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Rabia Belt

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Leroy Pitzer: Citizen, Voter, Lunatic?

On March 14th, 1905, 338 citizens of South Charleston, Ohio cast ballots to determine whether the town would ban the sale of liquor. 166 people voted no, 167 voted yes, 3 people did not mark their ballots, and 2 people marked their ballots incorrectly.[1] By one vote, South Charleston indicated that it would become a dry town and its celebrated taverns would close.

Not content to let the results stand, the tavern owners challenged the election in the Probate Court of Clark County. Ultimately, the court's decision turned upon a single man, Leroy Pitzer, and his mental state. The Ohio Constitution barred people deemed "idiotic or insane persons" from the vote. It was up to the Probate Court to decide if Pitzer met the standard of idiocy or insanity, declare his vote invalid, and thus change the election result to a tie.

For most legal scholars, the story of *In re South Charleston Election Contest* and Leroy Pitzer would remain hidden in the past. The decision of an Ohio County Probate Court would likely escape the vision of a field concentrated upon Supreme Court jurisprudence and federal appellate opinions. Legal scholarship is largely a story written from above, where powerful, clearly "legal" authorities enact legal rules that constrain those who are less empowered.

Yet, as historian Nancy Cott has observed, "law is both internally conflicted and plural in origin" as it "suppl[ies] an authoritative composite face."[2] Over the past few decades, noted legal historians have challenged this "law from above" model by demonstrating the significance of custom, the importance of local courts and community norms, and the multiple locations and sources of legal doctrine. Such alternative methodologies have uncovered original information

[1] In re South Charleston Election Contest, 1905 Ohio Misc. LEXIS 191, 1 (Ohio Prob. Ct. 1905).
[2] Nancy F. Cott, "Marriage and Women's Citizenship in the United States, 1830-1934," *American Historical Review* 103 (December 1998) 1443.

about the disempowered voices only hinted at in elite legal realms. As an example, Hendrik Hartog, in his seminal article, "Pigs and Positivism,"[3] illustrates that despite a legal opinion to the contrary, unpenned pigs roamed antebellum New York City by an assumed custom of pigkeepers. In another instance, Ariela Gross, in *Double Character: Slavery and Mastery in the Antebellum Southern Courtroom*,[4] describes the strong influence of slavery and the agency of enslaved people in Southern courts despite the formal acceptance of slavery and prohibition against slave testimony.

Such works complicate depictions of legal stories and de-center the primacy of federal appellate cases. *In re South Charleston* continues this revised model by yielding its insights in a story that is polyvocal, where the meaning of the formal legal documents take shape in legal contestation, and custom and local practice give meaning and provide the stakes for legal interpretation, thus shaping the outcome.

In re South Charleston Election Contest and Leroy Pitzer's challenged ballot was far from an isolated curiosity in American history. Over the course of the nineteenth and early twentieth centuries, forty states wrote voting bans based on mental status into their constitutions or legislation. The antebellum period witnessed a revolution in voting, as Americans began to believe that non-propertied white men could think independently. This shift was a change both in democratic theory and actual economic relations. As states revisited their constitutions after the American Revolution, Americans removed the English-derived restrictions on political citizenship for those considered economically dependent. Blackstone, in his *Commentaries on the Laws of England*, noted:

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[3] Hendrik Hartog, "Pigs and Positivism," 1985 *Wis. L. Rev*. 899 (1985).

[4] Ariela Gross, *Double Character: Slavery and Mastery in the Antebellum Southern Courtroom* (Princeton University Press: Princeton, NJ, 2000).

> [t]he true reason of requiring any qualification, with regard to property, in voters, is to exclude such persons as are in so mean a situation that they are esteemed to have no will of their own. If these persons had votes, they would be tempted to dispose of them under some undue influence or other. This would give a great, an artful, or a wealthy man, a larger share in elections than is consistent with general liberty.[5]

As Robert Steinfeld observed:

> In the early modern period, a wide range of adult relationships of dependence were considered normal. Hardly anyone questioned the right of persons who controlled resources to use those resources to create relationships of dependence. Such relationships were grounded in the notion that those who controlled resources might extend their protection and care to those who did not. The latter, in return, would owe loyalty and obedience. They were expected to serve their protectors and do their bidding. Those who controlled no resources had little choice about the matter. They frequently had to enter one of these relationships and submit to the government of others, simply in order to survive.[6]
>
> By the 1750s, 12 American colonies had adopted property qualifications for suffrage.[7]

During the revolutionary period, states required voters to be property-holders, reasoning that property allowed men the independence necessary to make political decisions for themselves.

When states revised their constitutions in the 19th century after the American Revolution, the question of voter qualifications was at the forefront of the minds of convention attendees. Between 1790 and 1850, every state in the Union held at least one constitutional convention.[8] As the country urbanized, independence remained a priority for voting, but requirements changed from owning property to paying taxes. Further urbanization and commercialization and the disappearance of agriculture caused a rise in the number of white men who could not fulfill

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[5] William Blackstone, *Commentaries on the Laws of England: Volume 1: The Rights of Persons* (1765), 171.

[6] Robert J. Steinfeld, "Property and Suffrage in the Early American Republic," *Stanford Law Rev.* 41: 335 (1989), 342.

[7] *Ibid.*, 337.

[8] Alexander Keyssar, *The Right to Vote: The Contested History of Democracy in the United States* (New York: Basic Books, 2000), 26.

tax or property requirements.[9] Especially in the South, state officials wanted poor whites invested in the polity so that they would serve in militia patrols.[10] New states competed for new members. Political parties as well lobbied for new members to swell their ranks.[11]

As common men became able to vote, the parameters of who could vote became more fraught. Elites considered some people, such as women, children, and nonwhites, unable to govern themselves and thus dependence relationships were for their protection. Others, such as servants, were thought to possess the capacity for self-autonomy, but contracted it away to their masters. For these dependents, their protectors were supposed to look out for their interests in the polity. Therefore, the emphasis in the concern about dependence shifted from economic factors such as a lack of property to social, functional, or intellectual dependence. Those marked for exclusion included criminals, paupers, and now the mentally impaired.[12] While before 1820 only two states listed suffrage exclusions based on mental status, by 1880, 24 out of 38 Union states disenfranchised people because they were "idiots, insane, of unsound mind, or under guardianship."[13] Though most white men received the vote, voting remained the exception for most people in the United States, with women, children, enslaved people, and now lunatics and idiots excluded from the franchise due to the requirements of perceived formal independence and minimal psychological competence.

Despite this sea change in thinking about voting, very little historical work has been done on the disenfranchisement and subsequent legal challenges of people with alleged mental

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[9] Steinfeld, 357.

[10] Keyssar, 38.

[11] *Ibid*., 39.

[12] Keyssar, 50.

[13] Moses Daniel Naar, *The Law of Suffrage and Elections* (New York: Naar, Day & Naar, 1880): 11-72.

disabilities.[14] Alexander Keyssar, for example, who has written perhaps the most exhaustive modern treatment of American suffrage laws, barely notes disenfranchisement based on mental competency.[15] Scholars whose work focuses on the disabled have analyzed issues of access, primarily a concern for people with physical disabilities, and not the outright ban on voting that people with mental disabilities still face today.

