

Spring 2017

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Recommended Citation

Katharina Heyer, *Eating in Public: Intellectual Disability and the Capacity for Citizenship*, 52 *Tulsa L. Rev.* 517 (2017).

Available at: <https://digitalcommons.law.utulsa.edu/tlr/vol52/iss3/16>

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EATING IN PUBLIC: INTELLECTUAL DISABILITY AND THE CAPACITY FOR CITIZENSHIP

Katharina Heyer*

STACY SIMPLICAN, *THE CAPACITY CONTRACT: INTELLECTUAL DISABILITY AND THE QUESTION OF CITIZENSHIP* (UNIVERSITY OF MINNESOTA PRESS 2015) PP. 192. PAPERBACK \$25.00.

“I, David Rector, want my voting rights restored, immediately.”¹

David Rector’s struggle to have his voting rights restored in time for this year’s presidential election was featured in a recent NPR newscast outlining the deliberate disenfranchisement of tens of thousands of Americans with mental disabilities.² In most cases, this is due to state laws or state constitutional amendments restricting the right to vote to persons by reason of mental incapacity, as stipulated by the Voting Rights Act.³ Common rationales given for these restrictions include the prevention of voter fraud, by ensuring that mentally incompetent persons are not manipulated into voting for other people’s preferences.⁴ They also include a concern over the democratic process itself: the need to protect the validity of the vote by distinguishing voters who make deliberate choices and express political preferences to affect the election results from those who do not understand the nature and purpose of voting.⁵ Thus, the capacity to reason and to deliberately engage in political processes becomes a central tool for denying equal citizenship to Americans with disabilities.

In David Rector’s case, it was his status of being placed under legal guardianship after a brain injury left him unable to walk or speak that automatically lost him

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1. Pam Fessler, *Disabled and Fighting for the Right to Vote*, NPR (Sept. 4, 2016, 6:00 AM), <http://www.npr.org/2016/09/04/492430780/disabled-and-fighting-for-the-right-to-vote>.

2. *Id.*

3. States may enact laws denying the right to vote to people “by reason of criminal conviction or mental incapacity.” Federal Voting Rights Act, 52 U.S.C.S. § 20507(3)(B).

4. Fessler, *supra* note 1.

5. *Id.*

the right to vote.⁶ He used the electronic voice on his eye-tracking device to petition a judge.⁷ His ability to communicate was a key factor in the eventual restoration of his voting rights: most state laws demand that individuals with guardians wishing to have their voting rights restored must be able to express those wishes directly to an officer of the court.⁸

During the 2012 presidential election, another voter under guardianship, Clinton Gode, made national news in his demands to have his voting rights restored. Appearing before a probate judge, he had to answer questions about the voting process, where he got his news, which candidate he preferred, and, most pressingly, whether other people ever tried to tell him how to vote—to which he replied, “Yeah, but I don’t listen to them.”⁹

This concern with mental capacity—the ability to reason, deliberate, and understand the voting process—animates much of Stacy Simplican’s, *Capacity Contract*, an important and necessary contribution to our thinking about citizenship and disability. Simplican’s book examines our public and private anxieties over disability, specifically intellectual disability, as they inform the demands of political participation. How are we to participate in politics without the ability to reason? What assumptions about people with intellectual disabilities have normalized their exclusion from voting and other institutions of citizenship?

While voting is not a case study, Simplican examines (more about this later in this essay) and raises important questions of how we arrived at notions of mental capacity and citizenship in the first place. Many of the voter qualifications that disenfranchise people with reduced mental capacity hail from the nineteenth and early twentieth centuries when states ran large-scale asylums and mental hospitals and subjected people deemed “idiots,” “morons,” and “feebleminded” to eugenic policies. Today, all but eleven states have disability-related voting restrictions that ban people under guardianship or judged to be incompetent.

And yet, legal guardianship status has very little to do with the capacity to vote, and guardianship hearings rarely include inquiries into a person’s understanding of voting issues.¹⁰ Rather, guardianship centers on the ability to make decisions and meet basic needs for food, clothing, and shelter due to a disability. In many cases, individuals may be placed under guardianship when they were unable to take care of themselves during a psychiatric crisis. This does not mean that they lack an understanding of how elections work, or what issues are at stake with their vote. And yet, people with intellectual disabilities are routinely challenged at the polls, asked to take tests, or answer questions not required of other voters.¹¹

6. *Id.*

7. *Id.*

8. *Id.*

9. Deanna Pan, *Protecting the Voting Rights on People with Mental Disabilities*, MOTHER JONES (Nov. 5, 2012, 5:02 PM), <http://www.motherjones.com/politics/2012/11/voting-rights-mental-disabilities>.

10. Bazelon Center for Mental Health Law, *Vote, It’s Your Right: A Guide to the Voting Rights of People with Mental Disabilities* 12 (2016), (<http://www.bazelon.org/Where-We-Stand/Self-Determination/Voting/Voting-Policy-Documents.aspx>).

