN PHILOSOPHIES OF SCIENCE AND TECHNOLOGY 129 (Robert Figueroa & Sandra Harding eds., 2003).

58. Presentation by Radoslav Procházka, Chair of the Slovak National Assembly’s Committee for Constitutional Law, Human Rights—Back to the Foundations (Dec. 5, 2011) (mentioning private bills submitted by some members of parliament aimed at restricting the right to vote on the basis of education); see also *Vnútro má vypracovať analýzu, či možno obmedziť volebné právo* [Ministry of Internal Affairs has to prepare an analysis about whether it is possible to limit the right to vote], SME [Slovakian daily], Mar. 21, 2011 (translation by authors).

59. See, e.g., *Women in Kuwait Get Vote*, N.Y. TIMES (May 17, 2005), available at [http://www.nytimes.com/2005/05/16/world/africa/16iht-Kuwait.html?\\_r=0](http://www.nytimes.com/2005/05/16/world/africa/16iht-Kuwait.html?_r=0); Press Release, Inter-Parliamentary Union, *IPU Welcomes Saudi Arabia’s Decision to grant to Women the Right to Vote and Stand for Election* (Sept. 26, 2001), available at <http://www.ipu.org/press-el/gen353.htm> (indicating Saudi women were granted the right to vote and be elected in limited municipal elections). Regrettably, many restrictions in many countries remain. See *No Voice: The Exclusion of Women from Voting*, DEMOCRACY REPORTING INTERNATIONAL (July 2011), available at [http://www.democracy-reporting.org/files/dri\\_briefing\\_paper\\_15-\\_no\\_voice-\\_the\\_exclusion\\_of\\_women\\_from\\_voting.pdf](http://www.democracy-reporting.org/files/dri_briefing_paper_15-_no_voice-_the_exclusion_of_women_from_voting.pdf) (detailing voting exclusions against women in Pakistan).

ternational community.<sup>60</sup> Their stark omission was raised in a report issued by the Office of the U.N. High Commissioner for Human Rights<sup>61</sup> that in turn lent political support for the General Assembly to authorize consideration of a disability-specific treaty, the eventual CRPD.<sup>62</sup> However, disabled persons still remain near the end of the queue of vulnerable population groups to be accorded equality, their current exclusion mirroring the historical treatment of other groups of individuals perceived as biologically different.<sup>63</sup> Within the realm of voting, people with disabilities are even more neglected than peer identity groups due to prevailing laws and policies that are still enforced.<sup>64</sup> Yet, in all these cases, law has been the vehicle through which socially contingent restrictions were held out as objectively determined, with the asserted lesser abilities of respective groups couched in terms of neutral scientific principles that in turn prescribed appropriate so-

60. See Michael Ashley Stein, *Disability Human Rights*, 95 CAL. L. REV. 75, 85–93 (2007) (recounting both the absence of disability and its contingent nature when included in international human rights instruments). Sexual minorities are prominent among those who remain neglected. See *id.* at 113–16.

61. Gerard Quinn et al., *Human Rights and Disability: The Current and Future Potential of United Nations Human Rights Instruments in the Context of Disability* (2002), available at [www.nhri.net/pdf/disability.pdf](http://www.nhri.net/pdf/disability.pdf). See also Leandro Despouy, *Report on Human Rights and Disabled Persons*, ¶¶ 280–81 (1993) (noting that “persons with disabilities are going to find themselves at a legal disadvantage in relation to other vulnerable groups” because “unlike the other vulnerable groups, they do not have an international control body to provide them with particular and specific protection”).

62. See Michael Ashley Stein & Janet E. Lord, *Future Prospects for the United Nations Convention on the Rights of Persons with Disabilities*, in THE U.N. CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES: EUROPEAN AND SCANDINAVIAN PERSPECTIVES, 22–23 (Gerard Quinn & Oddny Mjöll Arnardóttir eds., 2009).

63. See Michael Ashley Stein, *Same Struggle, Different Difference: ADA Accommodations as Antidiscrimination*, 153 U. PA. L. REV. 579, 609–15 (2004) (analogizing to race and sex the historical treatment of persons with disabilities in the United States on the basis of biological difference).

64. Perhaps only convicted felons face an equivalent level of exclusion and there the argument is that they ought to forfeit the franchise for political reasons, not because they are perceived as incapable of voting. In 1960, the ECtHR held that restrictions on the right of convicted prisoners to vote do not violate their rights under Article 3 of Protocol 1 to the ECHR. See *X v. Federal Republic of Germany*, App. No. 530/59, 1960 Y.B. Eur. Conv. H.R. 184 (Eur. Ct. of H.R.). However, in 2006, the Court held in *Hirst v. United Kingdom* that while such bans on prisoners can serve a legitimate purpose, the United Kingdom’s ban was disproportionate and indiscriminate, and that “[s]uch a general, automatic and indiscriminate restriction on a vitally important Convention right must be seen as falling outside any acceptable margin of appreciation, however wide that margin might be, and as being incompatible with Article 3 of Protocol No. 1.” See *Hirst*, *supra* note 16. See also *Scoppola v. Italy* (No. 3), App. No. 126/05, (May 22, 2012), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-111044> (affirming *Hirst* and holding that general, automatic and indiscriminate disenfranchisement of all serving prisoners, irrespective of the nature or gravity of their offences, is incompatible with Article 3 of Protocol No. 1 (right to free elections) whilst accepting the argument that each state has a wide discretion as to how it regulates the ban). The Court’s judgment in *Hirst* indicated that prisoners may frequently or sometimes vote in 13 countries: Austria, Belgium, France, Germany, Greece, Italy, Luxembourg, Malta, the Netherlands, Norway, Poland, Romania and Turkey. *Id.* The Court’s judgment also indicated that prisoners cannot vote in another 13 countries: Armenia, Azerbaijan, Bulgaria, Estonia, Georgia, Hungary, Ireland, Latvia, Liechtenstein, Moldova, Russia, Slovakia and the United Kingdom. *Id.* The ECHR has further held that restrictions on the voting rights of nationals who reside abroad are permissible. See *X and others v. Belgium*, App. No. 1065/61, 1961 Y.B. Eur. Conv. H.R. 260 (Eur. Comm’n H.R.).

cial roles for given groups of persons, the attendant exclusions bolstered by law.<sup>65</sup>

Ironically—and pointedly—political participation is one of the key avenues through which marginalized groups most effectively seek equality. Participation in decisionmaking is regarded as fundamental to human rights realization for persons with disabilities, serving to amplify their voice and create visibility, not only in an electoral process but beyond. Hence, disenfranchising persons with disabilities reinforces barriers for the group’s ability to advocate for change through existing political processes and is inimical to the principles that animate human rights in the context of disability—autonomy, non-discrimination, inclusion, participation, equality of opportunity, and respect for difference.

### B. *The CRPD’s Participatory Mandates*

The CRPD is a holistic human rights instrument that prohibits discrimination on the basis of disability and also contains measures to ensure that persons with disabilities are able to achieve full enjoyment of their human rights and fundamental freedoms.<sup>66</sup> The EU ratified the CRPD as a regional integration organization, which in turn binds its member states to the extent of EU competence.<sup>67</sup> This marked the first time the EU acceded to a human rights treaty as an overarching entity. Many European countries, both individual member states of the EU, and those outside its purview, have likewise ratified the CRPD.<sup>68</sup> These states have to comply with both the CRPD and the ECHR. For that reason, although the CRPD is not binding on the ECtHR, the European Court refers to the CRPD in informing its own standards under the ECHR.<sup>69</sup>

Article 29 of the CRPD requires states parties to “ensure that persons with disabilities can effectively and fully participate in political and public life on an equal basis with others,” including “the right and opportunity” of voting.<sup>70</sup> Read both on its own and in conjunction with Article 3 (General

65. For a discussion of application of this schema by the United States Supreme Court, see Anita Silvers & Michael Ashley Stein, *Disability, Equal Protection, and the Supreme Court: Standing at the Crossroads of Progressive and Retrogressive Logic in Constitutional Classification*, 35 U. MICH. J. L. REFORM 81 (2002).

66. Rosemary Kayess & Phillip French, *Out of Darkness into Light? Introducing the Convention on the Rights of Persons with Disabilities*, 8 HUM. RTS. REV. 1, 2, n.4 (2008).

67. See CRPD, *supra* note 4, art. 42 (“The present Convention shall be open for signature by all States and by regional integration organizations at United Nations Headquarters in New York as of 30 March 2007.”). For a discussion of the competences of the EU in connection with CRPD ratification, see Lisa Waddington, *The European Union and the Convention on the Rights of Persons with Disabilities: A Story of Exclusive and Shared Competences*, 18 MAASTRICHT J. 411 (2011).

68. See *Status on the Convention on the Rights of Persons with Disabilities*, UNITED NATIONS TREATY COLLECTION, available at [http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-15&chapter=4&lang=en](http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&lang=en) (reporting 158 signatories and 138 parties, including 43 European countries and all European Union member countries).