For scholars in disability studies, the opening of this paper—a small town of cheerful eccentrics, with a possibly insane person caught up in a legal system not of his making—may

[14] An increasing number of articles note contemporary difficulties for people with mental disabilities who wish to vote. *See, e.g*., Marcus Redley, Julian C. Hughes and Anthony Holland, "Voting and Mental Capacity," *British Medical Journal* 341 (2010); Nicholas F. Brescia, "Modernizing State Voting Laws That Disenfranchise the Mentally Disabled with the Aid of Past Suffrage Movements," 54 *St. Louis University Law Journal* 943-966 (2010); Raymond Raad, Jason Karlawish, and Paul S. Appelbaum, "The Capacity to Vote of Persons with Serious Mental Illness," *Psychiatric Services* 60 (2009); H. Keeley, Redley M. and ICH Clare, "Participation in the 2005 General Election by Adults With Intellectual Disabilities," 53 *Journal of Intellectual Disability Research* (2008):175-81; Sally Balch Hurme and Paul S. Appelbaum, "Defining and Assessing Capacity to Vote: The Effect of Mental Impairment on the Rights of Voters," *McGeorge Law Review* 38 (2007); Kay Schriner, "The Competence Line in American Suffrage Law: A Political Analysis," *Disability Studies Quarterly* 22, no. 2 (2002): 61-72; A. Blais, L. Massicotte, and A. Yoshinaka, "Deciding Who Has The Right To Vote: A Comparative Analysis Of Election Laws," 20 *Electoral Studies* (2001):41-62; Kay Schriner and Lisa Ochs, "No Right Is More Precious": Voting Rights and People With Intellectual And Developmental Disabilities," (Research and Training Center on Community Living, Institute on Community Integration, Policy Research Brief) 11, no. 1 (2000), Available at http://ici.umn.edu/products/prb/111/default.html; Paul S. Appelbaum, "'I Vote. I Count': Mental Disability and the Right to Vote," 51 *Psychiatric Services* 849 (2000); Note, "Mental Disability and the Right to Vote," 88 *Yale Law Journal* 1644 n.18 (1979). In particular, scholars highlight voting problems for the elderly, regardless of whether they are labeled as mentally disabled. *See, e.g*., Antoine Bosquet, Amar Medjkane, Dorit Voitel-Warneke, Philippe Vinceneux, and Isabelle Mahé, "The Vote of Acute Medical Inpatients: A Prospective Study," *Journal of Aging and Health* 21, no. 5 (2009): 699-712; Sean Flynn, "One Person, One Vote, One Application: District Court Decision in *Ray v. Texas* Upholds Texas Absentee Voting Law That Disenfranchises Elderly and Disabled Voters," 11 *Scholar* 469 (2008-2009); Jason Karlawish and Richard J. Bonnie, "Voting by Elderly Persons with Cognitive Impairment: Lessons from Other Democratic Nations," 38 *McGeorge Law Review* 879-892 (2007); Mary Schrauben, "Ensuring the Fundamental Right to Vote for Elderly Citizens in the United States," 9 *T.M. Cooley Journal of Practical & Clinical Law* 307 (2006-2007); David Drachman, "Fading Minds and Hanging Chads: Alzheimer's Disease and the Right to Vote," *Cerebrum* (January 1, 2004) Available At http://www.dana.org/news/cerebrum/detail.aspx?id=1258; Jason H. Karlawish et al., "Addressing the Ethical, Legal, and Social Issues Raised by Voting by Persons with Dementia," *JAMA* 292, no. 11 (2004): 1345-1350; Brian Ott, William Heindel and George Papandonatos, "A Survey of Voter Participation by Cognitively Impaired Elderly Patients," 60 *Neurology* 1546 (2003); Jason H. Karlawish et al., "Do Persons with Dementia Vote?" 58 *Neurology* 1100 (2002); Susan A. MacManus, *Targeting Senior Voters: Campaign Outreach to Elders and Others with Special Need*s (Lanham, MD: Rowman & Littlefield, 2000).

[15] Keyssar, *Right to Vote*, xvi.

echo a far more famous juxtaposition, that of Michel Foucault's *Madness and Civilization.* In that work, Foucault introduces a pre-modern Europe where Fools inhabit towns as community members. Modernity marks the enclosure of the Fool within asylums, and the distinction between the normal and the pathological. Those considered normal are "worthy" of full-fledged citizenship; the pathological, on the other hand, are quarantined away as biomedical specimens.

Foucault's account from naturalistic community to biomedical ostracism has proved influential in disability studies.[16] Disability studies' explicitly civil-rights oriented framework attacks the medically-focused model of disability that Foucault depicts. This old medical model privileges the viewpoint of doctors, therapists, and other allied professionals who diagnose, label, and treat those considered disabled.[17] In its place, disability scholars advocate a social model of disability that foregrounds the lived experience of a person with an impairment interacting with the world. Thus, while a person may have an impairment, it is social context that gives meaning to a disability. For example, someone's impairment could be the inability to walk, but her disability takes shape in a community that decides whether or not to fund wheelchairs, sidewalk curb cuts and ramps. In the words of scholar Sagit Mor:

> Disability studies investigates issues such as the social construction of disability, ableism and the power structure that supports and enhances the privileged status and conditions of non-disabled persons in relation to disabled persons, the genealogy of social categories such as normalcy, and the politics of bodily variations. The basic approach that all disability studies scholars share is that disability is not an inherent, immutable trait located in the disabled person, but a result of socio-cultural dynamics that occur in interactions between society and people with disabilities.[18]

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[16] Shelley Tremain, ed., *Foucault and the Government of Disability* (Ann Arbor: University of Michigan Press, 2005).

[17] *See* Simi Linton, *Claiming Disability* (New York: NYU Press, 1998).*referred to* in Sagit Mor, "Between Charity, Welfare, and Warfare: A Disability Legal Studies Analysis of Privilege and Neglect in Israeli Disability Policy," *Yale Journal of Law and Humanities* 18, no. 63 (2006): 73.

[18] Mor, 64.

Disability studies scholars emphasize the importance of the structural landscape in shaping the lived experiences of people with disabilities. Disability activism has certainly had its successes in altering this landscape, most notably, the Americans with Disabilities Act of 1990 (ADA), and it is gaining a foothold in the academy. Though the sociocultural model of disability studies is grounded in social context that changes over time, the field's current strength is in cultural studies instead of history.[19] Primarily, disability history focuses upon the eugenics movement of the early 1900s and the emergence and events of the modern disability movement (that is, from approximately the 1970s to the present).[20]Although synthetic works about the nineteenth century increasingly note ability as an important axis of analysis,[21] the evolution and interweaving of disability with the development of the modern American state and the rise of the

[19] For representative cultural work, see Rosemarie Garland Thomson, *Staring: How We Look.* (Oxford: Oxford University Press, 2009); Tobin Siebers, *Disability Theory* (Ann Arbor: University of Michigan Press, 2008); Martha Stoddard Holmes, *Fictions of Affliction: Physical Disability in Victorian Culture* (Ann Arbor: University of Michigan Press, 2004); Lennard J. Davis, *Bending over Backwards: Disability, Dismodernism & Other Difficult Positions* (New York: New York University Press, 2002); Rachel Adams, *Sideshow U.S.A.: Freaks and the American Cultural Imagination* (Chicago: University of Chicago Press, 2001); Helen Deutsch and Felicity Nussbaum, eds., *"Defects": Engendering the Modern Body* (Ann Arbor: University of Michigan Press, 2000); Ruth Butler and Hester Parr, eds., *Mind and Body Spaces: Geographies of Illness, Impairment and Disability* (New York: Routledge, 1999); Mairian Corker, "Differences, Conflations and Foundations: The Limits to 'Accurate' Theoretical Representation of Disabled People's Experience?" *Disability and Society* 14 (1999): 627–642; Mairian Corker, *Disability Discourse* (Buckingham: Open University Press, 1999); Lennard J. Davis, "Crips Strike Back: The Rise of Disability Studies," *American Literary History* 11, no. 3 (Autumn 1999): 500-512; Lennard J. Davis, ed., *The Disability Studies Reader* (New York: Routledge, 1997); Rosemarie Garland Thomson, *Extraordinary Bodies: Figuring Physical Disability in American Culture and Literature* (New York: Columbia University Press, 1997); Rosemarie Garland Thomson, ed., *Freakery: Cultural Spectacles of the Extraordinary Body* (New York: New York University Press, 1996); Lennard J. Davis, *Enforcing Normalcy: Disability, Deafness, and the Body* (New York: Verso, 1995); Benedicte Ingstad and Susan R. Whyte. eds., *Disability and Culture* (Berkeley: University of California Press, 1995); Leslie Fiedler, *Freaks: Myths and Images of the Secret Self* (New York: Simon and Schuster, 1978).