11. *Id.* at 6-8.

In the *Capacity Contract*, Simplican argues that our anxieties about disability are inherently political, “as disability reveals a deep discrepancy between the ways we conceptualize the demands of political participation and the actual range of ways people act politically.”¹² We idealize cognitive capacity as a necessary democratic resource and base political membership on a threshold level of capacity, excluding anyone who falls below. The capacity contract thus becomes one of domination and erasure, and echoes analogous critiques of liberal democratic theory posed by Pateman’s *Sexual Contract*¹³ and Mills’ *Racial Contract*.¹⁴ Pateman poses men’s domination over women’s bodies as the basis of fraternal equality, while Mills examines white supremacy at the heart of the social contract. For example, when Chief Justice Taney ruled on the question of citizenship for freed slaves in *Dred Scott v. Sandford*, he assumed the exclusion of non-Europeans as a given.¹⁵ Jefferson’s promise that “all men are created equal” did not have to qualify that he only considered “white men” as included in the Declaration of Independence.¹⁶

Simplican expands this analysis by locating similar assumptions about intellectual capacity as a prerequisite for democratic citizenship. The capacity contract not only denies citizenship for people without capacity, but also frames the category of inclusion for others. Thus, when women and non-whites were protesting their exclusion from the social contract they demonstrated their intellectual capacities as evidence for admittance.¹⁷ The women’s suffrage movement, for example, successfully deployed disability to justify their cause. Women challenged their exclusion from the vote by pointing to the ways they were grouped together with “idiots, criminals, and the insane,” and marshaled evidence of their intellectual capacities to distinguish themselves from those less deserving.¹⁸ As long as there was somebody left to occupy the category of the “truly incompetent,” women could safely exit the category of the disenfranchised and leave the boundaries of citizenship intact.¹⁹

Social movements thus work within the confines of the capacity contract by criticizing the racist and sexist institutions that emerge from it, rather than challenging its capacity-based prerequisites.²⁰ Simplican contends that this goes for the contemporary disability rights movement as well: it challenges assumptions about disability, and demands inclusion into the categories of citizenship on the basis that

12. STACY SIMPLICAN, *THE CAPACITY CONTRACT: INTELLECTUAL DISABILITY AND THE QUESTION OF CITIZENSHIP* 3 (2015).

13. CAROLE PATEMAN, *THE SEXUAL CONTRACT* (1988).

14. CHARLES W. MILLS, *THE RACIAL CONTRACT* (1997).

15. *Scott v. Sandford*, 60 U.S. 393 (1857).

16. *Id.* at 407.

17. SIMPLICAN, *supra* note 12, at 64.

18. Douglas Baynton, *Disability and the Justification of Inequality in American History*, *THE NEW DISABILITY HIST.: AM. PERSP.* 33 (2000). See also Rabia Belt, *Outcasts from the Vote: Women’s Suffrage and Mental Disability* (Law & Society Annual Meeting Conference Paper, 2015) (Oct. 14, 2016) (unpublished paper) (available at <https://www.law.berkeley.edu/wp-content/uploads/2016/10/Paper-Belt.pdf>).

19. Belt, *supra* note 18, at 24-27.

20. SIMPLICAN, *supra* note 12, at ch. 3. See also Baynton, *supra* note 18, at 50-51.

people with intellectual disability are able of reflection and consent.²¹ While the assertion of rights and the demolition of stereotypes about intellectual disability is an important political project, Simplican worries that to embrace people with marginal intellectual disabilities will only serve to re-inscribe the capacity contract for those with more profound disabilities.²² While women and nonwhites may be able to mobilize against wrongful ascription of irrationality and incapacity, people with intellectual disabilities are the last ones left to occupy the category.²³

This elegantly written book offers a deep analysis of the origins of the capacity contract in political philosophy, particularly in the work of John Locke's *Second Treatise of Government* (1689), and, *Essay Concerning Human Understanding* (1690), as well as John Rawls *Theory of Justice* (1971). Simplican continues to trace the capacity contract in the work of contemporary philosophers such as Martha Nussbaum, Iris Marion Young, and Eva Feder Kittay, who theorize a politics of care, dependency, and vulnerability but still echo ableist assumptions in regards to capacity.²⁴ *The Capacity Contract* is an important addition to a growing literature on intellectual disability and American citizenship, captured most prominently by Allison Cary's comprehensive history of the civil rights struggle of people with intellectual disabilities.²⁵

