

## PROTECTING THE RIGHT TO VOTE ON ELECTION DAY

FRANK ASKIN\*

*Every General Election Day, students from the Rutgers Law School Constitutional Rights Clinic, under faculty supervision, represent voters who need orders to vote. These are voters who believe they have a right to vote but are turned away at their polling place because their names are not on the rolls. The majority of the clients claim they registered before the deadline but the registrations were never processed. Other clients visited a motor vehicle agency in New Jersey or some other "voter registration agency" designated as such by the National Voter Registration Act (NVRA) but were not offered an opportunity to register. Pursuant to New Jersey statute, assigned Election Day Judges have the authority to issue orders to vote to applicants who made a "good faith" effort to register to vote. The article describes the mechanics and pedagogical value of this project, surveys election law in other states and suggests ways in which other programs could emulate the Rutgers project.*

For more than 30 years, second- and third-year students enrolled in the Constitutional Rights Clinic at Rutgers-Newark Law School, on every General Election Day, have been representing voters who needed orders to vote after being turned away at their polling places.

Pursuant to New Jersey's third-year practice rule, third-year students represent the rejected voters before specially assigned Election day Judges at the Essex County Courthouse in Newark, while 2Ls do intake interviews. The 2Ls generally return the following year as the courtroom litigators. Depending on the year and the level of public interest in the election, students obtain anywhere from a handful of orders to more than 200.

The program provides not only a great learning experience for students, it provides an important public service for eligible voters who would not otherwise get a chance to vote. Some years back, a grateful client wrote a letter to the New York Times lauding the program for having helped her and her husband obtain orders to vote. The Times published it under the heading *Truth, Justice and the American Way: In Newark, Real-Life Superheroes Prowl on Election Night*. Her letter concluded as follows:

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\* Distinguished Professor of Law, Robert E. Knowlton Scholar, and Director of the Constitutional Rights Clinic, Rutgers School of Law-Newark.

After we cast our ballots and returned home, we put the court orders on our refrigerators. They serve to remind us that the wheels of justice do turn, if you kick them in the right place, and that while superheroes don't always wear capes, they can often be found in the Hall of Justice.

In recent years, our program and back-up materials have been replicated in other counties by volunteer lawyers for the New Jersey Civil Liberties Union and lawyers from the Office of Public Advocate until it was disbanded by Governor Chris Christie in 2010.

The voters who are aided by this program are those who have reason to believe they are properly registered to vote, but show up at their polling place to be told their names are not on the voting rolls. Such voters have two options. (1) The least onerous one is to cast a provisional ballot, which will be discarded unless a mistake is discovered by the Board of Elections when the provisionals are reviewed within the next three days. (2) The road less traveled is for the rare persistent voter to go to the county seat and appeal the denial to an Election Day Judge. That's where we come in. My students in Newark - or volunteer lawyers elsewhere in the State - are waiting at the courthouse to assist them.

In Essex County, we have had total support from the County Assignment Judge and court administrators. In most years, all of the Election day Judges (usually two in the morning and two in the afternoon) are sitting on the same floor of the County Courthouse. Court personnel provide a long table and chairs for us in the corridor where would-be voters can see us as they come off of the elevator. We have signs in English and Spanish identifying ourselves as the Rutgers Voter Assistance Project.

One of the students will approach a would-be voter and ask if s/he would like free help to try and get an order to vote. Invariably, the answer is in the affirmative. We also ask the client to sign a retainer agreement so that we can have a private interview without outside attorneys from either the political parties or the Attorney General's office listening in.

Part I of this article will discuss the law of New Jersey as enforced by the judiciary on Election Days. Part II will examine the laws and judicial decisions in other states to determine where similar programs would be feasible.<sup>1</sup> Part III will discuss the pedagogical utility of the program and its impact on student careers.

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<sup>1</sup> The article will ignore states that have election-day registration since all eligible voters may register and vote on Election Days there.