[20] There are significant exceptions, of course, for example: Kim Nielsen, *A Disability History of the United States* (New York: Beacon Press, 2012); Beth Linker, *War's Waste: Rehabilitation in World War I America* (Chicago: University of Chicago Press, 2011); Douglas Baynton, *Forbidden Signs: American Culture and the Campaign Against Sign Language* (Chicago: University of Chicago Press, 1998).

[21] *See, e.g.*, Barbara Young Welke, *Law and the Borders of Belonging in the Long Nineteenth Century United States* (New York: Cambridge University Press, 2010), 180-81.

rights-bearing individual remains understudied.[22]

This paper demonstrates the importance of disability to the development of the franchise. While the current disability studies historiography identifies the 19th century as the period where the "medical model" of disability developed, this paper suggests that the medicalization of disability may be overstated in some venues.[23] Significantly, this historiography does not catalog what preceded and shaped the period. Moreover, the medical model does not identify the law as a coterminous axis of power that serves to define and differentiate people with disabilities as a distinct social class. In the case discussed in this paper, a "common sense" model of

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[22] Longmore and Umansky note: "For political and policy historians, disability is a significant factor in the development of the modern state, by raising questions of who deserves the government's assistance and protection, what constitutes a capable citizen, and who merits the full rights of citizenship." Paul K. Longmore and Lauri Umansky, *The New Disability History: American Perspectives*, The History of Disability Series (New York: New York University Press, 2001), 766.

The history of psychiatry is a robust field that has yielded interesting and important insights about the development of psychiatry within the United States. Recent scholarship follows in the footsteps of pioneers such as Michel Foucault, Norman Dain, Gerald Grob, and David Rothman, and identifies the 19th century as a period of rapid expansion in the discipline of American psychiatry and also an era where insanity and idiocy became matters of intense public concern. American psychiatrists reshaped and redefined European insights on the mind and created a profession centered upon benevolent, paternalistic, non-punitive treatment, coined "moral treatment" by French physician Philippe Pinel, and focused upon institutional supervision. As the rise of public institutions for people with mental disabilities suggests, the subject of mental ailments also caught the attention of the 19th century American state. While prior to the 19th century local governments rarely initiated formal action against the insane or feeble-minded unless they were violent, over the course of the 1800s, the state was increasingly interested in classifying, monitoring, and detaining people with mental disabilities. From 1840 until 1890, the U.S. census categorized people with insanity and idiocy by region and country of origin. Starting in 1882 with the Chinese Exclusion Act, immigration laws restricted people with mental disabilities from entering the country. The use of civil confinement exploded, as well as the extension of laws over new types of people considered mentally disabled, such as "drunkards" or "persons of unsound mind."
As a subfield, medical jurisprudence has described how the law has classified those deemed insane. Susanna Blumenthal, among others, has done pioneering work on how insanity operated within private law. She has detailed, for instance the important and foundational link between mental capacity and legal responsibility, the weak due process protections in civil commitment, and the emergence and requirements for what she calls the "default legal person."

This paper seeks seeks to break new ground in looking at an example of public law, the ways in which the concepts of insanity and idiocy shaped the conferral or denial of political rights and political participation. It offers offers an example of how psychiatry was involved in creating legal categories that ensnared people in a subordinate relationship to the state. Furthermore, as people with mental disabilities were increasingly caught up in a web of state-mandated restrictions ranging from guardianship to confinement, my project will depict how different state and legal apparatuses interacted and how mental disability was used as both a matter of status as well as practice.

[23] As Tom Shakespeare observes, the "medical model" of disability is used as a catch-all shorthand that is undertheorized and historicized. *Disability Rights and Wrongs* London & New York: Routledge, 2006.

disability is far more important than a medical definition, where the state relies upon lay or vernacular understandings of impairment for the classification and stigmatization of a person with disability and then translates these assumptions into legal language for a harder and more formal restriction. Thus, this is not just the story of an oppressed man struggling against a small set of expert oppressors. Pitzer's plight illustrates how the cultural meaning of disability for everyone in society is shaped in part by the experiences of the people with impairments all around them. And, and voting illustrates, these cultural meanings matter even in disputes that ostensibly about the political rights of individuals and their relationship to the state. Furthermore, it is noteworthy that Pitzer becomes formally disabled as a result of political tactics that have nothing to do with disability on their face. [24]

This "common sense" model of disability formation expands upon the insights of scholars of racial formation such as Ariela Gross and Ian Haney Lopez. These scholars illustrate how law produces racial definitions and boundaries through trials of racial identification. In Ian Haney Lopez's *White by Law* and Ariela Gross's *What Blood Won't Tell*,[25] they examine what Haney Lopez calls "the *formal* legal construction of race – that is, the way in which law as a formal matter, either through legislation or adjudication, directly engages racial definitions."[26]

[24] This process of the state management of disability formation is reminiscent of Peggy Pascoe's work on racial formation in *What Comes Naturally: Miscegenation Law and the Making of Race in America* (Oxford University Press, 2010).

[25] Ian Haney Lopez, *White by Law: The Legal Construction of Race* (New York: NYU Press, 2006); Ariela J. Gross, *What Blood Won't Tell: A History of Race on Trial in America.* (Cambridge: Harvard University Press, 2008). See also Peggy Pascoe, "Miscegenation Law, Court Cases, and Ideologies of 'Race' in Twentieth-Century America." *Journal of American History* 83 (June 1996): 44-69.

[26] Lopez, *White by Law*, xv.

Here, as a trial court applying the Ohio Constitution, the judge does not explicitly address the philosophical arguments for and against enfranchising those with mental disabilities. But in the process of resolving the uncertainties of diagnosis and definition, applying the formal constitution in this case requires constructing its purposes and meanings. While the power plays between taverns and churches of South Charleston echo the contested legal dynamics depicted by Hartog, it is significant that the linchpin of the case, Leroy Pitzer, does *not* have a voice. He is the conduit used by others to gain strategic political advantage.

Probably no one in South Charleston was surprised that the 1905 election was so close or that it became the subject of a contentious lawsuit. Founded as a stopover point between Cincinnati and Columbus in 1807, saloons peppered the town from its beginning.[27] From the start, South Charleston earned notoriety for its "many celebrated taverns" and eccentric characters.[28] The question of whether drinking should be allowed, and if so, under what conditions, was politically lively throughout Ohio, and indeed across the United States, at the turn of the century. In 1894, the Clark County Prohibition Committee circulated a letter throughout the county, including South Charleston. "DEAR FRIEND, DON'T FAIL TO VOTE," Rei Rathbun, the committee chairman urged, "Let nothing keep you away from the polls." He asked potential voters to "[s]ee any of your Prohibition friends whom you think may

[27] Albert Reeder, *South Charleston: Early History and Reminiscences by One Who Knows, A Souvenir* (The New Franklin Printing Co.: Columbus, OH, 1910), box 1, folder 1, South Charleston Records, Clark County Historical Society.

