



INCLUSION, ELIGIBILITY AND FORFEITURE

INCLUSIÓN, ELIGIBILIDAD Y PÉRDIDA

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| INFORMACIÓN DEL ARTÍCULO | ABSTRACT/RESUMEN |
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| <p>Recibido el: 23/07/2024 Aceptado el: 30/08/2024</p> <p>Keywords:</p> <p>Ethics, social exclusion, philosophy of action, marginalization, values education</p> <p>Palabras clave:</p> <p>Ética, exclusión, filosofía de la acción, marginalización, educación para la ciudadanía</p> | <p>Abstract:</p> <p>One of the buzzwords of today is 'inclusion'. But the idea that everyone should be 'included' is a mistake, thoughtlessly reproduced by many. This holds in the private sphere, as well as in the institutional settings of the public sphere. There is very little conceptual analysis of the term, although there is plenty of literature on 'social inclusion' and the political vision of including the marginalized. My aim is to show that there are constraints on inclusion – particularly in institutional settings. Participation in social life is a kaleidoscope of inclusion and exclusion practices; this makes social life possible. Without inclusion/exclusion practices social life would be chaotic – if not impossible. Even philosophy journals have submission criteria which permit exclusion: e.g. the paper must not be under consideration by any other journal. Thus, exclusion is not per se a denial of someone's dignity or a failure to recognize them as a fellow human being. The aim of this short essay is to raise awareness about inclusion and two of its constraints (eligibility and forfeiture), thereby starting a long overdue debate in the humanities.</p> <p>Resumen:</p> <p>Una de las palabras de moda hoy en día es "inclusión". Pero la idea de que todos deberían estar "incluidos" es un error, reproducido irreflexivamente por muchos. Esto es válido tanto en la esfera privada como en los entornos institucionales de la esfera pública. Hay muy poco análisis conceptual del término, aunque hay mucha literatura sobre la "inclusión social" y la visión política de incluir a los marginados. Mi objetivo es mostrar que existen limitaciones en la inclusión, particularmente en entornos institucionales. La participación en la vida</p> |



social es un caleidoscopio de prácticas de inclusión y exclusión; esto hace posible la vida social. Sin prácticas de inclusión/exclusión la vida social sería caótica, si no imposible. Incluso las revistas de filosofía tienen criterios de presentación que permiten la exclusión: p. e., el artículo no debe estar bajo consideración de ninguna otra revista. Por lo tanto, la exclusión no es *per se* una negación de la dignidad de alguien o una falta de reconocimiento como ser humano. El objetivo de este breve ensayo es crear conciencia sobre la inclusión y dos de sus limitaciones (elegibilidad y pérdida), iniciando así un debate largamente esperado en las humanidades.

Introduction

One of the buzzwords of today is ‘inclusion’. But the idea that everyone should be ‘included’ is a mistake, thoughtlessly reproduced by many. This holds in the private sphere¹, as well as in the institutional settings of the public sphere. A central purpose of social institutions is to allocate benefits and burdens (equitably) among the members of society. The logic of institutions requires that they apply eligibility criteria and, consequently, some individuals are included, and some are excluded. A foreign national (usually male) living in a country with conscription is normally excluded from serving in the military; only nationals are subject to (i.e. included in) conscription.

There is very little conceptual analysis of the term ‘inclusion’, although there is plenty of literature on ‘social inclusion’ and the political vision of including the marginalized (see Lombe & Sherraden, 2008).² My aim is to show that there are constraints on inclusion – particularly in institutional settings. Participation in social life is a kaleidoscope of inclusion and exclusion practices; this makes social life possible.³ Without inclusion/exclusion practices social life would be chaotic – if not impossible. Even philosophy journals have submission criteria which specify exclusion: e.g. the paper must not be under consideration by any other journal. Thus, exclusion is not *per se* a denial of someone’s dignity or a failure to recognize them as a fellow human being.⁴ The aim of this short essay is to raise awareness about inclusion and two of its constraints (eligibility and forfeiture), thereby starting a long overdue debate in the humanities. There may be other constraints, but these two seem central to me.

Does inclusion mean that everyone ‘belongs’? When considering inclusion claims our first port of call is eligibility. Are the excluded eligible? If not, why not? Should they be

eligible for inclusion? Inclusion – conceptually – entails that some individuals might be excluded (Goodin, 1996, p. 349; similarly, Hansen, 2012).⁵ But even if you are included (via eligibility), you can forfeit that right through wrong-doing.