## I. THE OPERATION OF THE VOTER ASSISTANCE PROJECT IN NEW JERSEY

Our training materials include a dozen scenarios illustrating the types of cases we typically have to deal with on Election Day. They fall into the following categories: (1) persons claim they registered to vote on the street or on a campus during a registration drive but found they were not on the rolls when they got to the polling place; (2) they got a driver's license or changed their address at the department of motor vehicles but were not asked if they wanted to register to vote as required by the National Voter Registration Act (NVRA); (3) they received benefits at a public assistance agency without being offered a registration opportunity, as also required by the NVRA; (4) somehow or other their name was purged from the registration rolls without their knowledge; or (5) they have some *sui generis* problem such as becoming eligible to vote between the time of the registration cutoff and Election Day.

At our training session, we moot these various scenarios with the 2Ls learning how to do proper intake, and the 3Ls arguing the case before the court. At the training, I play the client and then the judge.

### A. *Good Faith (But Unsuccessful) Efforts To Register*

A major portion of the cases we handle on Election Day involve people who claim they attempted to register more than 21 days before the election but for some reason their registration was not processed. More often than not they submitted the registration form to a third-party registrar acting on behalf of a voluntary organization such as the League of Women Voters, a Public Interest Research Group, or a student-run registration drive on a college campus. Some clients testify that they personally deposited the registration form in the mail.

The authority to issue an order to vote is contained in a statute that provides that a challenged voter on the day of any municipal, primary, general or special election . . . may apply to a Superior Court Judge sitting at the county seat for permission to vote.<sup>2</sup>

The relevant New Jersey statute authorizes the issuance of an order to vote to an otherwise eligible voter who testifies as follows:

The challenged voter is properly registered at his location; or

The challenged voter was properly registered at his location as of the last election at which the challenged voter voted, but has moved to another location within the county since then and in good faith attempted to register at the new address within the time prescribed

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<sup>2</sup> N. J. Stat. Ann. § 19:15-18.3. A challenge includes a refusal by a poll worker to allow the voter to cast a ballot on the voting machine.

by law.

For the purposes of this section, a good faith attempt to register shall include: completing the prescribed registration form no later than 21 days before the election in the presence of a person who appears to be over 18 years old and says that he or she can and will witness the form and mail it to the register for the applicant; completing a form received in the mail from the commissioner of registration, superintendent of elections or the county board which states that the information has been received that the applicant has moved and placing the completed form in a proper mailbox with proper postage, if necessary, no later than 21 days before the election; completing a registration form in any government office; and reasonably relying upon the oral statements of an official at a polling place that they will insure proper registration.<sup>3</sup>

The statute is not an absolute model of clarity. What does “the voter was properly registered at his location mean?” If the voter was properly registered at his location, his name would probably be in the poll book. And why is “a good faith attempt to register” modified by “was properly registered at his location . . . but has moved to another location within the county?” If the latter referred only to persons who moved within the county in which they were already registered, it would be redundant, since such persons are already authorized to vote by provisional ballot at their new location.<sup>4</sup>

Fortunately, the overwhelming majority of election day judges who hear these cases combine the two provisions and issue orders so long as they are satisfied that the applicant made a good faith effort to register at their proper address whether or not they were previously registered in the county. They often issue these orders over the objection of a deputy attorney general who generally appears on behalf of the county board of elections.<sup>5</sup>

The experience in other counties has been similar. An expert certification by the former New Jersey Public Advocate submitted in a pending law suit attests that in the 2008 Presidential Election, attor-

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<sup>3</sup> N.J. Stat. Ann. § 19:15-18.3.

<sup>4</sup> *Id.* at 19:31-11(b). An adversary will often argue that the order should be for the voter to cast a provisional ballot, which would of course be discarded if the applicant's name is not on the rolls. We respond that a provisional ballot is acceptable only if the judge appends a requirement that the order be attached to the provisional. We have on file at least one emergency Appellate Division ruling that the voter be allowed to vote on a machine. Order to Vote, *In re Eric Hoff* (Nov. 3, 2009)(On file with the Rutgers Law School-Newark Constitutional Rights Clinic).