69. The first decision referring to the CRPD was *Glor v. Switzerland*, *supra* note 47.

70. CRPD, *supra* note 4, art. 29.

principles),<sup>71</sup> Article 4 (General obligations),<sup>72</sup> and Article 5 (Equality and non-discrimination),<sup>73</sup> Article 29 reveals that the CRPD unequivocally prohibits exclusionary practices on the basis of disability.<sup>74</sup>

Moreover, read in conjunction with Article 12 on legal capacity, Article 29 requires states parties to facilitate voting rights and to support decision-making for all persons with disabilities in the context of political participation, and Article 5 incorporates a duty to provide reasonable accommodation in the realization of all rights, including voting accommodations.<sup>75</sup> Such measures might include, for example, the provision of assisted voting by a designee selected by the voter requiring assistance, access to off-site or alternative voting venues, the availability of sign language interpreters, the introduction of tactile ballot guides or accessible electronic voting machines or the supply of plain language voting procedure instructions.<sup>76</sup> Support in this context applies to the entirety of the electoral process: voter information and education, registration, site selection, election campaigns, ballot casting, voter observation, and post-election assessment. The CRPD likewise requires states parties to take proactive measures to ensure that voters with disabilities can exercise their rights. This is as true in terms of providing accessible formats under both Article 29 (political participation) and Article 9 (accessibility) as it is of Article 12's general directive to facilitate the legal capacity of persons with disabilities.

The CRPD, much like the Universal Declaration and the ICCPR, does not specify exceptions to the full and equal enjoyment of human rights by persons with disabilities.<sup>77</sup> Still, as an international human rights treaty, the CRPD is part and parcel of the overall human rights law scheme and must be understood within that context. By the same token, the CRPD informs human rights law insofar as it clarifies the application of human rights to the specific context of persons with disabilities.<sup>78</sup> Significantly, the CRPD Committee, the body entrusted with implementing the treaty, has cast serious doubt on the permissibility of restrictions on the basis of disability in its concluding observations on the first state reports it reviewed, those submitted by Tunisia and Spain. The CRPD Committee urged those states to adopt legislative measures to ensure enfranchisement by persons with disa-

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71. *Id.* art. 3.

72. *Id.* art. 4(3).

73. *Id.* art. 5.

74. This is expressed in several contexts. *See, e.g., id.* art. 5(2) ("States Parties shall prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds.")

75. *See id.* art. 5(3).

76. For more detailed discussion and examples of election access measures to facilitate participation in the electoral process by persons with disabilities, see JANET E. LORD ET AL., HUMAN RIGHTS. YES! ACTION AND ADVOCACY ON THE RIGHTS OF PERSONS WITH DISABILITIES 31–43 (2d ed. 2012).

77. *See* CRPD, *supra* note 4, art. 4(5); ICCPR, *supra* note 14, art. 50; UDHR, *supra* note 13, art. 30.

78. *See* Lord & Stein, *supra* note 55, at 149 (discussing how a disability rights-based paradigm invokes civil, political, economic, social, and cultural rights to a greater degree and in conjunction more than conventional paradigms).

bilities,<sup>79</sup> and it castigated Spain for permitting individual assessments of voters with disabilities.<sup>80</sup> In addition, the General Comment on Article 12 recently issued by the CRPD Committee underscores that “the person’s decision-making ability cannot be used to justify any exclusion of persons with disabilities from . . . the right to vote.”<sup>81</sup> This was also highlighted by the recent decision of *Bujdosó and 5 others v. Hungary*, in which the Committee held that disenfranchisement is contrary to Article 29 even if based on an individual assessment of voting capacity.<sup>82</sup>

In sum, the CRPD confirms that persons with disabilities are entitled to the same right to enfranchisement as persons without disabilities, and that this right applies to persons historically perceived as incapable of voting. The next sections therefore argue that under current circumstances states cannot prevail in excluding “incapable” voters with disabilities under the guise of protecting the legitimacy of political processes.

### C. *Rationales for Disability-Based Exclusion*

States seeking to disenfranchise persons with disabilities have done so on the ground that such exclusions are essential to protect the legitimacy of their respective democratic processes.<sup>83</sup> For example, in *Kiss*, Hungary claimed that individuals placed under guardianship needed to be excluded from voting. Otherwise, the authenticity of its political system would be undermined in the eyes of the general populace.<sup>84</sup> More specifically, states have argued that excluding the entire category of persons placed under guardianship from exercising their franchise is required in order to avoid fraudulent, manipulated, and/or incompetent voting.<sup>85</sup>

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79. Committee on the Rights of Persons with Disabilities, *Concluding Observations of the Committee on the Rights of Persons with Disabilities on Tunisia*, ¶ 35, U.N. Doc. CRPD/C/TUN/CO/1 (May 13, 2011) (“The Committee recommends the urgent adoption of legislative measures to ensure that persons with disabilities, including persons who are currently under guardianship or trusteeship, can exercise their right to vote and participate in public life, on an equal basis with others.”); CRPD Committee Concluding Observations, Spain, *supra* note 19, ¶¶ 47–48 (“The Committee recommends that all relevant legislation be reviewed to ensure that all persons with disabilities regardless of their impairment . . . have the right to vote and participate in public life . . .”).

80. CRPD Committee Concluding Observations, Spain, *supra* note 19, ¶ 47 (“The Committee is concerned that the right to vote of persons with intellectual or psychosocial disabilities can be restricted if the person concerned has been deprived of his or her legal capacity, or has been placed in an institution. It is further concerned that the deprivation of this right appears to be the rule and not the exception. It regrets the lack of information on standards of evidence or grounds, and criteria used by judges when depriving persons of their right to vote. It notes with concern the number of persons with disabilities denied their right to vote.”).

81. Committee on the Rights of Persons with Disabilities, *Draft General Comment on Article 12 of the Convention—Equal Recognition before the Law*, ¶ 44 (September 2–13, 2013).

82. Bujdosó, *supra* note 10.

83. See Pamela S. Karlan, *Framing the Voting Rights Claims of Cognitively Impaired Individuals*, 38 *MC-GEORGE L. REV.* 917, 925 (2007).

84. Kiss, *supra* note 7, ¶ 25–26.

85. See Decision of the Slovenian Constitutional Court no. U-I-346/02 from July 10, 2003, available at <http://www.us-rs.si/>; see also Nález Ústavního soudu ze dne 12.07.2010 (ÚS) [Decision of the Czech Constitutional Court on July 12, 2010] no. IV. ÚS 3102/08, available at <http://nalus.usoud.cz/>. Cf.

Sparse data exists on electoral fraud,<sup>86</sup> and we are unaware of any research demonstrating fraud specifically involving persons with disabilities.<sup>87</sup> Absent empirical evidence that persons with disabilities are either generally susceptible or relatively more prone to becoming victims of fraud, the assumed connection between disabled voters and fraudulent voting must be attributed to state prejudice and stigma. Indeed, unfounded but deeply held beliefs define stereotypes.<sup>88</sup> There is no evidence of fraudulent voting practices specifically involving disabled voters,<sup>89</sup> despite the prevalence of concerns that large numbers of disabled voters are isolated in institutions where their contact with the outside world is limited and where their dependence on care providers is heightened.<sup>90</sup> Moreover, to the extent that these involuntary residents are at risk of becoming targets for would-be perpetrators of voter fraud, that possibility is not specific to disabled persons. The same risk arises from placing any group of individuals in an isolated and heavily controlled living environment. It would be bizarre to remedy one human rights violation—the segregation of persons with disabilities—with another. As a result, while fraud is a legitimate state concern, in the absence of any specific evidence to the contrary, disenfranchising individuals on the basis of their disability categorically violates their human rights and cannot be justified under any international legal standard.<sup>91</sup>

State concerns regarding electoral manipulation, a variation of electoral fraud, are predicated on the belief that it is easier to unduly influence persons with disabilities than others.<sup>92</sup> As in the case of fraud, we are unaware of any empirical evidence supporting the notion that individuals with disa-

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Deborah Markowitz, *Voting and Cognitive Impairments: An Election Administrator's Perspective*, 38 MCGEORGE L. REV. 871, 905 (2007) (describing the features of the Canadian electoral system that work to reduce the risk of fraud committed against people with cognitive impairment who are allowed to vote).

86. Nina A. Kohn, *Preserving Voting Rights in Long-Term Care Institutions: Facilitating Resident Voting While Maintaining Election Integrity*, 38 MCGEORGE L. REV. 1065, 1076 (2007) (“While the potential exists for fraud in nursing home voting, evidence of its occurrence is minimal and largely anecdotal.”). Indeed, empirical evidence of fraud is generally lacking. See Aviva Shen, *Colorado Secretary of State Gives Up On Voter Purge*, THINKPROGRESS, (Sept. 11, 2012, 2:30 PM), <http://thinkprogress.org/justice/2012/09/11/826661/colorado-secretary-of-state-gives-up-on-voter-purge/?mobile=nc> (reporting the decision of Colorado Secretary of State Scott Gessler to end a voter purge, originally initiated by asking for proof of citizenship from 4000 voters. Approximately 90% of those asked were verified either through response or through a federal database before the Secretary of State ended the purge.).