These considerations are important because they will have a bearing on current controversies (and any future policy decisions): e.g. when it comes to voting rights, naturalization of foreign nationals, migration, etc. I will take no position (or very little) on such questions here. My aim is to lay some conceptual groundwork.

History

The current notion and importance of inclusion entered public consciousness via debates in educational theory. These debates were particularly prominent in the 1960s and 1970s, centring on (Osgood, 2005, p. 3) ‘the propriety of segregating or integrating children with disabilities in regular classroom settings.

What we can learn from the debate in education is that inclusion presupposes eligibility. Disabled children are eligible for mainstream education because the relevant criterion is ‘being a child’. The reason for their wide-spread exclusion was reluctance to make schools physically accessible for disabled children (e.g. wheelchair users) or make any other necessary adjustments. Financial considerations and/or prejudice negated their legitimate eligibility claims.

It is a principle of justice, going back to Aristotle’s *Nicomachean Ethics* (2002, V.3. 1131a10–b15), to treat like cases alike and unlike cases differently (see also Honoré 1962, pp. 82f., and Hart, 1997, p. 159). Thus, adults or children’s pets are not eligible for inclusion in the mainstream education of children. Some individuals may be excluded – if they differ in some relevant respects. Being disabled (whether physically and/or cognitively) is not a relevant difference when it comes to educating children, as long as they (as well as their classmates) will benefit from it.

Previously, only German citizens could become teachers in Germany. This had to do with the notion of loyalty to the state, because teachers normally become civil servants. In those days German nationals and foreign nationals were treated differently (in the context of becoming a teacher), because there was a relevant difference: nationality.⁶ If

there is no relevant difference, then we may treat people equally (e.g. everyone residing in Germany, irrespective of nationality, is eligible for medical treatment). If there is a relevant difference between individuals/groups, then we may treat them differently (e.g. through exclusion). Only men are eligible for a prostate exam, and only women are eligible for a smear test. The relevant criterion here is sex.⁷

If we were promoting blanket inclusion, then we might include people who are not eligible (according to existing criteria): e.g. tourists could vote in national election if they happen to be in the country; over-21 footballers could join the under-21 category; nosy people, without an alcohol problem, could join AA-meetings.⁸ The result of blanket inclusion would be that institutional distinctions and categories became meaningless; and there would be no need to allocate burdens and benefits equitably among citizens.

If this is right, then we need to be able to justify the eligibility criteria, particularly to those who are being excluded. We could explain to adults who are keen on education that they do not qualify for the mainstream education of children, because they are grownups rather than children, and if they are reasonable people they will accept this.⁹ The same goes for little Joe's puppy 'Rocky' – although little Joe may be convinced that Rocky would benefit educationally from coming to school with him.

Another important point is: should the eligibility criteria be expanded to include people who believe that they ought to qualify?¹⁰ Sometimes they should, i.e. when the criteria for eligibility in a particular context strike us as being wrong, i.e. not *relevant*. For a long time, women were barred from running the Boston Marathon – because of their sex (until 1971). And the IOC only introduced women's marathon at the 1984 Olympics in Los Angeles. Similarly, women's football in the UK was popular at the beginning of the 20th century, but was destroyed when the FA (Football Association) banned it from its grounds in 1921 (the ban was lifted 50 years later).¹¹

Why Include?

Existing inclusion/exclusion practices are (normally) not arbitrary. We know that girl's schools improve the educational attainment for girls. To achieve inclusion of girls when it comes to scholastic achievement (and later in public life), it is sometimes necessary to

exclude (boys). The same holds for the female category in sports – it excludes all male athletes and creates the conditions for including the maximal number of female athletes in sport. Without this, many women and girls would be excluded from the benefits of sport – we exclude in order to include (see Parry & Martínková, 2021, p. 1487). Lawford-Smith (2024, p. 222) introduces a helpful distinction: ‘segregation’ and ‘separation’. The segregation of black people in the US was disempowering, but the separation of girls from boys in school can be empowering for girls. Exclusion is wrong if its aim is segregation, but right if its aim is separation that would bring about a social benefit. Note that boys are not disadvantaged because girl’s schools exist, and male athletes are not disempowered because of the female category in sports.

New inclusion initiatives can have at least two distinct motivations: to prevent wrongful/unlawful¹² discrimination and/or to facilitate the integration of ‘newcomers’ into social practices. Children should not exclude potential playmates because they are red-heads; this would be wrongful discrimination. Similarly, every child, *qua* being a child, is entitled to an education. It doesn’t matter here, if the child is smaller or taller than others, or that the child has mastered the alphabet already, or that the child is a girl. None of these characteristics are relevant when it comes to being entitled to an education.