<sup>5</sup> A person who moves to a new county within thirty days of an election may return to the county of registration and vote there for all offices for which s/he is still eligible, including Governor and United States Senator. *Afran v. Cnty. of Somerset*, 244 N.J. Super. 229 (App. Div. 1990).

neys for the Public Advocate represented 497 voters in New Jersey on Election Day and obtained 438 orders to vote, for a success rate of eighty-eight percent.<sup>6</sup>

Conversely, some twenty-five percent of provisional ballots cast by voters who forego an opportunity to see a judge are discarded, even though most of them are then counted as registrations for future elections after election officials verify the identity and eligibility of those persons.<sup>7</sup>

It is helpful that New Jersey has a long history of judicial decisions protecting the state constitutional right to vote<sup>8</sup> and requiring that provisions protecting the right to vote be liberally construed to uphold voting rights.<sup>9</sup> The students who are representing voters on Election Day are trained in those provisions and instructed to freely cite them when appearing in court, at least in initial appearances before each sitting judge. In addition, we send the judges assigned to sit on Election Day a packet of materials containing the relevant state and federal statutes and judicial opinions - on the assumption that the judges will be generally unfamiliar with the relevant law.

### *B. Violations of the National Voter Registration Act*

The National Voter Registration Act (NVRA)<sup>10</sup> requires certain state agencies to assist their clientele to register to vote in federal elections. The covered agencies are regulated by two separate sections of the act. One section, generally referred to as motor-voter,<sup>11</sup> covers only motor vehicle agencies.<sup>12</sup> The other section requires states to designate as “voter registration agencies” all offices in the state that provide public assistance and all offices that provide State-funded pro-

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<sup>6</sup> Certification of Ronald Chen, Esq., *Rutgers Univ. Student Assembly (RUSA) v. Middlesex Cnty. Bd. of Elections*, No. C-85-11 (*N.J. Super. Ct. Ch. Div.*, May 4, 2012).

<sup>7</sup> In the 2008 General Election in New Jersey, 18,710 provisional ballots were rejected out of 73,874 cast, or 25.3 percent. Of those rejected, 16,308, or 86 percent, were accepted as registrations for future elections. N.J. Div. Of Elections, 2008 Presidential Ballot Summary, <http://www.state.nj.us/state/elections/election-results/2008-provisional-ballot-summary.pdf>. Of the counted provisionals, most of those are cast by voters who moved from one address in the county to another and thus have their names on the county's rolls.

<sup>8</sup> N.J. Const. art. II, § 3.

<sup>9</sup> See generally *In Re Attorney General's "Directive on Exit Polling: Media & Non-Partisan Pub. Interest Groups,"* issued July 18, 2007, 200 N.J. 283, 302 (2009); *Worden v. Mercer Cnty. Bd. of Elections*, 61 N.J. 325, 334 (1972); *Gangemi v. Rosengard*, 44 N.J. 166, 170 (1965); *Asbury Park Inc. v. Woodley*, 33 N.J. 1, 11 (1960); *In re Absentee Ballots Cast by Five Residents of Trenton Psychiatric Hosp.*, 331 N.J. Super. 31, 36 (App. Div. 2000); *Afran v. Cnty. of Somerset*, 244 N.J. Super. 229, 232 (App. Div. 1990).

<sup>10</sup> 52 U.S.C. § 20501, et. seq.

<sup>11</sup> 52 U.S.C. § 20504.

<sup>12</sup> This provision is implemented in New Jersey by N.J. Stat. Ann. § 39:3-10. “Each applicant for a state motor vehicle driver’s license application, including any application for a renewal thereof, . . . shall be offered an opportunity to register to vote.”

grams primarily engaged in providing services to persons with disabilities.<sup>13</sup>

The Act also provides that states shall designate other offices within the State as voter registration agencies and lists the following offices as eligible for such designation: “public libraries, public schools, offices of city and county clerks (including marriage license bureaus), government revenue offices, unemployment compensation offices, and [other] offices that provide services to persons with disabilities.”<sup>14</sup>

The motor-voter provisions were the first to catch on after passage of the NVRA in 1993. When the Office of Public Advocate was reinstated in New Jersey in 2002, it began monitoring compliance with NVRA by the New Jersey Motor Vehicle Commission. That review found compliance wanting. Among other deficiencies, the New Jersey driver’s license application failed to include “a voter registration form for elections to Federal office” as required by the NVRA.<sup>15</sup> Compliance depended upon each individual MVC agent asking the right question and offering the registration opportunity.