[28] Robert Ross, ed., South Charleston, p. 1, box 1, folder 2, South Charleston Records, Clark County Historical Society.

be a little careless and remind them to vote." Even "the sick and weak" had to be "gotten to the polls" if the Prohibition Committee was to prevail.

Though Clark County only went dry for a year,[29] prohibition activists continued to organize. In 1902, anti-drinking advocates, drawn mainly from the Protestant churches, organized a Law and Order League that monitored the saloons for illegal activity and lobbied for new regulations to restrict their business. Their activities, as documented in the local newspapers, uncovered nightly activity where women[30] and African Americans[31] "loitered" and groups of men played slots,[32] gambled, shot pool, fought, and drank.[33]

Anti-saloon activists pushed for a Screen Ordinance, which would "provide[] that in any place devoted to the sale of intoxicating beverages by retail, there shall be maintained no screens, colored glass or other obstructions to prevent a free and unobstructed view of the interior of the saloon from the outside" during nighttime hours. Moreover, saloons would be required to have "sufficient light to distinguish from the outside the features of any person inside the saloon." In short, a person could not visit a saloon anonymously; to be a saloon-goer meant that one had to

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[29] "Beal Law Election Today: "Drys at South Charleston Say They are Ready for Contest," *The Press-Republic*, 14 March 1905, p. 1.

[30] "Saloon Raid: Five Women and Five Men Taken in by Police – Saloon with Peculiar Name Falls Prey to the Officers' Net – Practice Must Stop," *The Daily Morning Sun*, 6 January 1905, p. 1; "Saloon Raid: Thirty-Three Loiterers and Two Proprietors Arrested – Ed Hynes' Place Again Visited and Thirty Men and Women Takes in Charge," *The Daily Morning Sun*, 12 March 1905, p. 1.

[31] "Saloon Raid: Nineteen Loiterers Taken Into Custody by the Police – Montgomery & Ellicott's Place on Center Street Contained a Goodly Number of Negroes," *The Daily Morning Sun*, 5 February 1905, p. 2.

[32] "Fined: For Exhibiting A Slot Machine in His Saloon – First of the Series – Of Cases Against the Indicted Men – Edward Hines is Fined $50 and Ten Days in Jail and Placed Under Bond," *The Daily Morning Sun*, 14 February 1905, p. 1.

[33] "Saloon Cases: Among Those to be Threshed Out During Present Term," *The Daily Morning Sun*, 5 February 1905, p. 12.

be willing to show his or her face to the rest of the town and face the possible social consequences.

On February 28, 1905, South Charleston residents crowded into the gallery of the council chamber as their council representatives debated the measure. The council clerk read aloud the names, "representing a large percentage of the prominent business, social, and political interests of the city," listed on petitions from nine local churches.[34] The Ordinance passed by one vote. Mayor Bowles, however, issued a veto. With such a narrow margin of victory, the anti-saloon forces were unable to muster enough support to overcome the veto and actually enact the ordinance.

Though the morning newspaper noted in the days after the Screen Ordinance vote that the "saloons closed promptly at twelve o'clock" and liquor dealers "cheerfully obeyed" closing time, the saloon owners were aware of the growing forces arrayed against them.[35] South Charleston churches held revival meetings, added to their numbers through conversion, and joined forces with the Women's Christian Temperance Union.[36] Finally, anti-saloon activists targeted saloon owners' pocketbooks through legal action. At the start of the January 1905 term for the Clark County criminal court, saloons faced seventy-one indictments for liquor law violations, selling to

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[34] "Screen: Ordinance is Passed by a Narrow Chance Threatened With Defeat – Which was Averted by Timely Conference Before Meeting – Petitions From Churches Read – Vote Unchanged Apportion for Sewer Election," *The Daily Morning Sun,* 1 March 1905, p. 1.

[35] "Saloons: Closed Promptly at Twelve O'Clock Last Night – Orders Passed Around on the Quiet are Cheerfully Obeyed by Liquor Dealers," *The Daily Morning Sun*, 3 March 1905, p. 2.

[36] "Big Revival: At South Charleston Has Stirred Up the Town – More than a Hundred Conversions," *The Daily Morning Sun*, 19 January 1905, p. 6; "Joint Meeting: Of Women's Christian Temperance Unions Yesterday – Celebrate Anniversary of Crusades in This City and Offer Memorial to Frances E. Williard," *The Daily Morning Sun*, 20 February 1905, p. 3; "Saloons: Are Discussed in Local Pulpits by Able Speakers. Review of Last Year's Work Is Made by Officials of Anti-Saloon league of Ohio. Hon. T. H. Clark and W.B. Wheeler Expound Upon Temperance Question," *The Daily Morning Sun,* 13 February 1905, p. 1.

minors, and Sunday operating hours, and twenty-six indictments for gaming devices.[37] Over the three-year course of the Law and Order League's actions, saloon owners paid $12,000 in fines and costs to the Clark County treasury.[38]

In Ohio, a new bill threatened to put the saloon owners out of business entirely. Using a 1902 law, called the "Beal" law, forty percent of the electorate in a municipality, through petition, could trigger a special election to decide whether the municipality would prohibit liquor. In the previous year, Ohio residents voted 793 saloons out of business.[39] Out of 1,371 townships in the state, 975 were legally dry.[40] Less than a month after the Screen Ordinance battle, South Charleston prepared for a Beal law election. The nine South Charleston churches marshaled enough names for the petition through several revival meetings.[41] Church ministers spoke about the evils of alcohol in their sermons and the churches hosted speakers from Cincinnati and Columbus to rally potential "dry" voters.[42] The owners of the six saloons and two drug stores identified sympathetic "wet" men and asked them to promise to vote in the election.[43] On the eve of the election, neither side knew which one would prevail.[44]

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[37] "Court Fines: In Saloon Cases for Three Years Amounts to $12,000 – An Average of $4,000 a Year Since the Formation of the Law and Order League," *The Daily Morning Sun*, 5 March 1905, p. 8.

[38] *Ibid.*

[39] "Annual Report of Anti-Saloon League Shows Large Number of Drinking Places Closed by Law," *The Daily Morning Sun, 2* January 1905, p. 1.

[40] *Ibid.*

[41] "Beal Law Election Today: "Drys at South Charleston Say They are Ready for Contest," *The Press-Republic*, 14 March 1905, p. 1.

[42] *Ibid.*

[43] *Ibid.*

[44] *Ibid.*

From the beginning of South Charleston's election contest, things went awry. The Clark County Board of Elections created ballots designed for township elections instead of municipality elections.[45] Though the Beal law stipulated that the ballots should read: "The sale of intoxicating liquors as a beverage shall be prohibited," and "The sale of intoxicating liquors as a beverage shall not be prohibited," the actual ballots simply listed "For the sale" and "Against the sale." Moreover, the order of language was reversed, so that South Charleston electors were offered the choice of allowing liquor before banning it, instead of vice versa. Further complicating matters was that in the last temperance lecture, the speaker instructed potential voters "to be sure to mark their ballots in the upper left hand corner" to register their "dry" vote; on the actual ballot, this would result in a "wet" vote.[46]

Though the poll monitors and judges recognized the ballot language mistake as soon as the polls opened, the election proceeded, albeit with much nervousness by the "dry" partisans. Ultimately, approximately half of the town residents voted in one of the heaviest turnouts in South Charleston history. More South Charleston residents voted in the Beal law election than in the previous election for the President of the United States.[47]

Despite the disadvantage, the "dry" side prevailed by just one vote. When they heard the news, the anti-saloon activists cheered, but they knew that their victory might be short lived –

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[45] "Charleston Goes Dry by Just 1 Vote: Drys Nearly Defeated by the Wrong Form of Ballots," *The Press-Republic*, 15 March 1905, p. 1.