87. Kohn, *supra* note 86, at 1077–78 (stating that, while there have been several high-profile cases alleging nursing home residents’ ballots were improperly completed, there have been no systemic studies of voting fraud in long-term care facilities).

88. REBECCA J. COOK & SIMONE CUSACK, *GENDER STEREOTYPING: TRANSNATIONAL LEGAL PERSPECTIVES* 9 (2010).

89. Kohn, *supra* note 86, at 1078 (stating that most reports of voter fraud in nursing homes cannot be substantiated and residents with dementia have not been targeted by perpetrators of voter fraud).

90. See Office of the High Comm’r for Human Rights, Regional Office for Europe, *Forgotten Europeans, Forgotten Rights: The Human Rights of Persons Placed in Institutions* (by Camilla Parker) (2010).

91. See, e.g., Shantha Rau Barriga, *Democracy Disabled: Discrimination at the Polls*, HUMAN RIGHTS WATCH (May 20, 2011), [www.hrw.org/news/2011/05/20/democracy-disabled-discrimination-polls](http://www.hrw.org/news/2011/05/20/democracy-disabled-discrimination-polls).

92. See Interview with László Székely, Hungarian Government Commissioner for Civil Code Reform, in Budapest, Hung. (Aug. 26, 2011) (on file with authors).



bilities are more susceptible to manipulation than the general population.<sup>93</sup> Undue influences are ubiquitous and inevitable in democratic voting processes.<sup>94</sup> Voters in open societies are exposed to divergent sources of information and will diverge on the reasons for their voting decisions.<sup>95</sup> Some base their choices on promised policies and programs. Others choose on the basis of their family's longstanding political affiliation, the candidate's hairstyle or other personal characteristics, or the artistic qualities of the advertisements.<sup>96</sup> Many rely on the advice of their family members, friends, and other associates.<sup>97</sup> These are all permissible forms of influence that a state cannot and should not attempt to control. Any effort to control these forms of influence would contravene the right to freedom of information.<sup>98</sup>

No justification exists to treat people with disabilities materially differently in this context; non-disabled voters are similarly susceptible to a wide range of undue influences. Some may argue that disability often limits access to information, which in turn impedes voter decisionmaking. However, in-

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93. See Kohn, *supra* note 86, at 1079 (“[W]hen fraud occurs, it targets nursing home residents in general and not simply those residents suffering from diminished mental capacity.”).

94. See, e.g., Paul Allen Beck & M. Kent Jennings, *Family Traditions, Political Periods, and the Development of Partisan Orientations*, 53 J. OF POLITICS 742, 742 (1991) (asserting that one of the most important influences on adult political orientation is the family); Cameron Ross, *Regional Elections and Electoral Authoritarianism in Russia*, 63 EUROPE-ASIA STUD. 641, 654 (2011) (noting the Russian practice of having school class leaders call parents in order to pressure them to vote); Ann Zimmerman & Kris Maher, *Wal-Mart Warns of Democratic Win*, WALL ST. J. (Aug. 1, 2008), available at <http://online.wsj.com/article/SB121755649066303381.html> (detailing Wal-Mart employer attempts to implicitly manage employees' voting patterns in the 2008 U.S. presidential election).

95. See, e.g., Kevin Arceneaux, *Do Campaigns Help Voters Learn? A Cross-National Analysis*, 36 BRIT. J. POL. S. 159, 162 (2005) (noting that voters with less political sophistication tend to glean more information from political campaigns); Jeffery J. Mondak, *Media Exposure and Political Discussion in U.S. Elections*, 57 J. OF POLITICS 62, 83 (1995) (“[M]ost voters cast a wide net when endeavoring to acquire political information. Voters do pay some attention to news reports, debates, and campaign advertisements, but voters also elicit relevant information from everyday life . . . with resulting influence on electoral choice.”).

96. See LYNDA LEE KAID ET AL., *POLITICAL COMMUNICATION IN EUROPEAN PARLIAMENTARY ELECTIONS* 93–94 (Michaela Maier et al. eds., 2011) (stating that exposure to television advertisements that include an entertainment element can produce a marked change in young German voters' attitudes); Alexander Todorov et al., *Inferences of Competence from Faces Predict Election Outcomes*, 308 SCI. 1623, 1623 (2005) (“[I]nferences of competence, based solely on the facial appearance of political candidates and with no prior knowledge about the person, [can] predict the outcomes of elections for the U.S. Congress.”); see also Beck & Jennings, *supra* note 94, at 759 (“[C]hildren from highly politicized families were most likely to carry the family partisan tradition with them . . .”).

97. See Paul Allen Beck et. al, *The Social Calculus of Voting: Interpersonal, Media, and Organizational Influences on Presidential Choices*, 96 AM. POL. SCI. REV. 57, 64 (2002) (stating that a candidate favored by an individual's personal network is more likely to have an advantage in the individual's own mind); Mondak, *supra* note 95, at 83 (suggesting that an individual's political leanings may influence the electoral decisions of those with whom they converse, regardless of whether the conversation focuses on political campaigns).

98. ICCPR, *supra* note 14, art. 19; UDHR, *supra* note 13, art. 19; see also TOBY MENDEL, *FREEDOM OF INFORMATION: A COMPARATIVE LEGAL SURVEY* 4 (2003) (asserting that effective participation in elections is dependent on the freedom to access information through a variety of methods); *Iran: New Assault on Freedom of Information*, HUMAN RIGHTS WATCH (Jan. 25, 2012), available at [www.hrw.org/news/2012/01/25/iran-new-assault-freedom-information](http://www.hrw.org/news/2012/01/25/iran-new-assault-freedom-information) (condemning Iran's arrest of journalists and bloggers as a violation of the right to freedom of information with regard to elections).

adequate access to education and information is not a sound basis upon which to erect additional barriers to rights. Consequently, excluding persons with disabilities from exercising their human right to political participation because of unsubstantiated presumptions arising from their disability status cannot be justified under international law. Rather, governments concerned about undue influence should ensure that persons with disabilities have access to education and information from diverse sources in a form that they can use. Governments can also implement safeguards limiting the possibility of undue influence in the voting process.

Alleged lack of voting capacity (retrogressively called “incompetence”) is probably the most prevalent justification states provide when disenfranchising persons with disabilities.<sup>99</sup> For example, Hungary rationalized its actions in *Kiss* by asserting that the people with disabilities who are placed under guardianship, much like children, are inherently not “capable of making conscious and judicious decisions.”<sup>100</sup> However, adults with disabilities are not children.<sup>101</sup> Most adults with disabilities, much like the general voting public without disabilities, are able to vote.<sup>102</sup> This is true even of many persons placed under guardianship, who also form a highly heterogeneous group with varying capacities. As *Kiss* held, guardianship is simply not a good enough proxy for restricting voting rights because it is grossly over-inclusive and therefore targets a large number of individuals whose voting capacity is intact.<sup>103</sup> That some persons with disabilities may require assistance with managing finances ought not to create any presumptions as to their ability to vote.<sup>104</sup>

Nevertheless, it is true that some percentage of persons with disabilities is unable to exercise their right to vote, even with assistance. Often this is caused by the interplay between those individuals’ impairments and inaccessible voting environments. When that is the case, providing reasonable accommodations—such as decisionmaking facilitation, physical access, or alternative formats—can allow those persons currently viewed as lacking

99. Jason H. Karlawish & Richard J. Bonnie, *Voting by Elderly Persons with Cognitive Impairment: Lessons from Other Democratic Nations*, 38 MCGEORGE L. REV. 879, 884 (2007).

100. *Kiss*, *supra* note 7, ¶ 25.

101. According to disability rights advocates, the infantilization of adults with disabilities has been a significant rationale for stripping away autonomy. See Mitchell Levitz, *Voices of Self Advocates*, in *THE HUMAN RIGHTS OF PERSONS WITH INTELLECTUAL DISABILITIES, DIFFERENT BUT EQUAL* 453, 458 (Stanley S. Herr et al eds., 2003) (stating that the tendency to deprive individuals with intellectual disabilities of their right to make their own choices decreases their self-determination and autonomy); see also Shantha Rau Barriga, *From Paternalism to Dignity*, HUMAN RIGHTS WATCH (2012), available at <http://www.hrw.org/world-report-2012/paternalism-dignity> (discussing how Argentinean women and girls with disabilities are often infantilized in the health system and deprived of their capacity to make decisions for themselves).

102. See *infra* Part II.C.

103. *Kiss*, *supra* note 7, ¶ 39.