The review resulted in extensive negotiations between the Public Advocate and the MVC. The result was a Memorandum of Understanding (MOU) between the two agencies “Concerning Compliance with the National Voter Registration Act of 1993.”<sup>16</sup> The MOU contained extensive provisions for the vigorous enforcement of motor voter in New Jersey. Among other provisions was the following:

Within 60 days of the execution of this MOU, the MVC shall commence enhanced employee training procedures to ensure that all NVRA-eligible applicants (persons seeking to obtain or renew a New Jersey driver’s license, or an MVC non-driver identification card) are asked by an MVC representative whether the applicant wishes to register to vote.<sup>17</sup>

The MOU is one of the documents relied upon by the Voter Assistance Project and is provided each year to the Election Day Judges in Essex County.

Our student-lawyers elicit testimony from the applicants that they were not offered an opportunity to register to vote when they applied

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<sup>13</sup> 52 U.S.C. § 20506.

<sup>14</sup> *Id.* New Jersey voter registration agencies are listed in N.J. Stat. Ann. § 19:31-6.11.

<sup>15</sup> 52 U.S.C. § 20504.

<sup>16</sup> *Memorandum of Understanding between the New Jersey Department of Law and Public Safety and the Attorney General as Head of the Department and Chief State Election Official, the Department of the Public Advocate and the New Jersey Motor Vehicle Commission Concerning Compliance with the A National Voter Registration Act of 1993*, (Mar. 6, 2008), available at [http://graphics8.nytimes.com/packages/pdf/nyregion/20081012\\_VOTER\\_NJ\\_MEMO.pdf](http://graphics8.nytimes.com/packages/pdf/nyregion/20081012_VOTER_NJ_MEMO.pdf).

<sup>17</sup> *Id.* at 3, Item 3.

for services at an MVC office, and then ask the witness how they would have responded if so asked.

Orders to vote have been routinely issued in such cases so long as the judge found the applicant credible. When a Judge in Bergen County in 2008 denied an order, the Public Advocate took an emergency appeal to the Superior Court Appellate Division. The panel issued the following order:

This matter is remanded to Judge . . . for further factual findings. The Judge shall determine whether the applicant was or was not offered the opportunity to register by local Motor Vehicle Commission whenever he presented to update his driver's license. If the Judge determines applicant was not advised of opportunity to re-register to vote, she shall enter an Order permitting applicant to vote. If the Judge determines applicant was advised and did not choose to re-register to vote, then her prior Order shall stand.<sup>18</sup>

For reasons that are not clear, implementation of the “voter registration agency” provisions of the NVRA have proceeded much more slowly across the country, including New Jersey, compelling numerous law suits by the United States Department of Justice and voter registration advocates to enforce compliance.<sup>19</sup> It may be that the shorthand designation of the NVRA as the “motor-voter” law has misled local administrators, despite clear statutory mandates covering each “voter registration agency.”<sup>20</sup>

In 2009, the Rutgers Constitutional Rights Clinic, in conjunction with Project Vote, on behalf of the local ACORN affiliate in New Jersey, filed a 90-day right-to-sue letter with New Jersey's Secretary of State and Director of State Department of Human Services (DHS) alleging non-compliance with the “voter registration agency” provi-

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<sup>18</sup> Order to Vote, In the Matter of Harold McDonald (Nov. 4, 2008)(Copy of Order on file with Rutgers Law School-Newark Constitutional Rights Clinic). This is one of the documents we submit in advance each year to the election day judges.

<sup>19</sup> See e.g., United States v. Rhode Island, No. 11-00113 (D.R.I., Mar. 25, 2011); ACORN v. Scott, No. 08-CV-4084-NKL (W.D. Mo., July 15, 2008)(order granting preliminary injunction); Harkless v. Brunner, 545 F. 3d 445 (6th Cir. 2008); Indiana State Conf. of the NAACP v. Gargano, (S.D. Ind., Apr. 18, 2011)(settlement agreement); Valdez v. Squier, 676 F. 3d 935 (10th Cir. 2012); Georgia State Conf. of the NAACP v. Kemp, No. 11-01849 (N.D. Ga., Apr. 18, 2012)(settlement agreement). Catalog of cases is contained in Election Administration - Policy Paper A Voter Registration at Public Assistance Agencies, available at [www.projectvote.org](http://www.projectvote.org).

