

## Against the Political Exclusion of the Incapable

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**ABSTRACT** *Political exclusion on grounds of incapacity is the primary remaining source of exclusion from the franchise. It is appealed to by states and theorists alike to justify excluding young people (under 18) and many people with cognitive disability from the franchise. Defenders of this exclusion claim that no wrong is done by this exclusion and that states gain some significant benefits from this restricting of the franchise. I have argued elsewhere that political exclusion as currently practiced in modern liberal democratic states in fact causes significant harms, as it excludes some people who have the relevant capacity for political participation. Here, I argue that the exclusion of incapable actors prevents no significant harms to democratic outcomes, and that it confers no significant democratic benefits on the states practising this exclusion. As such, I argue that we ought to heavily modify and perhaps even abandon the capacity standard for political inclusion.*

### Introduction

There are two important aspects of the debate about enfranchisement. On one hand, there is an on-going and important discussion regarding the importance of political inclusion for everyone who satisfies the hurdle requirements for participation. These hurdle requirements have, over time, been significantly reduced, such that in many places the only requirements are membership in the political community (through citizenship or permanent residence), a basic level of competence, and being of age. Some jurisdictions also continue to disenfranchise criminals, either as an element of their punishment, or as a civil disqualification existing alongside the punishment. This debate is important because it follows the increasing recognition that it is important, for the legitimacy of the democracy, and of the democratic institutions, to include *all* the capable citizens of the country in democratic participation. We no longer accept gender or race as legitimate grounds of discrimination, because gender and race are irrelevant to political capacity. We retain age limits for political participation, as there is not yet consensus regarding the capacity of those who are below the voting age. On the other hand, we maintain these systems of exclusion to ensure that *only* those with good claims to inclusion are allowed to participate. Much less is said about this second requirement.

I address this deficiency here. There is an assumption in the relevant literature that the requirement of including *only* the politically capable is as important as the requirement of including *all* the politically capable. This assumption is only occasionally defended, as for example by Lopez-Guerra, who argues on the basis of fairness that ‘all and only those members of the polity who have . . . the *franchise capacity*’ should be

included.<sup>1</sup> If including only the capable is not as important as including all the capable, then one of the major arguments underpinning the political exclusion of young people and the cognitively disabled is significantly undermined. In this article, I provide some reasons to think that there is a relevant asymmetry in importance between the inclusion of all the capable and the inclusion of only the capable. I argue that it is much more important to include all the capable in political participation, and that as such, our practice should be tailored in such a way that it risks failing to include only the capable, when this risk brings about a more complete fulfilment of the requirement to include all the capable.

In Section 1 I examine the capacity requirement as practiced, and point out the key features of the standard used by modern liberal democratic states. This is followed in Section 2 by a discussion of those who are in fact incapable, as opposed to those who are excluded by the capacity standard as practiced in modern liberal democratic states. These two groups, while they overlap significantly, are not identical; a situation which provides us with the impetus to change our practice. Thirdly, I look at the potential harms that could arise from including incapable actors in our democratic process, along with the benefits claimed to arise from the current practice of exclusion of this group. Finally, I reverse the examination, looking at the harms caused by the current exclusion of the in fact incapable, and the benefits that could accrue to them were they included.

## 1. The Capacity Exclusion

Modern liberal democratic states unanimously run on an inclusive conception of democracy. In all such states, the default presumption is that all people are included in the franchise, and in political participation more generally. Exclusions are created by means of exceptions to this default presumption. The most common set of exclusions are what I will call the ‘SAC’, or Sane Adult Citizen exclusions. This set of exclusions serves to impose requirements of soundness of mind,<sup>2</sup> age,<sup>3</sup> and citizenship on people who claim their rights to political participation.<sup>4</sup> I should note here that this test applies primarily to formal methods of political participation, the classic example of which is voting. Informal methods, such as protest, membership of political groups, and so on, relax some or all of these requirements. However, for better or worse, it is through formal methods, usually voting, that political participation primarily influences societal outcomes.