104. *Kiss*, *supra* note 7, ¶ 44; see also Herr, *supra* note 27, at 433–36 (explaining that the Swedish system of support for individuals with intellectual disabilities acknowledges the varying forms of assistance such individuals may require while still ensuring they maintain the right to vote).

voting capacity to participate equally in exercising their franchise. However, providing reasonable accommodations will not enable every person currently deemed incapable of voting to render a vote. At the end of the day, some small percentage will not be able to do so. Indeed, some persons will be unable to exercise their franchise even with the most extensive forms of facilitation currently available. Persons in a persistent vegetative state (i.e., a coma) are an obvious example and perhaps the only clear one. Persons in later stages of dementia, those undergoing a severe psychotic attack, or those with significant intellectual disabilities are other candidates, although we note that these categories (and their implied considerations) are more ambiguous. There is no objective cut-off point based on diagnosis or IQ score below which all persons could be safely declared to lack the capacity to vote. Even persons with the types of disabilities listed vary in their abilities due to differing levels of education, training, experience, familiarity with the social environment, and other factors.<sup>105</sup> Lack of capacity to vote is thus individual, but in some cases it nevertheless exists, and we are most likely to find it within these categories of persons.

In sum, a generalized approach to persons with disabilities cannot justify their disenfranchisement. There is no evidence that supports the view that this subset of the population is more likely to be targeted by would-be perpetrators of voter fraud or is easier to influence due to their disability. Nor could they, as a group, be characterized as incapable of voting. Therefore general exclusionary measures, whether based on disability or guardianship status, are grossly over-inclusive and impermissible. There is some small category of individuals with disabilities, however, who do lack the capacity to vote, in the sense that they currently cannot be accommodated reasonably (or extra-reasonably) in the voting process and are therefore unable to exercise their right to vote. How the discussed rationales of exclusion apply to their individual situation merits further attention.

#### *D. Permissibility of Interferences with the Right to Vote*

Under international law, state restrictions and limitations on the exercise of human rights are narrowly construed, if allowed at all. Additionally, certain human rights—for example, rights to be free from slavery and to be free from torture—are non-derogable and thus cannot be suspended or subject to derogation in times of emergency.<sup>106</sup> Political participation rights have gen-

105. Mental Disability Advocacy Center, *A kizáró gondnokság kérdése az új Ptk.-ban* [The question of plenary guardianship in the new Civil Code], 31 March 2008, 1.

106. See ICCPR, *supra* note 14, art. 4 (“In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the State Parties to the present Covenant may take measures derogating from their obligations to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination . . . . No derogation from Article 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision.”).

erally not been found to fall into this latter category of non-derogable rights.<sup>107</sup>

Restrictions and limitations on human rights are, like derogation itself, subject to strict interpretation. The overarching rule requires protection of the freedom at issue and restriction is the exception.<sup>108</sup> Under international law, state restrictions on the exercise of human rights are permissible only if they meet a narrow and strict standard: each abridgment must be prescribed by law and objectively justified on one or more specified grounds.<sup>109</sup> Thus, the restriction must pursue an acceptable aim and must be necessary to achieve that objective without unduly restricting the right in question.<sup>110</sup> The ECtHR, both in *Kiss* and elsewhere, uses the terms “legitimate aim” and “necessary in a democratic society” in its analyses when announcing this standard.<sup>111</sup> Neither prong, however, can currently be satisfied in the context of restricting voting by persons with disabilities.

i. *Legitimate Aims for Permissible Restrictions*

Under the ECHR and international human rights law generally, any restrictions on rights, whether general or particular, must be justified. That is, they must comply with the qualifying provision specifying the right’s possible limitations. Particularly, they must pursue an aim considered a legitimate ground for the restriction—such interests include, for example,

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107. See, e.g., ICCPR, *supra* note 14, art. 25; African [Banjul] Charter on Human and Peoples’ Rights, art. 13(1), June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58. A notable exception is the American Convention on Human Rights which identifies political rights amongst the higher classification norm. American Convention on Human Rights, AMERICAN CONVENTION ON HUMAN RIGHTS, ART. 23 (2), NOV. 22, 1969, O.A.S. TREATY SERIES NO. 36, 1144 U.N.T.S. 123 (“The law may regulate the exercise of the rights and opportunities referred to in the preceding paragraph only on the basis of age, nationality, residence, language, education, civil and mental capacity, or sentencing by a competent court in criminal proceedings.”).

108. *Handyside v. United Kingdom*, App. No. 5493/72, 1 Eur. H.R. Rep. 737 (1975). It is worth quoting in the context of free speech:

The questions which then fall to be considered are the needs or objectives of a democratic society in relation to freedom of expression; for without a notion of such needs the limitations essential to support them cannot be evaluated. . . . The aim is to have a pluralistic, open, tolerant society. . . . Of necessity this involves a delicate balance . . . . But democratic societies approach the problem from the standpoint of the importance of the individual and the undesirability of restricting the individual’s freedom. *Id.* ¶¶ 146–48.

109. The limitations clause in the International Covenant on Economic, Social and Cultural Rights most succinctly captures the current position, wherein “the State may subject such rights only to such limitation as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.” International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A (XXI), art. 4, U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (Dec. 16, 1966).

110. See, e.g., Charter of Fundamental Rights of the European Union, *supra* note 1, art. 52; Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3, arts. 13–15; ICCPR, *supra* note 14, arts. 18–23; ECHR, *supra* note 16, arts. 8–18.

111. See ECHR, *supra* note 16, arts. 2–11; *Kiss*, *supra* note 7, ¶¶ 37–38; see also *The Sunday Times v. United Kingdom*, App. No. 6538/74, 2 Eur. H.R. Rep. 245, ¶ 67 (1979); *Handyside v. United Kingdom*, App. No. 5493/72, 1 Eur. H.R. Rep. 737 ¶ 176 (1975).

national security, public safety, territorial integrity, and public health.<sup>112</sup> Article 3 of Protocol 1 to the ECHR (which covers an implied right to vote) contains no qualifying provision, such that the ECtHR's jurisprudence might embrace a wide range of aims as justifying limitation.<sup>113</sup>

In the case of excluding incapable voters, the ECtHR accepted in *Kiss* that the measure undertaken by Hungary served the legitimate aim of ensuring that only citizens capable of "making conscious and judicious decisions" are allowed to vote.<sup>114</sup> In other words, states are in principle permitted to protect the integrity of their electoral systems from incapable voters. Yet, neither the Hungarian government, nor the Court referred to the possibility of incapable voters influencing electoral outcomes. Therefore, they presumably consider any vote cast by incapable voters as *per se* harmful to the system, a harm that states legitimately may try to prevent. This conclusion is troubling because, as emphasized by the applicant in *Kiss*, it stems from the outdated view that persons with disabilities are incapable of making competent decisions.<sup>115</sup> Indeed, such misperception is exactly what the CRPD aims to overcome, and therefore it is decidedly unclear whether the ECtHR's justification would prevail under an analysis grounded in the CRPD.

In theory, it is possible to reconcile these two inapposite views if it is acknowledged that the state can take account of incapable voters when designing public policies to enable their participation, but not with the purpose of disenfranchising them. Enactment of public policies (such as providing disabled (and other) people with assistance and educating disabled voters to increase their competence when dealing with political issues) is certainly less worrying from a disability rights perspective, while still furthering the aim articulated in *Kiss*. Be that as it may, until the ECtHR's argumentation is explicitly overruled or put into doubt by other bodies, especially the Committee on the Rights of Persons with Disabilities, it remains the only explicit ruling on this point. In the absence of decisions holding the contrary, international human rights law does not currently prevent states from protecting the integrity of their electoral systems from incapable voters. The existence of a legitimate aim does not, however, automatically permit those states to disenfranchise incapable voters with disabilities. To do so, the applied measure must also be necessary and proportionate to its stated aim.<sup>116</sup>

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112. See ECHR, *supra* note 16, art. 3 and arts. 8, 9, 10, 11.

113. See ECHR, *supra* note 16, art. 3; *Kiss*, *supra* note 7, ¶ 38.

114. *Kiss*, *supra* note 7, ¶ 38.

115. *Id.* ¶ 28.

116. The proportionality test was articulated by the ECHR in the *Belgian Linguistic Case*, which held that differential treatment in the exercise of a right guaranteed in the ECHR must establish a reasonable relationship of proportionality in the means employed and the aim sought to be realized. Case "Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium" v. Belgium, App. Nos. 1474/62, 1677/62, 1691/62, 1769/63, 1994/63 and 2126/64, 1 Eur. H.R. Rep. 252 (1968).

ii. *The Principle of Proportionality*

“Necessity” and “proportionality” are not separate criteria in the ECtHR’s analysis—indeed, they are usually intermingled and considered together<sup>117</sup>—and so the Court’s proportionality analysis is wider than simply assessing the measure’s over-inclusiveness.<sup>118</sup> Along the same lines, the ECtHR utilizes several criteria uncommon to other judicial forums<sup>119</sup> and assesses a number of factors that are referred to differently than in other international human rights systems.<sup>120</sup> Consequently, for this analysis, we work within the ECtHR’s scope.