<sup>20</sup> N.J. Stat. Ann. § 19:31-6.11; *Id.* § 44:8-158 (agencies dispensing food stamps); *Id.* § 30:4D-19.1 (agencies providing assistance under the New Jersey Medical Assistance and Health Services Program); *Id.* § 26:1A-36.3a (agencies distributing food pursuant to the special supplemental food program for Women Infants and Children (WIC)); *Id.* § 44:10-5.9 (agencies administering assistance under Aid to Families with Dependant Children); *Id.* § 30:6D-17.1 (offices of the Division of Developmental Disabilities); *Id.* § 34:16-29.1 (Division of Vocational Rehabilitation Services in the Dept. Of Labor).

sions of the NVRA.<sup>21</sup>

Rutgers Law students had spent several months surveying local welfare offices in several counties around the state to determine compliance. Compliance was spotty at best. The overwhelming majority of applicants exiting the offices denied being offered an opportunity to register to vote. Inspections inside the offices found that some agencies did not even have voter-registration forms on hand. Only one of the five offices visited seemed to be in general compliance. Negotiations among the parties resulted in the issuance of a “National Voter Registration Act (NVRA) Implementation Plan” on September 4, 2009 by DHS.

The Plan listed the following Program Goals:

It is the Department’s goal to ensure that all CWA/MWAs (County and Municipal Welfare Agencies) provide registration opportunities in compliance with the NVRA. To achieve this goal DFD (Division of Family Development) will monitor the delivery of the following services which must be provided by all voter registration agencies:

1. Distribution of voter registration opportunity forms and applications for vote registration that contains the information required by 42 USC 1973gg-5(a)(6)(B) of the NVRA with each application, recertification, redetermination, or change of address concerning Work First New Jersey (WFNJ) or Food Stamp (FS) benefits or services.
2. Provision of assistance in filling out voter registration forms.
3. Acceptance of completed registration forms and the timely forwarding of completed voter registration applications to the New Jersey Division of Elections (DOE).
4. Reporting of voter registration opportunity responses to the DOE.

The Implementation Plan included intensive training for all agency personnel and requirements for keeping detailed records concerning responses to the “voter registration opportunity forms.” The Plan further promised to provide reports on monthly data collected to Project Vote and the Rutgers Clinic upon request.

Within two years, it became apparent that monitoring compliance would not be easy. There were too many offices involved, and it was almost impossible to determine from where individual registration forms were originating. If registration forms were handed out to clients for personal delivery, they were impossible to trace. Annual reports were supposed to be made by the State Division of Elections to

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<sup>21</sup> 52 U.S.C. § 20510.



the U.S. Elections Enforcement Administration, but those numbers were impossible to verify. Follow-up surveys by Rutgers law students determined that compliance was still spotty. On October 1, 2013, a new right to sue letter was served on the New Jersey Secretary of State on behalf of the New Jersey Conference of the NAACP by Project Vote, the Rutgers Law School-Newark Constitutional Rights Clinic, the Lawyers Committee for Civil Rights and DEMOS. That matter is currently in negotiations.

In the meantime, it has been possible to obtain orders to vote for persons who did not receive registration opportunities at “voter registration agencies” if they bothered to come to a county courthouse on Election Day. When persons came to the Essex Courthouse on Election Day claiming they had been denied the right to vote, students would determine if they had ever been clients at a covered agency and, if so, whether they had been offered the opportunity to register to vote. If not, the result was normally the same as in “motor voter” cases.

### *C. Sui Generis Cases*

In addition to the “good faith” and NVRA cases, we occasionally have to handle other types of denials of the right to vote.

Exhibit A is Anabel Clement. Ms. Clement was sworn in as a citizen on the last day for voter registration in October 2009. She asked about voting and was told to go to a post office for a registration form. The first two post offices she went to had no forms and by time she got one at a third post office, the registration deadline had passed. She mailed in the registration form, but when she called the Board of Elections, she was told it was received too late.