Sometimes the law/state enters the fray. Affirmative action, for example, is a policy aiming to promote inclusion by re-enforcing the eligibility claims of minorities. Some eligibility claims that were valid (i.e. just) – and *pro forma* institutionally recognized – have been effectively ignored in the past (voting rights for Blacks in the US).¹³

In many contexts we wish to facilitate integration. If children in the playground ignore one particular child, who just moved into the neighbourhood, then parents might step in and say: ‘Why don’t you let Charlie play too?’ If you start a new job, then it is a good idea to be assigned a mentor who will show you the ropes and introduce you to colleagues. If you are invited to a party, where everyone knows everyone else, then it is the job of the host (and the guests) to introduce you to the others and make you feel welcome.

These purposes of inclusion, non-discrimination and integration, presuppose eligibility. There is no need to explain to the delivery guy how the photo copier in the office works – we may ‘discriminate’¹⁴ between employees and visitors to the office. And there is no need to integrate a teenager into the games of little children in the sand pit. Said individuals all lack ‘eligibility’. Consequently, we may exclude them from certain activities and/or we don’t have to integrate them into those activities.

As we can see from these examples, there are often ‘facilitators’ (parents, mentors, party hosts) who create the conditions for integration. However, they cannot establish integration by *fiat*, because the individual in question must also do their bit. Thus, a child, who hasn’t learned to count yet, will not do well in a counting game and may temporarily be excluded (or given a different task) until they have learned to count. A party guest who refuses to engage with the others or is obnoxious will be difficult to integrate.

Discrimination Among Neophytes

The social justice activist assumes that our inclusion efforts directed at neophytes (they are eligible by definition) require that we discriminate within this group. Let us use first year university students to illustrate this.¹⁵ For those neophytes that belong to ‘marginalized’ groups, we need to institute special measures of inclusion. This reduces people to ‘identities’ often based on one particular¹⁶ characteristic: being black, a woman, gay, etc. Of course, this is a simplification of human lives. Such special measures could be: using ‘inclusive and welcoming language’ (whatever that might involve), not correcting their grammar in essays, valuing their particular experience (whether relevant or not – and simplified in the includer’s imagination).

The includer treats this sub-group of ‘marginalized’ neophytes as if their lives could be reduced to the black, female, working class or gay experience.¹⁷ This simplification is in itself done from a hegemonic standpoint; but the social justice activist is oblivious to this. Although the includer feels meritorious, she is actually adopting the ‘colonial’ viewpoint. The lives of the so-called marginalized are much more complex than the label they are carrying suggests, and so are the lives of the ostensibly non-marginalized. The latter may also have had difficult lives: losing one parent early on, drug/alcohol addiction

in the family, experiencing domestic abuse, lack of educational support/encouragement, etc. The social justice activist ignores all of this.

But the question is: do (all of) the ‘marginalized’ want to be subject to special (i.e. patronising) inclusion measures, relying on simplification and stereotypes? Wouldn’t it be better to just have integration measures for all neophytes, regardless of whether some have been given the label ‘marginalized’? In addition, if students wish it, the university could appoint a disability officer, offer a meeting place for first generation university students, etc. – rather than imposing a programme of special integration measures for the ‘marginalized’. The includer’s ‘special’ treatment for the marginalized may not be welcome by those groups and/or it may constitute an injustice to neophytes who have experienced social disadvantages that don’t register with the social justice activist.

Forfeiture

The second constraint on inclusion kicks in after eligibility has been established. Commonly, one can lose a right through voluntarily relinquishing or transferring that right (e.g. by entering into a contract); the old-fashioned term for this is ‘alienation’. But a non-voluntary loss of rights is also possible: forfeiture is a loss of rights due to wrongdoing (see Locke, 1690/1980, § 23)¹⁸. It can occur if one’s behaviour falls below a certain standard of ‘proper behaviour’ (Feinberg, 1978, p. 111).

A classic example for behaviour that triggers the forfeiture of rights is crime. Commonly, forfeiture theories of punishment assume that by committing a crime the wrong doer forfeits the right not to be punished; in Hohfeldian terms, this is a loss of immunity from punishment (Hohfeld, 1913). But in some jurisdictions being sentenced leads to further rights forfeiture.

In Germany, prisoners (in addition to losing the right not to be punished) may also lose the right to vote, if they have committed treason or attacked the President (Bundespräsident). And anyone with a prison sentence of one year or more cannot stand for public office in Germany. They have forfeited the right to be a Member of Parliament, mayor or local councillor for life.