[46] "Charleston Goes Dry by Just 1 Vote: Drys Nearly Defeated by the Wrong Form of Ballots," *The Press-Republic*, 15 March 1905, p. 1. "Goes Dry: Majority of One Against the Sale of Liquor – In South Charleston – Wets Are Likely to Contest the Election – Ballots Were Not According to Law, it is Claimed

– Heavy Vote Was Polled," *The Daily Morning Sun*, 15 March, 1905, p. 1.

[47] "Charleston Goes Dry by Just 1 Vote: Drys Nearly Defeated by the Wrong Form of Ballots," *The Press-Republic*, 15 March 1905, p. 1; "Goes Dry: Majority of One Against the Sale of Liquor – In South Charleston – Wets Are Likely to Contest the Election – Ballots Were Not According to Law, it is Claimed

– Heavy Vote Was Polled," *The Daily Morning Sun*, 15 March, 1905, p. 1. "Goes Dry," *The Daily Morning Sun*. "Charleston Goes Dry," *The Press-Republic.*

again.[48] The "wet" side had 10 days to petition the Clark County Probate Court for judicial review. Would they petition, and if so, on what grounds?

South Charleston residents were aware that elections commonly ended in the courts instead of at the ballot box. Beal law election contests alone resulted in fifty-three published legal opinions in Ohio. Local newspapers in South Charleston reported multiple electoral incidents in neighboring towns. Twenty miles away, in Pittsburg City, several wards reported riots at the polls and one man dropped dead "from excitement."[49] The local judge attempted to issue a bench warrant for the entire election board, but a fight among the police officers thwarted his attempt.[50] Later, the sheriff discovered a ballot box with a false bottom and over 100 fake ballots stuffed inside.[51] Temperance advocates in the town of Washington Court House raised $10,000 to litigate a case of illegal voting against the election judges.[52] They were accused of an elaborate scheme that involved using carbon paper and duplicate ballots to replace official "dry" votes.[53] Like South Charleston, the residents of North Lewisburg did not know which side of the dispute would prevail.[54] Residents voted all day; schoolchildren, who had the day off from school for the election, roamed the streets and helped the temperance workers; the Woodstock

[48] "Mayor: To Blame No More than People Who Elected Him – For the Recent Defeat of the Screen Ordinance – Church People Do Not Do Their Duty," *The Daily Morning Sun,* 15 March 1905, p. 6.

[49] "Disgraceful: Scenes in Pittsburg City Election Yesterday – Citizens' Ticket Defeats the Regular Republican Ticket – Many Arrests Made and Much Fraud Alleged," *The Daily Morning Sun,* 22 February 1905, p. 7.

[50] *Ibid*.

[51] *Ibid*.

[52] "Both Sides: Of Temperance Question at Washington C.H. – Talk of Criminal Proceedings," *The Daily Morning Sun,* 4 April 1905, p. 1.

[53] *Ibid*.

[54] "Beal Law Election is a Tie: North Lewisburg Minister Struck By a Son of a Saloon Keeper," *The Press-Republic,* 12 April 1905, p. 1.

Band entertained the crowd.[55] When the ballots were counted, and a tie was announced, Rev. Dr. Woodward, the pastor of the Methodist church, announced that the temperance side would contest the election.[56] This statement so enraged "Smuck" Landis, the son of a saloon owner, that he struck the pastor in the head. Luckily, bystanders were able to rush Landis into jail and avert further rioting.[57]

While South Charleston residents watched and waited for a potential lawsuit, details about the improper ballots and reports of people mistakenly casting ballots for the wrong side filled the local newspapers. The newspapers speculated that the "wets" would petition the court based on the faulty ballots, even though the mistake favored their side.[58] Two days after the election, *The Press-Republic* provided another possibility for litigation. Leon H. Houston, a wealthy merchant, realized that he accidentally voted for the "wet" side. He went back to his polling place and the judges allowed him to cast another ballot for the "dry" side.[59]

As predicted, two saloon owners, James B. Malone and John H. Way, filed suit in the Clark County Probate Court a half hour before their deadline for litigation expired. The final decision rested with Springfield native Judge Frank Geiger, the Clark County Probate Court Judge, newly installed after the previous probate judge died three days after the election.[60]

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[55] *Ibid*.

[56] *Ibid*.

[57] *Ibid*.

[58] "Saloon Men of South Charleston Are Preparing for Contest – Representatives were Here Yesterday to Retain a Lawyer and Will Take Action," *The Daily Morning Sun*, 17 March 1905, p. 3.

[59] "Was Allowed to Change His Ballot," *The Press-Republic*, 16 March 1905, p. 1.

[60] "Career of Great Usefulness Has Come to a Close: Judge Mower is Dead – End Came to His Suffering at 3:15 Yesterday Afternoon – Funeral Will take Place Monday – Bar Association Will Meet Today, Memoir," *The Daily Morning Sun*, 18 March 1905, p. 1.

The owners argued that the Beal law election was illegal and void and asked that it be set aside on multiple grounds: "[1] that no proper ballots were printed, [2] that persons not entitled to vote were allowed to do so, [3] that one ballot was thrown out, changing the result of the election, and [4] finally that said election was petitioned for by less than 40 per cent of the qualified electors of the village, as is required by law."[61] While the first, third, and fourth claims were fairly straightforward, the claimants were vague on who exactly voted illegally. Filing the petition gave them a month's reprieve to prepare their case – and find illegal voters.

In all, the lawyers for both sides issued over fifty subpoenas for witnesses.[62] Their efforts flushed out three people with questionable votes, besides the two votes of Leon H. Houston. Two of them, Charles Warrington and Laybourn Haughey, were blind and 93 years old, respectively. They arrived together in a carriage and cast their ballots at the curb with the assistance of poll workers, instead of within the polling place itself. Both men said they cast "dry" ballots. As for the third, Leroy Pitzer, the "wets" argued that he was mentally deficient and his vote was illegal.

Despite an abundance of election litigation, Judge Geiger did not have robust legal guidelines to follow. For one, Ohio's experience with the modern voting process was still evolving. Until 1851, Ohio residents regularly voted viva voce, enabling political parties to directly observe individual voters' partisan preferences. Though the 1851 Ohio Constitution required elections by ballot,[63]political party managers printed tickets that were easily manipulated by distributing specific ballots to particular voters or by changing the language on

[61] "Beal Law Election Contested," *The Press-Republic*, 25 March,1905, p. 7.

[62] "Fifty Subpoenas: Issued for Witnesses in Beal Contest," *The Daily Morning Sun*, 5 April 1905, p. 6.
[63] Ohio Constitution of 1851, Article 5, Section 2.

the ticket itself.[64] In 1891, Ohio, along with almost every other state in the country, adopted a modified version of the Australian ballot system, which mandated that the government print and provide standard ballots listing all the candidates or issues for voters to mark their choices.[65] Though good government reformers intended Australian ballots to decrease political party influence and increase the secrecy – and thus the validity – of votes, they also presented difficulties for voters with literacy problems or impairments.[66] Indeed, New York initially vetoed the secret ballot in part because the governor argued that blind and illiterate voters would have to forfeit secrecy in order to vote.[67] Ultimately, it was Judge Geiger's responsibility to balance the norms of uniformity, integrity, democracy, and legibility in the electoral process for South Charleston.