A state’s disenfranchisement of voters on the premise of protecting its electoral system presumes that incapable voters are in fact exercising their right to vote. As an initial matter, the entire population of persons that could even conceivably be catalogued as incapable voters is miniscule. In Hungary, for instance, the entire population of persons potentially suffering from a “severe” or “profound” intellectual disability is less than 12,000 people, or about 0.15% of all voters.<sup>121</sup> Of these individuals, some, like those persons in coma-like conditions, will be practically unable to exercise their legal capacity if given the opportunity. Other groups identified above, such as persons in later stages of dementia, those undergoing an acute psychotic attack or those with significant intellectual disabilities, may be physically able to cast a ballot, but given that even capable persons with disabilities vote in smaller numbers than the general population<sup>122</sup>—and that the category of incapable voters is restricted to those so stringently disabled that they cannot be accommodated reasonably during the process of voting—it is highly doubtful that individuals in these groups would in fact vote if given the opportunity. Therefore, systemic electoral legitimacy is not

117. See, e.g., *Olsson v. Sweden*, App. No. 10465/83, 11 Eur. H.R. Rep. 259, 285 (1989).

118. For a general description of proportionality, see Aharon Barak, *Proportionality and Principled Balancing*, 4 L. & ETHICS OF HUM. RTS. 3, 6 (2010). The European Court’s proportionality analysis overlaps with Barak’s proportionality in the regular sense, which is wider than proportionality *stricto sensu*.

119. For example, the European Court’s proportionality analysis is intertwined with principle of subsidiarity. On their relationship, see generally JONAS CHRISTOFFERSEN, FAIR BALANCE: PROPORTIONALITY, SUBSIDIARITY AND PRIMARITY IN THE EUROPEAN CONVENTION ON HUMAN RIGHTS, 3.

120. For example, the principle of subsidiarity is embodied by the European Court’s margin of appreciation doctrine, and is part of its proportionality analysis. Cf. *supra* note 109. Christoffersen identifies several areas where the European Court engages in proportionality analysis under different names. See Christoffersen, *supra* note 119, at 83–94.

121. Bass estimates the number of people living with severe and multiple disabilities in Hungary is between 8,000 and 12,000. See Bass László, *Jelentés a súlyosan, balmazottan fogyatékos embereket nevelő családok életkörülményeiről* [Report on the living circumstances of families raising persons with severe, combined disabilities], 1, 49 (Kézenfogva Alapítvány 2004).

122. Persons with disabilities as a whole also vote in smaller ratios than the general population. See, e.g., Inclusion Europe, *Recommendations for Accessible Elections in Europe* 3 (2011), available at [http://e-include.eu/images/stories/Policy\\_Recommendations\\_EN.pdf](http://e-include.eu/images/stories/Policy_Recommendations_EN.pdf) (reporting that 31.5% of persons with intellectual disability voted in the 2010 UK elections compared to 65.1% of the general population; 20% of persons with intellectual disability voted in the 1998 Swedish elections compared to 81.4% of the general population; and 31% of persons with intellectual disability voted in the 1994 Swedish national elections compared to 86% of the general population).

a very compelling ground for affirmatively disenfranchising these individuals.

By contrast, studies indicate that up to three percent of all votes are cast in error<sup>123</sup> and that the percentage of “irrational” votes—for instance, those who close their eyes and choose randomly—is even higher.<sup>124</sup> Thus, any gains to the legitimacy of a state’s electoral system associated with disability-based restrictions of the kind considered in *Kiss* are marginal at best. Although such measures may protect the electoral system from a very small subset of incapable voters, they do not address the much larger voting population of irrational persons without disabilities.

Furthermore, it is unclear how allowing for incapable voters in fact harms the system. If it is because incapable voters do not rationally evaluate the best likely outcome of their electoral selections, many of the otherwise capable non-disabled voters are guilty of the same offense. Persons who vote based on family traditions or a candidate’s hairstyle harm the system in a similar way. It is therefore troubling that states take the time and expense to disenfranchise incapable voters, yet care little about irrational voters even though they harm the electoral system in a similar way. Since all incapable voters as a factual matter are also persons with disabilities, the targeted approach applied by states gives rise to the obvious objection of discrimination. It is also insufficient to aver that irrationality is a matter of choice by those who are otherwise capable of being rational, whereas incapacity is inherent. As shown by philosopher Jason Brennan, irrational voters (whom he refers to as “bad voters”) are irrational for a reason.<sup>125</sup> In Brennan’s view, irrational voters do not have the skills necessary for efficient voting because mastering them was not worth their while.<sup>126</sup> They thus cannot choose to vote rationally, and states cannot rely on this distinction.<sup>127</sup>

A more convincing justification of the differential treatment of these two categories of voters, however, would maintain that although states are unable to identify irrational voters, they can identify incapable voters. States might further aver that this divergence exists because, whereas there is no objective test to assess the rationality of voters’ bases for decisionmaking,<sup>128</sup>

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123. See Ted Selker, *The Technology of Access: Allowing People of Age to Vote for Themselves*, 38 MCGEORGE L. REV. 1113, 1113 (2007) (“between one-half and three percent of voter selections on a typical ballot are actually for an adjacent selection”); cf. Steven F. Huefner, *Remedying Election Wrongs*, 44 HARV. J. LEGIS. 265, 274 (2007) (discussing common mistakes that lead to voting errors as illustrated by the 2000 presidential and 2006 congressional elections in Florida).

124. JASON BRENNAN, *THE ETHICS OF VOTING* 164 (2011) (“Among people in the lowest knowledge quartile, only 12.2 percent and 9.7 percent knew which party controlled the [American] House of Representatives and Senate, respectively. The bottom 25 percent of citizens does worse than a coin flip when it comes to political knowledge—they are systematically in error.”).

125. *Id.* at 174.

126. See *id.* at 165.

127. *Id.* at 169.

128. *Id.* at 108.

there are tests to establish “voting capacity.”<sup>129</sup> Although that much is true, the argument is fatally flawed because voting capacity tests are not entirely accurate at identifying incapable voters and therefore always exclude some capable ones.<sup>130</sup> In fact, psychiatric experts agree that such evaluations are not exclusively based on objective criteria, but rely on policy and social prejudice as well.<sup>131</sup> Hence, denying persons with disabilities the right to cast a ballot on the basis of voting capacity tests is an over-inclusive measure because it excludes some capable voters.

Nor is it sufficient to note, albeit correctly, that some amount of over-inclusion is permissible under international law.<sup>132</sup> There are indeed eligibility criteria, such as requirements to reach the age of majority or relocation to a new voting district before the voter registration deadline.<sup>133</sup> However, these examples differ from the disenfranchisement of capable voters. Age and residency are not suspect classifications under international law, and therefore exclusions predicated on membership in these categories are technically permissible.<sup>134</sup> Capacity assessments, however, affect only persons with disabilities and discrimination based on disability is explicitly prohibited by the CRPD<sup>135</sup> and recognized as an impermissible ground for discrimination by the ECtHR.<sup>136</sup> Therefore, any unjustified over-inclusion in the case of capacity assessments is an impermissible classification. The argument that targeting is permissible when grounded in objective criteria, which we agree with above, will also fail. It would lead to unjustly excluding at least some capable disabled persons, which no objective reason can justify. Because some amount of misidentification of capable disabled per-

129. See, e.g., Sally Balch Hurme & Paul S. Appelbaum, *Defining and Assessing Capacity to Vote: The Effect of Mental Impairment on the Rights of Voters*, 38 MCGEORGE L. REV. 931 (2007) (describing the Competence Assessment Tool for Voting, or CAT-V); Raymond Raad et al., *The Capacity to Vote of Persons with Serious Mental Illness*, 60 PSYCHIATRIC SERVICES 624, 625 (2009).

130. Hurme & Appelbaum, *supra* note 129, at 962 (“There is no scientifically determinable point on that spectrum at which we can say the person manifests sufficient capacity for the task.”); Kohn, *supra* note 86, at 1083 (asserting the significant likelihood that individuals tested by CAT-V will be incorrectly assessed as lacking the capacity to vote); Raad et al., *supra* note 129, at 624.

131. See, e.g., Paul S. Appelbaum, “*I Vote, I Count*”: *Mental Disability and the Right to Vote*, 51 PSYCHIATRIC SERVICES 849, 850 (2000) (“It seems likely that popular attitudes towards the mentally disabled—seeing them as intrinsically irrational and incapable of participating in civil functions—play an important role.”); Karlawish & Bonnie, *supra* note 99, at 884 (noting that traditional explanations claiming that certain persons should be excluded from voting because their intellectual disabilities are incompatible with making informed and rational choices are increasingly regarded as discriminatory).

132. See, e.g., Horych v. Poland, No. 13621/08, ¶ 93 (Eur. Ct. Hum. Rts., Apr. 17, 2012), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-110440> (providing an example of a prison special security regime that was classified as over-inclusive, but nevertheless worthy of further consideration by the ECtHR).

133. Mass. Gen. Laws ch., 51 § 1F (2012) (stating that, in Massachusetts, registration is allowed until 20 days before elections).