The additional forfeiture of rights can apply during incarceration as well as after release. In Iowa and Kentucky felons are barred from voting for the rest of their lives. In other states they may regain their right to vote immediately after serving their sentence or sometime after (in Florida they have to wait seven years). In these examples crime leads to a double exclusion: in the first instance via incarceration (exclusion from social life), and in the second via denial of certain civic rights (voting, running for public office), an exclusion from political life.¹⁹

Outside of the context of crime we also encounter forfeiture. A child who hasn't developed its social skills sufficiently, e.g. by using biting as a response to frustration, will be – rightly – excluded from play by other children. Similarly, a boxer or footballer who bites their opponent, forfeits the right to compete (i.e. they should be disqualified).²⁰ And if the new employee turns out to be a 'sexist pig', he may not be invited to join an outing to the local pond.

Marginalization

Contrary to many social justice activists, marginalization by itself is not a reason for (blanket) inclusion; this would merely be an appeal to emotion. Eligibility claims are context dependent. We need to distinguish between justified and unjustified marginalization. Racists, people who believe in alien abduction, or members of a militia group (in the US) fall into the first category. Despite their horrid or questionable beliefs, they are eligible for inclusion in many areas of life: medical treatment, having their children educated, buying ice cream, etc. But a racist would not be eligible to become a school teacher (just like a candidate who doesn't have a degree). We reject their eligibility claim outright, because we don't want children to be exposed to hate. If it turns out that a currently employed teacher spouts racist ideology in class, then they lose their original eligibility claim through forfeiture. Similarly, members of a militia group would not be eligible to join the military, because they promote insurrection. And if we discover that serving military personnel belong to such a militia group, then they forfeit the right to serve their country (i.e. they lose their original eligibility claim).

The eligibility claims of the unjustly marginalized, like those of everyone else (i.e. people in the mainstream), are context dependent. Being disadvantaged in social life does not mean that all their eligibility claims are valid. Thus, speakers of a minority language, have a valid eligibility claim to have their children educated in their native language – even if the state were to deny their claim. The state of California (under ‘Proposition 227’, from 1998 onward) used to teach everyone in an English-only environment, ending previously provided bilingual (English/Spanish) education. This further disadvantaged the Hispanic population. In 2016 the eligibility claims of this minority to bilingual education were recognized again (via ‘Proposition’ 58). This illustrates nicely how the driver for eligibility criteria can be either political expediency or considerations of justice.²¹

However, if a member of the Hispanic community, wants to teach physics in high school, then the basis for granting their eligibility claim is not that they belong to a marginalized group; it is because they have a physics degree. Conversely, if they don’t have a physics degree, then they can be – rightly – excluded from making the shortlist for the job. Similarly, if the qualifying time to enter the Boston Marathon is 3 hours, then a runner who belongs to a marginalized group does not have a valid eligibility claim if their time is 3 hours and 10 minutes.

German job ads often state that if candidates are equally qualified then the prospective employer will give preference to disabled people. It is not their disability which meets the eligibility claim; it is the fact that they are qualified for the job. This provision in German employment law is aiming to re-affirm the eligibility claims of a marginalized group (disabled people). Without it, many employers would overlook them. This is a form of positive discrimination.

Conclusion

Before we decide that someone needs to be included, we need first to establish that they are eligible for inclusion in a particular context. And if their behaviour falls short of a certain standard, usually behaviour that harms others or views that we find abhorrent (e.g. racism), then they may (temporarily) forfeit their right to inclusion.

Inclusion claims don't last forever. Society, or the in-group, often narrow or widen the eligibility criteria. This is either done because of political expediency (e.g. cancelling bi-lingual education; accepting foreign nationals as teachers in Germany) or because of justice considerations²² (e.g. re-instating bi-lingual education in California; doing away with legacy admissions in US college applications).

Eligibility claims may be rejected outright when they pose a threat to a particular institution, e.g. militia members (bent on insurrection) endanger the functioning of the military. Admitting a minority athlete who doesn't meet the qualifying times for the Boston Marathon, would be unfair to all other runners (those meeting the standard and those who were excluded). It would make a mockery of sport. In contrast, match-fixers, dopers, cheaters, or intentional rule-breakers – although eligible to play – may be excluded (temporarily or permanently) from athletic endeavour via forfeiture. They pose a threat to the integrity of the game.

So, the lesson is: unjustified marginalization is a social ill, but it doesn't establish any eligibility claims (and neither does justified marginalization) – it all depends on the context.²³

Notes

¹ When friends from school happened to be at our house during meal times, then my mother would of course invite them to join us for lunch or dinner. She did not invite (include) all the neighbourhood kids to join us, although, being XYZ, she did have the inclination.