Disability historians will appreciate Simplican's close analysis of the ways the capacity contract found its way into eugenic philosophy and the development of the residential institutions, psychiatric hospitals, and of a professional class that could identify and measure intellectual capacity. She explores the work of French scientist Gaspard Itard, who sought to test Locke's theories of rationality by "civilizing" the famous "wild child," Victor of Aveyron, and who then influenced the work of British medical doctor John Langdon Down, after whom Down syndrome is named, and who contributed to the growth of "idiot asylums."²⁶ In the United States, anxiety over the uncontrollability of feeble-mindedness led to Henry Goddard's eugenic theories, which provided the foundation of *Buck v Bell*, and which Simplican sees as a larger anxiety over the "American ideal of self-government and whether disability could be sufficiently purged to enable this idea to flourish."²⁷

Simplican sees the capacity contract as more than just a source of erasure and domination: she locates it simultaneously as a source of solidarity and shared vulnerability.²⁸ This is the flip side to the contract, which "sees incapacity as essential to human life and thus bases democratic solidarity on shared human vulnerability."²⁹

21. SIMPLICAN, *supra* note 12, at 95-99, 118-35.

22. *Id.* at 69.

23. *See* Baynton, *supra* note 18.

24. *Id.* at 84-91; MARTHA NUSSBAUM, *FRONTIERS OF JUSTICE: DISABILITY, NATIONALITY, SPECIES MEMBERSHIP* (2009); IRIS MARION YOUNG, *Taking the Basic Structure Seriously*, 4 *PERSP. IN POL.* 91 (2006); EVA FEDER KITTAY, *LOVE'S LABOR: ESSAYS ON WOMEN, EQUALITY, AND DEPENDENCY* (Routledge 1999).

25. ALLISON C. CAREY, *ON THE MARGINS OF CITIZENSHIP: INTELLECTUAL DISABILITY AND CIVIL RIGHTS IN TWENTIETH-CENTURY AMERICA* (2009).

26. SIMPLICAN, *supra* note 12, at 47-63.

27. *Buck v. Bell*, 274 U.S. 200 (1927); SIMPLICAN, *supra* note 12, at 59.

28. SIMPLICAN, *supra* at 12.

29. *Id.*

Simplican seeks to demonstrate this solidarity contract not as an act of closure, but as a practice “as we imperfectly aim to understand our interconnected political aims.”³⁰ What makes this book so compelling is that Simplican makes this point in combination with extensive auto-ethnographic fieldwork with self-advocates to consider strategies used for tackling anxiety and for attaining political empowerment. Simplican takes seriously the demands of self-reflexivity in disability research when she states, “[i]f we care about disability, we must be in close proximity to it.”³¹

Here Simplican draws on Hannah Arendt to theorize the uses of dance, humor, and eating in public as “democratic modes of action.”³² Arendt’s concept of political action as spontaneous, plural, and public provides the theoretical link—however tenuous—to this book’s case study.³³ The case study is not as thickly theorized as the preceding chapters and doesn’t always clarify the ways in which these methods of empowerment become part of the solidarity contract. And yet, connecting theories of anxiety over mental capacity to fieldwork featuring the lived experience of disability is a hallmark of disability studies. It also reflects decades of research that show direct contact between people with intellectual disabilities and the nondisabled as an indicator of positive attitudes towards disability. In that sense, eating in public, humor and dancing all become strategies for self-empowerment, for lowering barriers, and for destabilizing ablest assumptions about mental capacity, even if readers are left wishing for more description of how this solidarity was created in Simplican’s fieldwork.

The Capacity Contract’s main intervention is into the literature of political philosophy and disability studies. Simplican’s analysis is equally important for scholarship on disability legal studies where we think of disability rights as “rights of inclusion” and where we analyze the capacity contract’s impact on the construction of disability as a legal category.³⁴ American disability law’s basis in civil rights—and its analogies to other forms of discrimination—can reify boundaries between intellectual and physical disabilities in the types of difference that can be accommodated and find political support. Moreover, Simplican’s attention to anxieties over capacity should prompt alliances, both political and intellectual, between critical race research and disability studies.³⁵ As we pay attention to police violence, prison populations, zero tolerance policies in schools, and the disenfranchisement of all kinds of voters—disabled, incarcerated, black—we see the importance of such capacity interventions for all forms of disability research.

30. *Id.* at 122.

31. *Id.* at 14-15.

32. *Id.* at 24.

33. HANNAH ARENDT, *THE HUMAN CONDITION* (1958).

34. FRANK ENGEL & DAVID MUNGER, *RIGHTS OF INCLUSION: LAW AND IDENTITY IN THE LIFE STORIES OF AMERICANS WITH DISABILITIES* (2003).

35. Andrew Dilts, *Incurable Blackness: Criminal Disenfranchisement, Mental Disability, and the White Citizen*, *DISABILITY STUD. Q.*, (2012); Jess Waggoner, “*Oh say can you_*”: *Race and Mental Disability in Performances of Citizenship*, 10 *J. OF LITERARY & CULTURAL DISABILITY STUD.* 87, (2016); Ravi Malhotra, *Shelby, Race, and Disability Rights*, *BERKELEY J. OF AFR.-AM. L. & POL’Y*, (2015).