In issuing Ms. Clement an order to vote, Essex County Superior Court Assignment Judge Patricia Costello cited the statute, which allows 17 year olds to register if they will become 18 before Election Day.<sup>22</sup> Judge Costello then ruled from the bench as follows:

So, on the whole, given the attitude and the clear message in the [New Jersey] Supreme Court cases [ordering liberal interpretation of state law provisions protecting the right to vote] and her good faith, and I find her to be a credible witness in attempting to navigate the hurdles, and there were quite a few hurdles for her in just filling out some simple paper work and getting it mailed in on time, and the fact that as an analogy to the statute allowing 18-year-olds to vote, this is also a class type of a situation where the 18th birthday or the date that you achieve your citizenship are both triggering events. And if one happens within the 21 days, should be liberally

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<sup>22</sup> N.J. Stat. Ann. § 19:31-5.

construed. I find that's a good analogy. And the other happening within the 21 days should also be liberally construed and especially in light of her good faith effort, so I'm going to permit her to vote.<sup>23</sup>

We believe that if and when the case comes along, this precedent should also allow a parolee who comes off parole between the voter registration deadline and Election Day to obtain an order.<sup>24</sup>

We also get an occasional case involving a long-time voter whose name has erroneously been purged from the voting roll. It usually involves someone who has not voted in several years - often because of illness or other incapacitation. The NVRA has strict requirements for purging voters for non-voting.<sup>25</sup> It codifies public policy against stripping an otherwise eligible voter of the right to vote for no reason other than abstinence. Under the law, a voter can be purged only for failure to vote in two or more federal elections, but only if s/he fails to respond to written notification of imminent removal. In such a case, we insist that the Board of Elections produce proof of notification. The problem is that the court may suspend the hearing pending a search for the written documentation, requiring the would-be voter to wait around the courthouse for a considerable length of time. However, if the judge is satisfied with the applicant's testimony that s/he still resides at the place of his/her registration, an order will usually be issued without delay despite the long absence from the polls.

#### *D. Looking Ahead*

Meanwhile, the Rutgers Constitutional Law Clinic has instituted litigation challenging New Jersey's 21-day advance voter-registration requirement as an undue and no longer necessary burden on the right to vote under the New Jersey Constitution in light of modern technology.<sup>26</sup> The lawsuit cites the successful operation of election day registration in ten states and the District of Columbia, and the implementation of New Jersey's Statewide Voter Registration System (SVRS) as obviating the need for advance registration. A successful result in this suit would make the Voter Assistance Project redundant. It would also provide relief for the numerous voters whose provisional ballots are discarded for the instant election but counted as registra-

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<sup>23</sup> Transcript of Record at 30, In the Matter of Annabel Clement, (N.J. Super. Ct. Law Div., Nov. 3, 2009) (on file Rutgers Law School-Newark Constitutional Rights Clinic).

<sup>24</sup> In the fall of 2011, there were 372 people released from parole between the registration deadline and Election Day. Interview with Lawrence Gregorio, Deputy Executive Director, New Jersey Division of Parole.

<sup>25</sup> 52 U.S.C. § 20507.

<sup>26</sup> Rutgers Univ. Student Assembly (RUSA) v. Middlesex Cnty. Bd. of Elections, No. A-002383-13 (N.J. Super. Ct. App. Div., Nov. 19, 2014)(Order of dismissal reversed and remanded to the trial court).

tions for future elections, which amounted to 16,308 voters in the 2008 Presidential election.<sup>27</sup>

## II. REPLICATING NEW JERSEY'S VOTER ASSISTANCE PROJECT

This section explores the potential for other states to replicate our Voter Assistance Project. That presents a number of problems, ranging from the absence of appropriate legislation to the difficulty of researching relevant judicial materials. Moreover, New Jersey has a long tradition of legal opinions providing maximum protection for the right to vote under the State Constitution.

Since election day orders necessarily involve emergency applications, there are rarely formal judicial opinions.<sup>28</sup> Therefore, in seeking information about similar activities in other states, our searches are limited to finding relevant statutes with no annotations of reported decisions plus anecdotal information supplied by members of various listservs in response to inquiry.