134. ECHR, *supra* note 16, art. 14 (listing precluded grounds).

135. CRPD, *supra* note 4, art. 12.

136. Glor v. Switzerland, No. 13444/04 (Eur. Ct. Hum. Rts., Apr. 30, 2009), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-92525> (the first case in which the ECtHR recognized disability as a status covered by Article 14, the ECHR’s anti-discrimination provision); Kiss, *supra* note 7 (elevated disability to a suspect classification).



sons as incapable is an unavoidable consequence of any capacity assessment,<sup>137</sup> such assessments are always disproportionate, and so cannot be permitted under international law.

It also bears repeating that the practical application of individualized capacity assessments is far bleaker than the situation described above in abstract theoretical terms. Rather than beginning from a departure point of an even-handed application of scientifically sound assessment tools, the history of disenfranchisement of persons with disabilities—which has affected how they are perceived by society at large, including by those professionals administering and reviewing the tests—has been one of prejudice and stigma leading to grossly disproportionate exclusion from voting.<sup>138</sup> Returning to the example of Hungary, although between 8,000 and 12,000 persons could be classified as having “severe” or “profound” disabilities such that their voting capacity could conceivably be disputed,<sup>139</sup> as of 2011, 71,862 persons were under guardianship and legally excluded from the right to vote for lack of capacity.<sup>140</sup> Under a liberal reading of *Kiss*, all persons from the latter category can undergo an individualized assessment to establish whether their right to vote should be reinstated, and are presumed incapable until that time.<sup>141</sup> Given the scientifically unreliable nature of these assessments,<sup>142</sup> as well as Hungary’s interest in validating its procedures to protect the electoral system, it is very likely that most of those currently disenfranchised will remain so after the assessments. Even if we consider the Hungarian example extreme, capacity assessments are almost certain to produce similarly distorted results elsewhere. For example, the CRPD monitoring committee reached a similar conclusion regarding Spain, remarking that continued exclusion after an individualized assessment “appears to be the rule and not the exception.”<sup>143</sup>

What is more, even if strict scientific methodology existed to mitigate the problem of over-exclusion resulting from state-sponsored individualized assessments, it would still founder from a human rights perspective. International bodies are simply not in a good position to police assessment proce-

137. See generally Hurme & Appelbaum, *supra* note 129.

138. See CRPD Committee Concluding Observations Spain, *supra* note 19, ¶ 47.

139. See Bass, *supra* note 121, at 49.

140. Letter No. 10586/2011/2 from Dr. Benedek Judit, OIT Hiv., Office of the Nat’l Judiciary Council (March 18, 2011) (on file with authors) (on the number of persons under guardianship).

141. Letter No. 4/2011, from Miklós Soltész, Minister of State for Social, Family and Youth Affairs, on behalf of the Hungarian government to the Comm. on the Rights of Persons with Disabilities (May 31, 2012) (on file with authors) (observations in communication).

142. See generally Hurme & Appelbaum, *supra* note 129.

143. See CRPD Committee Concluding Observations, Spain, *supra* note 19, ¶ 47 (“[The Committee] is further concerned that the deprivation of this right appears to be the rule and not the exception. It regrets the lack of information on standards of evidence or grounds, and criteria used by judges when depriving persons of their right to vote. It notes with concern the number of persons with disabilities denied their right to vote.”).

dures.<sup>144</sup> Since prejudice against persons with disabilities is an important factor in individualized assessments of capacity to vote and distorts their outcomes, they should be avoided at all costs and replaced with clear rules that limit the scope of individual discretion. Because other alternatives, such as those based on guardianship, are clearly off the table following *Kiss*, the only viable possibility to curtail prejudiced assessments is to not disenfranchise anyone on the basis of lack of capacity.

Finally, under a proportionality analysis, states are required to demonstrate that they considered a “less restrictive alternative.”<sup>145</sup> Central European states, including Hungary, produce hugely over-inflated numbers of incapacitated persons, where the major reason for deprivation of capacity seems to be the mere presence of disability.<sup>146</sup> Historically, these individuals have been excluded from elections and not provided accessible or easy-to-read information about political processes in general or political parties in particular.<sup>147</sup> States truly concerned by the competence of the electorate—those with and without disabilities—would meet their duty to educate and inform voters instead of excluding them. Providing information, opportunities to learn by practice, and facilitation better ensures that persons with disabilities cast competent votes, fulfilling the same legitimate state aim through less restrictive means. Moreover, such measures help to satisfy the duty to accommodate voters with disabilities—and others—who require assistance in order to access their right to vote and participate in the political life of their communities.

### III. THE VOTING-INCAPABLE AND PROXY VOTING

Part II argued that the disenfranchisement of persons with disabilities is disproportionate under international human rights law because it unjustly discriminates against some disabled people with intact voting capacity. Hence, exclusion from the right to vote based on disability, guardianship, or an individual assessment of voting capacity is impermissible under interna-

144. See *Shtukaturvov v. Russia*, No. 44009/05, ¶ 95 (Eur. Ct. Hum. Rts., Mar. 27, 2008), (explaining the lack of direct contact between the European Court and persons whose legal capacity is assessed calls for judicial restraint in overruling the results of such assessments).

145. See, e.g., *Witold Litwa v. Poland*, App. No. 26629/95, 2000-III Eur. Ct. H.R. (2000).

146. See, for example, the guardianship reports of the Mental Disability Advocacy Center: *Guardianship and Human Rights in Bulgaria*, MENTAL DISABILITY ADVOCACY CENTER (2007); *Mental Disability Advocacy Center, Guardianship and Human Rights in the Czech Republic*, MENTAL DISABILITY ADVOCACY CENTER (2007); *Guardianship and Human Rights in Georgia*, MENTAL DISABILITY ADVOCACY CENTER (2007); *Guardianship and Human Rights in Hungary*, MENTAL DISABILITY ADVOCACY CENTER (2007); *Guardianship and Human Rights in Russia*, MENTAL DISABILITY ADVOCACY CENTER (2007); *Guardianship and Human Rights in Serbia*, MENTAL DISABILITY ADVOCACY CENTER (2006).

147. See, e.g., *Deprivation of the Right to Vote Affects People with Intellectual Disabilities Across Europe*, E-INCLUDE, (Sept. 24, 2010, 4:18 PM), <http://www.e-include.eu/en/articles/630-deprivation-of-the-right-to-vote-affects-people-with-intellectual-disabilities-across-europe> (“[I]t is clear that people with intellectual disabilities under guardianship are still denied the right to vote in several countries in Europe without any assessment of their actual ability to vote.”).

tional law. Such a conclusion signals significant progress for the vast majority of persons with disabilities presently barred from voting in Europe and elsewhere, but does it go far enough toward protecting the full enjoyment of the human right to political participation for individuals with disabilities? To comply with their international human rights obligations, and in particular with the CRPD's progressive mandates, states must provide support for persons to exercise suffrage. Nevertheless a small percentage of persons with disabilities, even with reasonable accommodations, will remain unable to participate in elections. Despite being legally entitled to vote, they functionally cannot vote. Accordingly, this Part considers a bold proposal by political philosopher Martha Nussbaum in which voting-incapable persons with disabilities would have their guardians cast votes on their behalf.<sup>148</sup> Because proxy voting violates international human rights and also engenders profound disadvantages, the *status quo* situation described in Part II, whereby those who cannot vote do not vote, is preferred.

#### A. *Capability and "Cognitive" Disability*

Building on concepts first enunciated by Nobel prize-winning economist Amartya Sen,<sup>149</sup> Nussbaum crafted a capabilities approach grounded in notions of justice and equality to delineate the obligations states have to their own citizens, with particular reference to those with intellectual (she uses the term "cognitive") disabilities.<sup>150</sup> Nussbaum's capabilities approach creates a fertile space within which to understand the reach and content of the human right to development. It enumerates ten capabilities for which states must make resources available so that individuals can have the agency, if they so choose, to increase their personal capabilities to a minimum threshold level.<sup>151</sup>

Control over one's political environment via meaningful participation is one of the ten capabilities Nussbaum listed in her earlier work;<sup>152</sup> her current proposal more fully articulates this capability in the context of individuals with intellectual disabilities as a means of ensuring their equal respect

148. Martha C. Nussbaum, *The Capabilities of People with Cognitive Disabilities*, 40 *METAPHILOSOPHY* 331 (July 2009) [hereinafter *Cognitive Disabilities*].

149. See generally AMARTYA SEN, *DEVELOPMENT AS FREEDOM* (1999); Amartya K. Sen, *Development as Capability Expansion*, in *HUMAN DEVELOPMENT AND THE INTERNATIONAL DEVELOPMENT STRATEGY FOR THE 1990s* 94 (Keith Griffin & John Knight eds., 1990).