For the procedural claims raised by the litigation, Geiger tilted his solutions towards allowing the electoral process to proceed without a lot of interference by the interested political factions or an abundance of binding rules and regulations. For example, he decided that the phrase "forty per cent. of the qualified electors at the last preceding municipal election" on a petition to trigger a Beal law election meant 40 percent of the people who actually voted, and not 40 percent of the total qualified electorate because the former would give a "fixed and certain" rule that would allow more triggered elections.[68] Furthermore, he did not allow the "wets" to

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[64] Isaac Franklin Patterson, *The Constitutions of Ohio: Amendments, and Proposed Amendments, Including the Ordinance Of 1787, the Act of Congress Dividing the Northwest Territory, and the Acts of Congress Creating and Recognizing the State of Ohio* (Ohio: The Arthur H. Clark Company, 1912), p. 24.

[65] Keyssar, 143; Australia was the first country to use a pre-printed secret ballot, in the 1850s.

[66] Keyssar suggests that the implementation of Australian ballots was a backdoor method to introduce literacy tests, 143-44.

[67] *World Almanac & Book of Facts* (New York: Newspaper Enterprise Association, 1892), p. 90.

[68] *In re South Charleston*, 4.

introduce claims that were not a part of their original petition; in particular, the argument that the South Charleston mayor's published proclamation for the Beal election was inaccurate as to the time of the election.[69] Though the "wets" claim would provide additional information on the validity of the election, Judge Geiger refused to hear the claim, out of concern that it would further complicate the litigation, "open[] the door wide to the introduction of testimony upon any point" and give the other side insufficient notice to prepare its case.[70] Significantly, he pointed to the high turnout for the election as evidence that the "electors of the municipality were fully informed of the pendency of the election and participated in the same" and that the possibly inaccurate mayoral proclamation did not create a practical problem.[71] Thus, Geiger did not address the possible unsettling or formal problems of the election and instead focused upon the practical success of electoral turnout.

Geiger followed the same course of favoring practical results over formal inaccuracies with the issue of the ballot design. He noted that despite the discussion about the mistake, the election continued and contestors on both sides cast ballots. Citing a general legal encyclopedia, Geiger argued:

> The American and English Encyclopedia of Law, Volume 10, page 714, state the proposition, 'The rule of law is well settled that objection to the form and contents of official ballots must be made before the election, and that when a person fails at the proper time to take any steps to correct errors in such ballots, he can not after being defeated, be heard to complain if there is an error in the ballots of which he had knowledge, and he might have corrected prior to such an election.'[72]

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[69] *Ibid*., 7.

[70] *Ibid*.

[71] *Ibid*., 9.

[72] *Ibid*., 12-13.

Despite the newspaper accounts and legal testimony of voters who mistakenly voted for the wrong position because of the incorrect ballots, Geiger characterized the ballot printing error not as a problem that would trouble the electorate as a whole, but as a case of loser's remorse on the part of the "wets." Geiger wrote that "a large number of cases are cited sustaining this proposition," yet, these cases all concern problems in ballots which list political candidates, and not political issues.[73] Therefore, in the precedent he cited, the blame for not raising the ballot errors would fall squarely on the shoulders of the contesting political parties. Here, Geiger allocated responsibility for electoral management on the interested factions even though they are not the formal parties of interest. They were expected to settle their deal making at the polling place through informal means, and thus, not anticipate a legal ruling to settle the election. Though this solution would ostensibly reduce post-election litigation and perhaps thus increase the reliability of election results, it would also distribute power to involved factions and not the electorate as a whole. Again, Geiger posited a lack of widespread practical problems in the vote, contending that "the objection that the voters were deceived by the form of ballot has not great weight, as they are supposed to be intelligent enough to read the ballot;"[74] consequently, though the ballots were "not technically accurate nor formal"[75] they were sufficient enough for the election.

The last claims at issue, however, brought into relief the question of whether the voters truly were intelligent and savvy enough to navigate the election. Geiger grouped the possible voting irregularities because of blindness and old age by Charles Warrington and Laybourn

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[73] *Ibid*., 13.

[74] *Ibid*., 14.

[75] *Ibid*., 13, citing *American and English Encyclopedia of Law*, Volume 10, (1898), p. 725.

Haughey together while separating out Leroy Pitzer. The "wets" argued that Warrington's and Haughey's votes were improper and should be declared illegal because they did not mark their own ballots or deposit them into the ballot box. According to the Ohio Australian Ballot Law, otherwise qualified but physically infirm electors could receive voting assistance under specific conditions.[76]

While the "drys" responded that blind and old people were allowed to receive assistance in voting, they did not emphasize that the election judges followed the procedure outlined in the Australian Ballot Law. Though both the court documents and newspaper accounts describe two judges walking to the carriage, marking the ballots, and depositing the marked ballots in the polling box, neither one indicates that the judges were of opposing parties or that Warrington and Haughey told the presiding judge of election that they needed assistance.[77] Instead of highlighting the formal law, the "drys" contended that Warrington and Haughey were longstanding residents – and voters – of South Charleston and that there was no evidence of voter influence or ballot alteration.[78] In essence, their reputations as respectable community members was intended to vouch for their behavior as political partisans.

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[76] "An elector who declares to the presiding judge of election that he is unable to mark his ballot by reason of blindness, paralysis, extreme old age, or other physical infirmity, and such physical infirmity is apparent to the judges to be sufficient to incapacitate the voter from marking his ballot properly, may, upon request, receive assistance in the marking thereof of two of the judges of election, belonging to the different political parties, and they shall thereafter give no information in regard to the matter" *Ibid*., p. 16-17 citing Ohio Australian Ballot Law, Section 2966-37.

[77] *Ibid*.,, p. 16-19; "Waxing Warm: Both Sides in South Charleston Contest Fighting Hard – Wets Claim that Persons Physically Unable to Mark Ballot Were Voted By Drys," *The Daily Morning Sun*, 8 April 1905, p. 8; "End: Of Beall Law Contest Case is not Yet. Attorneys are Fighting Every Point Raised by Hand to Hand, *Springfield Daily Gazette*, 13 April 1905, p. 3.

[78] *In re South Charleston*, 15-16; "End: Of Beall Law Contest Case is not Yet. Attorneys are Fighting Every Point Raised by Hand to Hand, *Springfield Daily Gazette*, 13 April 1905, p. 3.

Judge Geiger agreed with the "drys" arguments in validating Warrington and Haughey's votes – and sidestepping the formal requirements of the Australian Ballot Law. He contended that under the law, electors with physical infirmities were allowed assistance, and

> [i]t may well happen that the physical infirmity is such as would prevent the voter from leaving the carriage or reaching the actual presence of the ballot box, and the paralytic may be suffering from paralysis of the legs as well as the arms. The law constitutes the election officers the arm, or the legs, or the eyes of the afflicted person, as the case may be. There is no reason why a person paralyzed in the arms should receive assistance, while those having no use of the legs should have no assistance.

That is, Geiger upheld the votes in this particular case, because in a possible, hypothetical case, a voter with paralyzed arms and legs might not make it to the ballot box. Of course, in this instance, there was no evidence that Warrington or Haughey were unable to manage the trip to the actual polling place, or any discussion of why the actual scenario that occurred could be potentially problematic because in a highly charged election, unethical judges could change the ballots while "assisting" infirm voters. Geiger argued that though it "is highly proper that restrictions be placed upon the method of casting a ballot…it is equally proper that certain latitude be given in case of necessity."[79] Here, apparently, was an instance where such latitude was warranted. The reason? The purpose of the Australian Ballot Law "is not the secrecy of the vote, but the purity of the election."[80] Although the votes were not secret, since there was no evidence of fraud, then the votes should not be invalidated. Furthermore, as the "judges are properly assumed to be familiar with the law"[81] and the voters relied upon the judges' instructions, in the absence of fraud, the votes should be counted, "unless such irregularity is of

[79] *Ibid*., 18.