### A. States with Relevant Statutes

While it is certainly possible that even in the absence of a statute, a court of equity might grant an order to vote under its general equitable powers, there is no way to determine such actions except through anecdotal reports. On the other hand, there are statutes in several states that would appear to authorize courts of general jurisdiction to issue orders to vote on Election Day. However, repeated appeals to members of the major election law listserv and to the staff attorney listserv of the American Civil Liberties Union and its affiliates, have turned up only scant evidence of judges outside of New Jersey issuing orders to vote on Election Day to persons whose names were omitted from the official voting rolls.

The most specific statutory authorization is in California, where judges are authorized to issue orders to vote to persons who claim to have registered to vote through the Department of Motor Vehicles or any other public agency designated as a voter registration agency pursuant to the National Voter Registration Act. There is no indication that this also allows orders to be granted to persons who were not offered registration opportunities at the agencies.

The former Pennsylvania practice seems to have granted election day judges vast authority to issue orders to vote on Election Day, and

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<sup>27</sup> See *infra* note 7 and accompanying text.

<sup>28</sup> In New Jersey, we have unreported orders from emergency appeals as well as occasional transcript of a trial court argument and bench ruling, which we distribute in advance to the judges sitting on Election Day - and provide to the assistant attorneys general who are our election day adversaries.

anecdotal evidence suggests that the courts were once very active, especially in Philadelphia. However, recent statutory enactments now seem to limit the courts to issuing provisional ballots when the voter signs an affidavit that s/he was properly registered. It is unclear what happens to that ballot if the applicant's name is not found in the system.<sup>29</sup>

Michigan has an intricate provision for "affidavit ballots," which in some ways mimics what happens in New Jersey but without the participation of a judicial officer.<sup>30</sup> It allows an eligible voter to file an affidavit, under penalty of perjury, that s/he submitted a voter registration application. If s/he also provides proper identification and residence information, the ballot will be accepted. It would not extend to persons who were not offered registration opportunity at a voter registration agency.

Vermont has a similar affidavit provision.<sup>31</sup> According to the Director of Elections in the Secretary of State's office:

In Vermont, upon arrival at the polling place and finding their name does not appear on the voter checklist, a person who submitted a timely application (through the DMV, a social service agency, a voter reg drive, or to the clerk him or herself) may complete an affidavit swearing under penalty of perjury, that they did in fact submit such an application on time. The affidavit states that through no fault of the voter, the form was not properly processed despite being submitted on time. Upon completion of the affidavit the voter is allowed to vote.<sup>32</sup>

The New York statute appears to vest vast discretion in the courts to issue orders to vote on Election Days.<sup>33</sup> According to the legal director of the New York Civil Liberties Union: "The NY judges are quite liberal in issuing such orders. And I suspect that any voter who testifies he or she attempted to register and can credibly explain the circumstances will be permitted to vote."<sup>34</sup> There is no evidence to

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<sup>29</sup> 25 Pa. Cons. Stat. Ann. § 3046, 3050. See Pamela Pryot Dembe, President Judge, Court of Common Pleas, *Election Day Judicial Assignments - 2013 Primary Election*, <http://www.courts.phila.gov/pdf/notices/2013/Election-Order-Primary-Election-2013.pdf> (last visited Oct. 7, 2013).

<sup>30</sup> State of Michigan Bureau of Elections, *Procedure for Issuing a Ballot If Voter's Name Does Not Appear on Registration List*, [http://www.michigan.gov/documents/sos/Four\\_Steps\\_Proced\\_Provis\\_Vote\\_8-18-09\\_No\\_Forms\\_351957\\_7.pdf](http://www.michigan.gov/documents/sos/Four_Steps_Proced_Provis_Vote_8-18-09_No_Forms_351957_7.pdf).

<sup>31</sup> Vt. Stat. Ann. tit. 17 § 2148.

<sup>32</sup> Email from William Senning, Dir. of Elections, Elections Div., Vt. Sec'y of State. (Sept. 13, 2013)(on file with the Constitutional Law Clinic, Rutgers Law School-Newark). He states that Vermont does not keep a record of the number of affidavits submitted in an election.

<sup>33</sup> N.Y. Elec. Law § 16-108 (McKinney, Westlaw current through L.2013, chapters 1 to 340).