Sanity and age requirements for political inclusion both rely on a notion of cognitive capacity, or a minimum standard required for ability to meaningfully participate in democratic procedures. Those who have negative non-standard cognitive ability, that is, ability significantly below the norm, and those who are below the minimum voting age, are excluded. Those below the voting age are excluded on the basis of a presumption that this is indicative of diminished cognitive capacity.<sup>5</sup> Citizenship, by contrast, is a group-membership test. Further to these restrictions, there is a less common, but still widespread exclusion imposed on those who have committed various crimes against the state and are being punished for them. This is the criminality exception. It varies more drastically than do the others, with many states not restricting participation at all for criminals, while at the other end of the spectrum some places will

permanently disenfranchise criminals, beyond the length of their actual punishments.<sup>6</sup> For my purposes here, I will set aside both the Citizenship and Criminality exclusions. Neither of these relies on capacity to generate a justification for exclusion.

By contrast, the justification for excluding both the young and the cognitively impaired is the same, and each exclusion relies for its legitimacy on the capacity requirement as articulated by Shapiro, namely that, when dealing with citizens in good standing of a democratic country, the only legitimate reason for excluding them from political participation is on the grounds of incapacity. The fear that they will participate poorly, or inefficiently, when given the opportunity is insufficient. Only that they actually are not capable of performing these actions as an agent.<sup>7</sup> These features of individuals, youth and/or cognitive impairment, are taken to be sufficient indicators of a lack of capacity for political participation. The argument for exclusion on these grounds runs as follows:

1. Only capable actors are entitled to political participation.
2. Cognitively impaired persons are not capable actors.
3. Young persons are not capable actors.
- C. Neither cognitively impaired persons nor young persons are entitled to political participation.

While the political position of members of both of these groups has been under-researched, there is more recent work on the position of the cognitively disabled than on that of young persons.<sup>8</sup> In this article, my main concern will be the position of the young, although I will draw on the arguments *vis-à-vis* the cognitively disabled to illustrate certain points. In this my approach is distinct from, for example, Linda Barclay, who explicitly rejects arguments for the inclusion of the young, labelling such arguments ‘strategically unhelpful’ as they ‘will never enjoy widespread acceptance’.<sup>9</sup> I disagree with Barclay on both the helpfulness of arguments for the inclusion of the young, and on the possibility of their widespread acceptance. I argue that consistency in application of our reasons for inclusion requires us to admit the capacity of young people, and that a failure to do so is a harm to be addressed in just the same way as is the harm caused by the exclusion of the cognitively disabled.

When states apply the above argument they will, as a consequence, exclude all who are below the age of majority from political participation on grounds of incapacity. This occurs in all democracies, although as mentioned above, there is some minor variation in the age of majority, and this variation itself suggests that the attribution of incapacity is flawed. It seems worrying for a proponent of the incapacity account to be tied to the claim that, for example, Austrian citizens have participatory capacity at sixteen, while Japanese citizens do not gain it until twenty.<sup>10</sup> Yet for all the weaknesses of the capacity justification for excluding young people from democratic participation, it is the most defensible grounds of exclusion.<sup>11</sup> Fewer people with cognitive impairment are excluded. Some democracies do not exclude anyone on this ground, but the majority of democracies have at least some restrictions based on cognitive impairment.<sup>12</sup> However, taken as a single reason for exclusion, it is clearly false that all those who are currently excluded on grounds of incapacity are in fact incapable of democratic participation. A trivial example of this is provided in the case of a seventeen-year-old who turns eighteen the day after the election. There is no good ground for claiming that the same person,

one day older, has any better grasp of the necessities of participation than they had the day before. This idea is captured by Cohen, who notes that while the age criterion bluntly distinguishes between the capable and incapable it is a fact of human maturation that people come gradually into capacity.<sup>13</sup> If this person has capacity in one instance, they have it in the other, and they should be treated similarly in each case. Rather than examining the application of the capacity exclusion, I propose here to focus only on those who are in fact incapable of political participation; those who have been correctly identified by the exclusion principle, and who are by the above standard legitimately excluded from political participation. Some of these will be persons with cognitive disabilities, but most will be drawn from the group of those under the age of majority. However, as will become clear in the following discussion of the content of the capacity requirement for political participation, the total number of in fact incapable young people is much lower than is commonly believed. There are sets of benefits and harms arising from their exclusion, and similarly, both benefits and harms potentially arising from their inclusion. All must be considered.