[80] *Ibid*, 18-19.

[81] *Ibid*, 19.

sufficient importance to effect [sic] the honest expression of the people."[82] Geiger's decision rested upon evidence of fraud, but it is unclear how the "wets" could have provided enough proof to overturn his ruling. Once the judges left the carriage, Warrington and Haughey could not testify as to what happened to the ballots and if the judges were corrupt, they certainly would not mention it in court. Moreover, it is uncertain how Geiger concluded that the judges were familiar with the Australian Ballot Law, as there is no evidence that they followed it. What *is* certain is that Geiger was loath to throw out the two votes despite formal legal irregularities in the absence of clear and compelling evidence that there was practical fraud and deception.

Leroy Pitzer would not prove so lucky. By the time the court reached Pitzer's claim, nearly fifty witnesses had already testified. The newspapers gleefully anticipated Pitzer's arrival at court for the second-to-last day of testimony. Articles labeled him a simpleton[83] and an imbecile,[84] and reported that he "caused all sorts of amusement on the stand" as he insisted that he voted for the "dry" side and was not insane or idiotic.[85] His aunt, who was also subpoenaed, possibly tried to elicit sympathy for her nephew by describing him as physically disabled instead of mentally impaired. She testified that her nephew did not have a mental condition, but "was simply suffering from a prolonged attack of paralysis."[86] When Pitzer took the stand, though, when asked if he was paralyzed, "he began throwing both his members around in lively fashion and with such vehemence as to prove that he was not suffering from paralysis so far as his arms

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[82] *Ibid.*

[83] "Courts," *Springfield Daily Gazette*, 8 April 1905, p. 4.

[84] "Testimony Taken: Arguments in South Charleston Contest Will Begin Tomorrow Morning," *The Daily Morning Sun*, 9 April 1905, p. 8.

[85] "Courts," *Springfield Daily Gazette*, 8 April 1905, p. 4.

[86] "Testimony Taken: Arguments in South Charleston Contest Will Begin Tomorrow Morning," *The Daily Morning Sun*, 9 April 1905, p. 8.

were concerned. He gave a like exhibition with his legs upon request."[87] The newspaper concluded that "after he had finished the consensus of opinion was that if he was suffering from paralysis the results were not at all apparent from the naked eye."[88] From the newspaper coverage, it is clear that Leroy Pitzer was not a respected member of the South Charleston community. Whether Pitzer suffered from a mental condition sufficient to render his vote invalid, however, was a more complicated legal question.

According to the 1851 Ohio Constitution, no "idiot or insane person" was allowed to vote.[89] The "wets" argued that Pitzer fell within the class of idiots or insane persons, without specifying which one. Though the Constitution limited suffrage based on mental disability, it did not provide any guidelines on how to determine whether someone actually was mentally disabled. Both sides provided medical doctors loyal to their respective sides who gave conflicting testimony as to Pitzer's mental state.[90] In addition, they amassed a series of authorities to make their case.

Judge Geiger admitted in his opinion that the "[m]edical definitions and legal definitions on this subject seem not to be in exact accord."[91] None provided an authoritative definition of "idiot" or "insane." While the *American and English Encyclopedia of Law* defined an idiot as "one who has no understanding from his nativity," *Bouvier's Law Dictionary and Concise*

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[87] *Ibid.*

[88] *Ibid.*

[89] Ohio Constitution of 1851, Article 5, Section 6.

[90] Ohio Constitution of 1851, Article 5, Section 6. "Arguments are reached in the Beall Law Case," *Springfield Daily Gazette*, 10 April 1905, p. 1. The newspaper articles do not provide information on the testimony of the medical doctors, an interesting omission given the intense media attention for the case as a whole. Moreover, Judge Geiger does not discuss the medical testimony in detail in his opinion. Unfortunately, the case record was lost in a court house fire.

[91] *In re South Charleston*, 23.

Encyclopedia unhelpfully distinguished between "imbecility" and "idiocy" and defined both as a "form of insanity" from either a cognitive or mental defect.[92] The same sources also gave conflicting definitions of "insanity." Ohio legislative acts contradicted themselves, as the Ohio Statutes defined insanity seven different ways in as many statutes.[93] When Geiger looked to Supreme Court of Ohio case precedent, a case decided near the time of the enactment of the Constitution, *Clark v. State*, in 1846, the court noted that insanity "exists in all imaginable varieties and in such manner as to render futile any attempt to give a classification of its numerous grades and degrees that would be of much service, or under any circumstances safe to be relied upon; and much assistance can not be derived from metaphysical speculation."[94] The case of *Farrer v. State,* in 1854, was similarly unhelpful as a guide. The judge wrote, "I can not imagine her as other than idiotic or imbecile…It is enough to say that I think it proves her weak-minded and imbecile."[95] In *Loeffner v. State*, the judge questioned the possibility of defining insanity, writing: "insanity, indeed, exists in so many shapes and forms, and has so many varied insignia and manifestations, that it is almost impossible for science to comprehend it or give it intelligent definition…The classes, species, and modifications are not well understood by any of us, learned or otherwise. It seems, indeed, as indefinite in extent as mind itself."[96] In the one Supreme Court of Ohio case that addressed the issue of insanity or idiocy as it related to elections, *Sinks v. Reese*, the court threw out the vote of a person who was determined to be an

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[92] *Ibid*., 24.

[93] *Ibid*., 25.

[94] *Ibid*., 35, quoting *Clark v. State,* 12 Ohio 483, 488.

[95] *Ibid*., 26, quoting *Farrer v. State,* 2 Ohio St. 54, 68.

[96] *Ibid*., quoting *Loeffner v. State*, 10 Ohio St. 598, 604.

idiot, without "disclos[ing] the evidence upon which the court determined what constituted an idiot."[97]

In sum, Geiger cited twenty-nine separate definitions of "insanity" or "idiocy" as described in legal and medical treatises, encyclopedias, statutes, and cases. Despite this uncertainty, he concluded that is "clearly appearing to the court that [Pitzer] comes well within the class of persons prohibited by the Constitution from voting, under the term 'idiot' or 'insane person,' as such terms are defined by medical and legal writers and decisions of Ohio courts, contemporaneous with the adoption of the Constitution of 1851" without clearly stating which one of the twenty-nine definitions he adopted.[98] Despite this impressionistic use of sources, the legal system invalidated Leroy Pitzer's vote.

Geiger claimed that it "can not be disputed that [Pitzer] is a person of diseased mind, of limited mental capacity, incapable of carrying on in an intelligent manner the ordinary affairs of life, having no distinct ideas upon the question of morality, right or wrong, and one who would probably not be responsible for any criminal act committed by him."[99] Pitzer did not know "the value of money, or any definite conception of size or direction."[100] Geiger would "not hesitate a moment in adjudging him a proper person to be confined in an insane asylum were the matter brought before the court on an affidavit in lunacy; neither would there be any hesitation in appointing a guardian for him were a proper application made for the purpose, his mental

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[97] *Ibid*., 27-28.

[98] *Ibid*., 11.

[99] *Ibid*., 28.