150. See generally MARTHA C. NUSSBAUM, *FRONTIERS OF JUSTICE: DISABILITY, NATIONALITY, SPECIES MEMBERSHIP* (2006) [hereinafter *FRONTIERS*]; MARTHA C. NUSSBAUM, *WOMEN AND HUMAN DEVELOPMENT: THE CAPABILITIES APPROACH* (2000) [hereinafter *CAPABILITIES APPROACH*]. The more recent of these books also extends Nussbaum's theory to the realms of state obligations to other states and to non-human animals, both of which lie beyond the scope of this Article. For detailed elaborations and critiques of Nussbaum's capabilities approach, see Lord & Stein, *supra* note 55.

151. The ten capabilities Nussbaum deems vital to a full human experience are: life; bodily health; bodily integrity; senses, imagination, and thought; emotions; practical reason; affiliation; other species; play; and control over one's political environment and material surroundings. See *CAPABILITIES APPROACH*, *supra* note 150, at 78–80.

152. *Id.* at 80.

and dignity.<sup>153</sup> Within the realm of voting,<sup>154</sup> Nussbaum differentiates between three sub-groups of individuals with intellectual disabilities based on their characteristics. Group A members can vote with the assistance of reasonable accommodations; those in Group B cannot vote by themselves but can express a preference which their guardians can execute on their behalf; and Group C constituents can neither form a view on political issues for themselves nor communicate their choices to others.<sup>155</sup> Nussbaum indicates that the case for people from Groups A and B voting is “easy” in theory but nonetheless challenges the attitudes and norms of state implementers,<sup>156</sup> a position that accords with our analyses in Part II.<sup>157</sup>

As for Group C (the voting-incapable), Nussbaum suggests that to satisfy the principles of equal respect and dignity in the area of political rights, states must authorize guardians to vote on behalf and in the interests of persons from that category.<sup>158</sup> Acknowledging that this proposal invokes “a surprising and controversial use of notions of guardianship,” Nussbaum asserts that such arrangements are nevertheless essential for realizing the full equality of persons with intellectual disabilities.<sup>159</sup> By contrast, we favor the status quo, maintaining that such persons from Group C ought not to be disenfranchised nor to have a guardian exercise decisionmaking in their stead.

### B. *Human Rights and Substitute Decisionmaking*

Nussbaum’s proposal on behalf of the voting-incapable is facially appealing as it guarantees exercise of the franchise to the population of persons with disabilities who cannot be accommodated in the electoral process.

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153. *Id.* at 337. Much of what Nussbaum argues, and how we respond, applies equally to “voting-incapable” persons without intellectual disabilities. *See* discussion identifying groups in Part IIC(i). We therefore underscore that our references to person with intellectual disabilities is intended only to engage Nussbaum on her own terms, and not to lessen the similar nature of our conclusions for other individuals.

154. The proposal also extends to for-proxy jury service, a topic outside our current analysis, but one on which we would reach similar conclusions. In the event, Nussbaum explains that her earlier engagement with John Rawls in *FRONTIERS OF JUSTICE* was an attempt to put forward a capabilities theory as progressive as Rawls’s theory of justice in all spheres he covered, and to improve on the areas where he acknowledged shortcomings regarding persons with disabilities, the interactions between states, and non-human animals. *See Cognitive Disabilities*, *supra* note 148, at 337–41. Nussbaum also explains that the arguments in *FRONTIERS OF JUSTICE* delved into areas of economic and social rights, hence her desire to return for an extended explication to the realm of civil and political rights. *Id.* at 340.

155. *Id.* at 344–45. The division between Groups B and C does not precisely coincide with differences between capable and incapable individuals. Depending on the test used, some persons in Group B can be found incapable. However, since the exact criteria for incapacity is not a main concern for this analysis, we put these nuances aside and adopt the division suggested by Nussbaum.

156. *Id.* at 345–46.

157. A notable divergence is that Nussbaum grounds the legal basis for her assertions in American constitutional law, which she justifies through social contract ideals. By contrast, this Article derives its conclusions from human rights law and norms. Ultimately, we agree as to the disposition of Members of Groups A and B, but disagree as to Group C.

158. *Cognitive Disabilities*, *supra* note 148, at 347.

159. *Id.* at 333.

Nonetheless, it must be rejected for violating international human rights norms, for undermining the inherent dignity of persons with cognitive disabilities, and for failing in practice for several reasons, including those given in Part II.

i. *Substitution versus Assistance*

As an initial matter, it bears mentioning that the application of general international human rights principles makes clear that a right cannot be exercised by another person in the substituted manner proposed.<sup>160</sup> Indeed, a good deal of the negotiation and impetus for the CRPD evolved as a response to exactly this type of substituted decisionmaking having comprised the historical (and tragically, continuing) case for persons with disabilities.<sup>161</sup> The consequences of substituted decisionmaking for persons with disabilities have ranged from lack of control over their financial matters to involuntary sterilization to lifelong confinement in institutions created for their benefit and paternalistic “care.”<sup>162</sup>

Correspondingly, Article 12 of the CRPD acknowledges the equal legal capacity of persons with disabilities, and requires that state parties undertake appropriate measures to support individuals in exercising that legal capacity.<sup>163</sup> Article 12 thus establishes a supported decisionmaking framework to create conditions within which decisionmaking can occur free of coercion and undue influence. This approach preserves and enables autonomy by recognizing that persons with disabilities are inherently equal agents and holders of rights. Supported decisionmaking models, according to this mandate, must empower persons with disabilities to exercise their agency across a wide array of legal transactions and social encounters,<sup>164</sup> and states, as we saw in *Kiss*, are banned from using guardianship and other devices as heuristics for exclusion.

Nussbaum’s proposal clearly runs afoul of basic disability human rights norms including autonomy, dignity, and respect for the individual—precisely, and ironically, the values she seeks to honor. Lying at the center of this disjuncture between social contract ideals as espoused by Nussbaum and commonly held disability rights concepts is the divide that separates facilitated decisionmaking from substituted decisionmaking. In summary, an assistant does not decide on behalf of another person but instead supports an

160. See Lord & Stein, *supra* note 55.

161. See Michael Ashley Stein et al., *Equal Access to Health Care under the U.N. Disability Rights Convention*, in *MEDICINE AND SOCIAL JUSTICE: ESSAYS ON THE DISTRIBUTION AND CARE* 245 (Rosamond Rhodes et al. eds., 2012).

162. Disability Rights International (formerly Mental Disability Rights International) has documented egregious human rights violations against persons with disabilities in institutional settings, such as orphanages, social care homes, and psychiatric hospitals. See DISABILITY RIGHTS INTERNATIONAL, <http://www.disabilityrightsintl.org/media-gallery/our-reports-publications/> (last visited Nov. 17, 2013).

163. CRPD, *supra* note 4, art. 12.

164. See Lord & Stein, *supra* note 55.

individual in arriving at a conclusion and/or executing that person's own choice (with the supported individuals belonging to Groups A and B). By contrast, a substitute decisionmaker such as a guardian makes a decision on behalf of another person (here, the members of Group C).<sup>165</sup> No doubt a guardian can and should take the preferences and wishes of the person under his aegis into account, but the decision ultimately remains that of the guardian.<sup>166</sup>

While there is some debate over the validity of substitute decisionmaking in extreme circumstances of life and death or causing irreparable harm to one's self,<sup>167</sup> no such harm is envisioned in the case of voting. There are no extraordinary circumstances requiring the creation of an exception to the general 'no substitution' principle on which the CRPD is built.<sup>168</sup>

## ii. *Voting, Respect, and Dignity*

Nussbaum justifies her proposal on the ground that the right to vote "must be delivered on the basis of equality if the nation in question is to claim even minimal justice,"<sup>169</sup> a conclusion with which we agree. However, the analogue she delivers in support, that denying a voting-incapable person with a disability the opportunity to vote through a guardian is the same as excluding voting-capable women and African-Americans,<sup>170</sup> is inapposite. We are not equal because we vote. We are equal because we *are allowed to* vote, and there is a difference between these two propositions. Many women and African-Americans—as well as men and members of other racial groups—do not vote. That does not diminish society's respect towards them because such approbation is contingent upon their holding the right to vote. To subordinate their status, a state would have to disenfranchise the group.

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165. See Amita Dhanda, *Legal Capacity in the Disability Rights Convention: Stranglehold of the Past or Lodestar for the Future?*, 34 SYRACUSE J. INT'L L. & COM. 429, 433–34 (2007).

166. Parenthetically, although not specifically cited by Nussbaum, her proposal seems to attempt to either extend or supersede an argument made by philosopher Eva Kittay that family caregivers (who are not necessarily guardians, but often are, and certainly could be guardians) ought to have extra votes because they serve not only their own interests, but those of the people with cognitive disabilities to whom they have familial attachments, and thus can contribute to democratic goals of representation and accountability. See generally EVA FEDER KITTAY, *LOVE'S LABOR: ESSAYS ON WOMEN, EQUALITY, AND DEPENDENCY* (1998). Notably, yet another philosopher (and parent of a person with an intellectual disability), Michael Berube, rejected Nussbaum's proposal as not advancing an equality agenda. See Michael Berube, *Equality, Freedom, and/or Justice for All? A Response to Martha Nussbaum*, in COGNITIVE DISABILITY AND ITS CHALLENGE TO MORAL PHILOSOPHY 97 (Eva Feder Kittay & Licia Carlson eds., 2010).