² Predictably, this is beginning to change, see Holly Lawford-Smith's recently published essay 'Is Inclusion Good?' Lawford-Smith (2024, p. 221) recognised that inclusion practices often come with costs attached for those who are meant to do the including.

³ As we will see, sometimes this is justified, sometimes it isn't.

⁴ However, the present UK government does just that by putting refugees and migrants into detention centres, treating them as if they were criminals. Here, their inclusion claims have not even been examined, but a decision has been made to subject them to harsh treatment. This injustice is instituted for reasons of political expediency.

⁵ Robert Goodin (1996, p. 353) provides some nascent reflection on inclusion/exclusion. He understands that inclusion would be pointless without exclusion; for this reason, the former relies on eligibility (criteria). However, Goodin's essay aims at the political dimensions of inclusion, as instituted by states.

⁶ But as soon as there was a shortage of teachers, the criterion of German citizenship became porous.

⁷ Sometimes, there may be disagreement about what ‘relevant’ differences are, but I will not enter this discussion.

⁸ I owe the AA example to Jane Clare Jones.

⁹ They may qualify for adult education classes.

¹⁰ Note that it is the group of the already included who decide about changing eligibility criteria: individuals or excluded groups (e.g. women) might make eligibility claims, but the ‘in-group’ will decide. There is an imbalance of power here, but I will not pursue this. There can also be competing claims about exclusion/inclusion between minority groups (Lawford-Smith, 2024, p. 223).

¹¹ The particular reasons given were the health of female athletes, but also concern for femininity. None of these strike us as ‘relevant’ differences, considering the history of women’s football.

¹² I distinguish wrongful from unlawful discrimination, because the law often doesn’t interfere in the private sphere. For example, children (and their parents) sometimes discriminate wrongfully: ‘I don’t want you to play with that foreign kid.’

¹³ I will distinguish ‘valid’ eligibility claims (they promote justice), regardless of whether they are recognised by institutions or not, from eligibility claims that meet the currently specified criteria. The latter may or may not be just, e.g. legacy admissions at US colleges are highly dubious. Fortunately, legacy admissions appear to be on the way out.

¹⁴ People often fail to distinguish the two meanings of ‘discrimination’: 1. To recognize a given difference, e.g. between children and adults, and treat people accordingly (like giving children smaller portions for lunch); 2. treating individuals/groups differently based on prejudice and/or malice (e.g. ethnic minorities). The former is justified, the latter is not.

¹⁵ Now, if you really wanted to be ‘inclusive’ then you would have to make the lectures and seminars open to everyone. But they are only open to those who meet the qualifying criteria (i.e. achieving particular results in the school leaving examinations); thus, the public are ‘excluded’. The drive for inclusion only applies to those who qualify – not to the rest of the population.

¹⁶ We could of course have a black gay woman.

¹⁷ I have left out ‘disabled’ students from my list, because they may encounter physical barriers to learning. If they cannot access classrooms, the library, refectory, etc., because there is no wheelchair access, for example, then this would effectively negate their eligibility claim. Here, it would be right to institute inclusion measures (really: ‘access measures’) – because of their eligibility. The university could also provide audio recordings/transcripts of lectures, etc., if needed. Disabled students may of course be subject to stereotypes by some students and staff, but special inclusion measures will not change such attitudes; this is a societal problem, which would also apply to other marginalized groups (e.g. working-class students).

¹⁸ Locke (1690/1980, § 85) mentions the case of slaves, who forfeit their lives and liberties by having been taken captive in a just war. This does seem to be a case of forfeiture through wrong-doing (acts of aggression) for Locke (see also § 172, 178, 179).

¹⁹ Why voting rights should be withheld after a sentence has been served is highly problematic. Whereas protecting political office from people who have committed serious crimes seems a sensible policy. We do not want corrupt politicians.

²⁰ The boxer Mike Tyson bit Evander Holyfield, and the footballer Luis Suarez, a repeat offender, bit the Italian player Giorgio Chiellini.

²¹ Sometimes political expedience is veiled as a justice claim. But this is not necessarily a bad thing for those who have valid eligibility claims.

²² This may include the promotion of 'diversity' for people from underprivileged groups. Diversity on its own, without any relation to historical (and present) injustice (e.g. as experienced by ethnic minorities, women or gay people), is not a matter of justice but merely instrumental, analogous to the diversity in biology or ecology. The latter (instrumental) notion is based on the belief that variety is better than uniformity.

²³ I wish to thank Patrick Riordan and Stephen K. McLeod for helpful comments.

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