[100] *Ibid*.

condition being much more defective than in the majority of the cases where the court has been called upon to act in such matters."[101]

After impugning Pitzer's mental status with a cascade of different types of legal standards upon which Pitzer could possibly fail, Geiger evidenced some hesitation when it comes to the proof actually presented to him of Pitzer's mental deficiencies. The various definitions of mental deficiency that Geiger invoked involved performance at particular legal tasks. For instance, knowledge of right and wrong would align with mens rea requirements for criminal law. Yet, there is no indication Pitzer had difficulty performing the tasks involved with voting. Indeed, in an election that proved difficult for multiple voters, Pitzer did not have such difficulty, nor was his vote challenged at the election itself. Moreover, Geiger's opinion focuses upon the legal authorities and does not discuss the testimony of the medical experts at trial. Contradicting the authorities he consulted, which suggested that idiocy originated at birth, Geiger notes that Pitzer "had the ordinary intellect of a child as he grew."[102] When Pitzer was seven, "he was stricken by a sunstroke, the immediate result of which was paralysis, with all conditions attendant upon complete imbecility."[103] Geiger does not, however, indicate how Pitzer's mental state had changed since childhood. It was clear, for example, that he was no longer paralyzed. Moreover, Geiger does not note in his opinion that in the 1880 census, 2 years after the sunstroke, Pitzer is listed under the heading "maimed, crippled, bedridden, or otherwise disabled" but not under "idiotic" *or* "insane."[104] That is, as Pitzer's aunt's testimony suggested, Pitzer may have had a physical impairment rather than, or along with, a mental one. While his

[101] *Ibid.*, 29.

[102] *Ibid.*, 30

[103] *Ibid.*, 29

[104] 1880 United States Census.

aunt may have calculated that a physical disability would render Pitzer more sympathetic than a mental disability – like in the case of Warrington or Haughey, her testimony also aligns with previous evidence of Pitzer's impairments.

Geiger also acknowledges that Pitzer "displayed in his examination considerable shrewdness in some of his answers," suggesting that that Pitzer did display some mental acumen. Nonetheless, Geiger indicted Pitzer for "an absolute lack of knowledge of the proper way to mark his ballot, although he persisted in the statement that he voted "dry" at the election."[105] Significantly, he did not note that Pitzer actually *did* need help at the polling place, nor why anyone at the polling place did not challenge Pitzer's vote because of his "obvious" incompetence.[106]

If Geiger followed the same procedure for Pitzer as he had for the other claims, it is likely that the "dry" side would have prevailed by one vote – Leroy Pitzer's. A functionalist, as opposed to formalist, interpretation of Pitzer's predicament would have given Pitzer the benefit of the doubt for his vote, like with Warrington and Haughey, and would have not invalidated his

[105]*In re South Charleston*, 29.

[106] Notably, though state constitutional convention delegates confidently assumed that election officials would know lunatics when they saw them, and thus, did not include procedures for identifying people with mental disabilities at the poll, election challenges such as *In re South Charleston* indicate the failure of such a strategy. Disability scholars note the importance of visuality and representation to classification, discomfort about the "ugly," "crippled," or "maimed" body, and the fear of becoming disabled animating prejudice against disabled people. Here, while Pitzer is clearly identified as eccentric and lacking social respect, classifying him as mentally disabled was a more fraught process. *See, e.g.*, Licia Carlson, *The Faces of Intellectual Disability: Philosophical Reflections* (Bloomington: Indiana University Press, 2010); Susan Schweik, *The Ugly Laws* (New York: NYU Press, 2010); Rose Galvin, "A Genealogy of the Disabled Identity in Relation to Work and Sexuality," *Disability and Society* 21 (2006): 499–512; Thomson, *Staring*; Siebers, *Disability Theory*; Stoddard Holmes, *Fictions of Affliction*; Davis, *Bending over Backwards*; Adams, *Sideshow U.S.A.*; Hannah R. Joyner, *From Pity to Pride: Growing Up Deaf in the Old South* (Washington, D.C.: Gallaudet University Press, 2004); Halle Gayle Lewis, "'Cripples are not the Dependents One is Led to Think': Work and Disability in Industrializing Cleveland, 1861–1916," Ph.D. Dissertation, State University of New York at Binghamton, 2004; Martha Stoddard Holmes, *Fictions of Affliction: Physical Disability in Victorian Culture* (Ann Arbor: University of Michigan Press, 2004); Deutsch, H., "*Defects"*; Butler, M*ind and Body Space*s; Corker, "Differences, Conflations and Foundations"; Corker, *Disability Discourse*; Mary Klages, *Woeful Afflictions: Disability and Sentimentality in Victorian America.* (Philadelphia: University of Pennsylvania Press, 1999); Davis, "Crips Strike Back"; Carol Thomas, *Female Forms: Experiencing and Understanding Disability* (Philadelphia: Open University Press, 1999);

vote absent clear evidence of fraud or misrepresentation. Instead, Geiger cites constitutional language to invalidate Pitzer's vote, and render the election a tie.

When Geiger gave his decision, he read out his ruling for nearly an hour as the newspaper reporters and spectators listened and took notes.[107] Though all the local newspapers attributed the tie vote to Leroy Pitzer's invalid vote, they were not unanimous on his final mental status, variously calling him a "person of diseased mind,"[108] an "imbecile,"[109] an "idiot,"[110] and "insane."[111] John Brown, a spokesperson for the "drys," was quoted that while the "drys" were disappointed, the "wets" were celebrating. Nevertheless, he observed, "we are taking it philosophically, for we knew it was only a question of legality which we must submit to…We hold no grudge in the matter, but we feel certain of a final victory."[112]

South Charleston reran its election, and John Brown got his wish fulfilled nationally fourteen years later. Fourteen years after that, of course, the other side prevailed as Prohibition was repealed. Pitzer did not live to see that happen, as he was committed to the Columbus State Hospital for the Insane in 1907 and died in the Dayton State Hospital in 1912. On Pitzer's order

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[107] "Election Decided for Wets: Judge Geiger Holds Charleston Election Illegal Because Imbecile Voted," *The Press-Republic*, 27 April 1905, p. 2.

[108] "Set Aside: South Charleston Election Declared Invalid – The Vote of Leroy Pitzer – Hold Illegal and Deducted from Drys Renders Result a Tie – Was of Diseased Mind – Interesting Points of Law Governing the Case. Apply to Reopen the Case," *The Daily Morning Sun,* 27 April 1905, p. 1.

[109] "Election Decided for Wets: Judge Geiger Holds Charleston Election Illegal Because Imbecile Voted," *The Press-Republic*, 27 April 1905, p. 2.

[110] "Single Point Decides Beall Case for Wets: On All Essential Points Probate Judge Geiger is with the Drys in So. Charleston Matter – Motion is Made for a Re-hearing," *Springfield Daily Gazette*, 26 April 1905, p.1.

[111] *Ibid.*

[112] *Ibid.*

of lunacy and commitment, the same Judge Geiger noted his condition as "weak mindedness" caused by "intermarriage among his ancestors and childhood illness."

Thus, at the end, Pitzer collected a series of descriptions for his mental behavior, from imbecile, to idiot, to lunatic, with a similarly long list of causes for his condition, from childhood illness to eugenic factors. These various approaches to mental conditions, though, crystallized in the law because of political maneuvering at first glance that had little to do with disability. Long after the death of Pitzer himself, though *In re South Charleston* survives as still-binding law invalidating the votes of people with mental disabilities to vote in Ohio.[113]

[113] Unfortunately, these prohibitions are not an anachronism. Bazelon Center For Mental Health Law, *State Laws Affecting The Voting Rights Of People With Mental Disabilities* (2008) Available at http://www.bazelon.org/pdf/voter-qualificationchart6-08.pdf; Missouri Protection and Advocacy Services v. Carnahan (8th Cir. Sept. 28, 2006); Dow v Rowe, 156 F. Supp. 2d. 35 (D. Me. 2001).