167. See generally *RETHINKING RIGHTS-BASED MENTAL HEALTH LAWS* (Bernadette McSherry & Penelope Weller eds., 2010); PETER BARTLETT, OLIVER LEWIS & OLIVER THOROLD, *MENTAL DISABILITY AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS* (2006).

168. Shantha Rau Barriga, *From Paternalism to Dignity: Respecting the Rights of Persons with Disabilities*, HUMAN RIGHTS WATCH (2012), available at <http://www.hrw.org/world-report-2012/paternalism-dignity>.

169. *Cognitive Disabilities*, *supra* note 148, at 343.

170. *Id.*

More to the point, voting by proxy is not the same as voting alone or voting with assistance when it comes to expressing equal respect for voting-incapable persons with disabilities or promoting their dignity. This is true for three main reasons. First, although disenfranchised persons can no doubt feel ostracized, proxy voting is unlikely to improve their self-esteem. Those who are unable to form a political preference might not realistically be expected to have a self-conception of political community. Second, proxy voting on behalf of a miniscule minority (recall that in Hungary, these persons constitute 0.15% of all votes at most) will have doubtful, if any, impact on politicians being more responsive to the social choices expressed.<sup>171</sup> This is especially true because it is the guardians who are in fact voting and articulating political preferences, and politicians are already taking their preferences into account.<sup>172</sup> Third, proxy voting diminishes the dignity of persons with disabilities before third parties because it sends a clear signal to the social environment that the individual is flawed and, in the Hungarian government's words, not capable "of making conscious and judicious decisions."<sup>173</sup> In fact, disenfranchised persons with disabilities—including the applicant in *Kiss*<sup>174</sup>—raise the issue of such stigma as a crucial reason for seeking reinstatement of their right to vote.<sup>175</sup>

If anything, proxy voting further subordinates the voting-incapable. These individuals are already stigmatized on account of their disabilities, and the appointment of a guardian to vote on their behalf highlights their lower social status to their communities. Without such judicial intervention, an outside observer would not be able to tell with certainty whether an individual did not vote because she did not want to, or because she was unable. In terms of dignity, this is preferable to being identified as a person whose vote counted only because she is so disabled that a court prohibited her from voting and appointed a guardian to do so in her stead.<sup>176</sup>

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171. A more effective strategy would encourage persons with disabilities capable of voting to do so, since they currently vote in much lower numbers than the general population. See INCLUSION EUROPE, *supra* note 122 (citing differential data).

172. We underscore that in many countries the reality is very different from this hypothetical academic discourse. Large numbers of otherwise voting-capable persons with disabilities are disenfranchised and it matters hugely for them whether they can express their political choice directly or have to rely on family members or others who might have contradictory interests. By contrast, persons under guardianship are likely to be represented only to the extent that their interests do not collide seriously with those of their guardians.

173. Kiss, *supra* note 7, ¶ 25.

174. Kiss took the trouble of undergoing four years of litigation because his family members referred to his inability to vote as proof of his "serious disability" and "inability to take care of himself." Personal communication with A. Kiss (on file with author).

175. See Hungarian Civil Liberties Union [Társaság a Szabadságjogokért, TASZ], *Választójog és fogyatékososság* [Suffrage and Disability], (last accessed Nov. 17, 2012), <http://www.youtube.com/watch?v=PBgao8ZklGY>.

176. The appointment of a guardian presupposes the restriction of the represented person's own right to vote, as we explained in Part III.B.iii.

iii. *Proxy Voting in Practice*

Proxy voting by guardians on behalf of individuals in Group C requires the state to identify persons in Group C, and that invariably leads to the unjust exclusion problems outlined in Part II. Moreover, the abuses Nussbaum correctly identifies in other areas where guardians act on behalf of persons with disabilities militates for less, rather than more, substituted decisionmaking.

In order for guardians to cast ballots on behalf of Group C members, the state must first identify voting-incapable persons and restrict their franchise to avoid both the guardian and the represented person voting on the latter's behalf. This raises no problems for the theoretical world in which Nussbaum posits her proposal, for only voting-incapable persons will be connected with guardians to act on their behalf. However, as detailed in Part II, the state is unable in practice to precisely ascertain those who are incapable of voting. Consequently, some percentage of voting-capable persons with disabilities will be disenfranchised and have their basic human right to equal political participation precipitously violated.

Furthermore, and as Nussbaum acknowledges, even in imagined societies with well-functioning guardianship systems, the process of proxy voting itself allows for some corruption in which guardians do not vote in the real interests of their charges.<sup>177</sup> Nussbaum has no doubt that such abuses can and do happen—as she puts it, “what else is new?”<sup>178</sup>—but in her view voting misuse is no different from other areas where guardians mishandle their positions, such as the disposal of property and entering into of contracts.<sup>179</sup> Contrary to her suggestion, the situation is more serious in the case of voting. Compared to other areas of guardianship, the state cannot feasibly make a timely inquiry—before the vote is counted—into the relationship between the person with a disability and her proxy voting guardian. In reality, what happens in the voting booth usually remains in the voting booth, and objective outsiders such as courts cannot know for certain what role the guardian played in establishing or representing the person's choice. Absentee voting procedures and technical devices allowing for voting away from the polls further shield these human rights violations from scrutiny. Since no one else need be present when the ballot is marked, guardians can more easily abuse their positions.

Indeed, given the overuse of guardianship in many jurisdictions,<sup>180</sup> there is even more reason to limit the scope of power given to guardians. If states could satisfy the requirement of equality by allowing proxy voting, other-

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177. *Cognitive Disabilities*, *supra* note 148, at 347.

178. *Id.* at 348.

179. *Id.* at 347.

180. For an overview of human rights violations associated with guardianship and their prevalence, see Legal Capacity Reports, Mental Disability Advocacy Center, <http://www.mdac.info/en/resources?goal=137&format=144&page=1> (last visited Nov. 13, 2013).



wise capable persons with disabilities would likely find themselves deprived of the possibility of expressing their political choices. In fact, states would have a strong incentive to subject increasingly more persons to proxy voting because they consider guardians better educated and more knowledgeable than voters with disabilities. Under this instrumental view of voting, in which the person's best vote is the one that promotes the best outcome,<sup>181</sup> it would make sense to increase the "competence" of those casting votes via guardianship arrangements and thereby better protect the integrity of the political process. Thus, the same political motivations that currently result in disenfranchisement of persons with disabilities could easily lead to limiting their right to vote by subjecting them to proxy voting under the guise of "respect for equality."<sup>182</sup>

In sum, Nussbaum's proposal raises many serious disadvantages relative to the *status quo* position enunciated in Part II without adding any advantages. We should not introduce the concept of substitute decisionmaking to voting and incur both per se human rights violations and possible guardianship abuses. We rather maintain that the current situation in which those who cannot vote do not vote is preferable.

#### CONCLUSION

This Article argued that the fundamental right to vote cannot be curtailed on the basis of an alleged lack of capacity by persons with disabilities. Although the ECtHR's landmark decision in *Kiss* might be viewed as leaving that possibility open, we demonstrated that disenfranchisement based on individual assessment is disproportionate because it unjustly excludes a certain number of voting-capable individuals. Since all those affected are persons with disabilities, such state action violates the requirement of equality expressed in general international human rights law that recently was explicitly extended to cover disability. States concerned with the integrity of their electoral systems should pursue that goal by alternative means, most importantly by providing education and facilitation to persons with disabilities (and others) to exercise their franchise.

Further, although a small number of individuals cannot currently be accommodated in the electoral process, this also does not justify their disenfranchisement. Nor does it warrant a more intrusive measure, such as voting by proxy, as was suggested by philosopher Martha Nussbaum. That proposal has few advantages while also raising serious concerns about respecting the dignity of persons with disabilities. Instead, the *status quo* situation should

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181. An elaborate defense of the instrumental concept of voting is set forth by BRENNAN, *supra* note 124.

182. Taken to its logical consequence, this instrumental view would be decidedly undemocratic, with only the wisest few (whether with or without disabilities) making important decisions on behalf of their broader societies. *Id.*

remain and those who cannot vote—even with facilitation in the form of reasonable accommodations—should not vote, and in no circumstance should this situation justify singling out voting-incapable persons from other individuals or categorizing them differently before the law.

Significantly, the exercise of voting rights is only one subset of a larger framework and debate regarding the equal exercise of legal capacity by persons with disabilities. The solutions derived within this specific realm may not necessarily be applicable in other contexts where the stake for the individual (including the nature of possible eventual harm) varies. Nevertheless, our discussion provides valuable insight into the application of recognized international human rights principles concerning the equal recognition of legal capacity. This Article should therefore inform more general debates on how legal rules concerning the exercise of legal capacity should further, rather than hinder, the equal respect and dignity of persons with disabilities.