<sup>34</sup> Email from Arthur Eisenberg, Legal Dir., N.Y. Civil Liberties Union. (Aug. 23,

suggest that this would extend to persons who were not offered registration opportunities at voter registration agencies.

Virginia<sup>35</sup> and Louisiana<sup>36</sup> have similar statutes, which allow persons who are denied registration to seek court orders to register. However, the legal director of the ACLU in Virginia reports that the provision is limited to persons whose applications were refused registration by a registrar.<sup>37</sup> The only Louisiana case reported under its statute involved a person who was denied registration because he did not actually reside in the county.<sup>38</sup>

Aside from the few states discussed above, there seems to be no comparable laws in other states to assist voters on Election Day, although a court of equity in most states would no doubt have the inherent power to enfranchise voters on Election Day.

### III. PEDAGOGICAL BENEFITS OF THE PROGRAM

For most of the participating students, this is the only time in their law school careers when they can stand before a judge and argue on behalf of a client. As noted above, even the 2Ls who are doing intake return the following year to represent clients. In a high-turnout election (presidential years), some students will obtain multiple orders to vote for their clients. Many of the participating students have told me that this was their most worthwhile law school enterprise.

One eye-opening revelation for many of the students is that when they go into court, they are more knowledgeable about the law than the judges before whom they are appearing. For most of the judges this is a one-time experience and they are relatively ignorant of the law they are there to enforce. The students, on the other hand, have been carefully trained on the legal nuances.

During their training, the students are provided in advance with all of the necessary legal materials, including the relevant state and federal statutes and legal opinions. They are also provided with some dozen scenarios that represent the kinds of cases we are likely to have to deal with on Election Day.

In our training session, I play the potential client; one of the 2Ls is picked to interview me and produce an intake form for the 3L. It is the 2L's job to determine what kind of case is involved and which argument will have to be presented to the court. If the interviewee is

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2013)(on file at Rutgers Law School-Newark).

<sup>35</sup> Va. Code Ann. § 24.2-422.

<sup>36</sup> La. Rev. Stat. Ann. 18:113.

<sup>37</sup> Email from Rebecca Glenberg, Legal Dir., Am. Civil Liberties Union of Va. (Aug. 19, 2013)(on file at Rutgers Law School-Newark).

<sup>38</sup> State ex. rel. Wooters v. Dardenne, 59 So. 32 (La. 1912).

not forthcoming, the intake student has to remember to ask me (the client) if I ever received government assistance of any kind, and, if so, whether I was offered an opportunity to register to vote as required by the NVRA. On the intake form, there is a space to explain to the 3L which scenario is involved.

The 2L is also trained to ask the client to sign a retainer agreement so he or she can be interviewed privately without our adversary (usually an assistant attorney general or, occasionally, a lawyer representing one of the political parties) listening in. This underscores for the student the meaning of lawyer-client confidentiality.

I then assume the role of judge (and sometimes also an opposing attorney) and the 3L is assigned to argue the case. I require the student to spell out just why under the law I should give the client an order to vote.

On Election Day, I or another faculty supervisor will accompany the student into the courtroom. We try not to intervene in the argument, but on occasion we do find it necessary to whisper in the student's ear (or pass a note) reminding him or her of a particular relevant point.

One of the other positive by-products of the program is that election law is a burgeoning area of legal practice and more and more law firms are looking for students with relevant experience. On Election Day itself, there are often experienced election lawyers coming in to see judges on various matters and they are always impressed to see our students at work in the vineyards. During just the last three years, I have had three of my students hired by the major law firm in the state representing the Democratic Party and Democratic candidates.

Law school clinics that would like to establish voter assistance projects in their states are welcome to receive copies of the election-day training materials we use in New Jersey, although they would, of course, have to modify them in accord with the laws of their states.

Such clinics not only provide a unique opportunity for students to be trained in a burgeoning area of law, but also fill a gap in legal services available to otherwise helpless citizens threatened with disenfranchisement. And while a law school program may be limited to serving only residents of a particular venue, the experience in New Jersey demonstrates that once in operation, such a program can spur the public interest bar to emulate it throughout the state.