## 2. The In Fact Incapable

The justifiability of the capacity exclusion relies heavily on a particular conception of competence for political participation. The analysis of capacity commonly occurs in one of two ways. It is presented either as a minimal or an ideal conception. In practice, the actual capacity requirement in modern liberal democratic states is a minimal one, while the requirement appealed to in defence of current practices of exclusion is an ideal one, inconsistently applied.<sup>14</sup> The minimal requirements for capacity relied upon by modern liberal democratic states are captured by David Archard, who sets out the actual capacity required of political actors as being ‘a minimal rationality, an ability to distinguish between parties, candidates and policies in terms of interests, aims and goals which can be identified as worth promoting.’<sup>15</sup> He goes on to say that it ‘cannot be required (though it can be desired) of voters that they make wise choices.’<sup>16</sup>

This standard does not exclude many people. If you apply this minimalist conception you get something like the current standard for legitimate exclusion in the US, which is that ‘[a]n adult who lacks the capacity to understand the nature and effect of voting and to make an electoral choice may be precluded from voting.’<sup>17</sup>

An objection might be raised at this point that a minimalist conception of participatory capacity trivialises the ‘only’ requirement for participation sufficiently that of course including ‘all’ the capable is more important. There is some merit in this. Where there exists a relatively exclusive voting system, designed to ensure that only those displaying ideal or favourable characteristics participate, then it is comparatively more important not to allow people failing the standard to participate. But this type of elitist system has a range of different problems that are not applicable here, as the systems under which we operate (and should operate) are inclusive. There are however still persons who are excluded under a minimalist system. The very young are one such group, and some of the very old, particularly Alzheimer’s patients, seem to be legitimately excluded under this system. This latter group are not systematically excluded in current instantiations of participatory rights (although they can be

excluded on a case by case basis in many countries). This means that there is still, even with a minimalist conception of democracy, an actual problem of exclusion.

Just to reinforce the minimal nature of the capacity standard, as this adds weight to the privileging of the importance of including all capable over including only the capable, in the US, persons are considered incompetent to vote only if they 'lack the capacity to understand the nature and effect of voting such that they cannot make an individual choice'.<sup>18</sup> This requirement is taken very loosely, such that '[n]either the ability to read nor knowledge of English is required of voters and probing a potential voter's reasoning ability, understanding of the context in which the election is held, or understanding of the merits of any given ballot question would open the door to arbitrary (and possibly discriminatory) judgments reminiscent of the literacy tests used in the South to disenfranchise black voters until the middle of the 20th century.'<sup>19</sup> On this interpretation of the capacity standard, all adult citizens in good standing fulfil the requirements for inclusion, so their exclusion would straightforwardly undermine the inclusive goal of modern liberal democratic states. We should note that this could be, but need not be, framed as a rights issue, under Article 25 of the International Covenant on Civil and Political Rights. On such an account, the exclusion of adult citizens in good standing simply violates their rights under Article 25. This rights violation is however asymmetrical. You do not violate the right of the included to political participation by accidentally including one who does not fulfil the criteria.

That isn't to deny that there is potentially some wrong done through the mistaken inclusion of incapable actors. If actual and significant harm was done by false inclusion, then one could argue that, while no rights violations are occurring, something sufficiently wrong is being done to those legitimately included, by allowing the incapable to participate, that some few rights violations are acceptable, in order to suppress these other concerns. I am not however convinced that there is enough harm done to make including only the capable a reason to accept the incomplete inclusion of the capable, that is, to accept failing to fulfil the 'all' requirement. I turn to the potential and claimed harms in the following section.

### **3. Harms of Inclusion, Benefits of Exclusion**

Democracy seems plausibly to have both instrumental and intrinsic value.<sup>20</sup> We might think that Democracy has instrumental value in that it produces better outcomes for our political institutions than do other possible forms of government.<sup>21</sup> We might think Democracy has intrinsic value in that it confers some heightened degree of legitimacy on decisions made through this process, whether or not these decisions are instrumentally superior to those made through rival processes, such as the exertion of authority by a benevolent dictator. Accounts running this line often emphasise political equality.<sup>22</sup> Here, I remain neutral between these accounts. My claim is that we do not undermine the value of democracy by including incapable actors in our democratic systems. To defend this, I first examine how such harm could occur, then argue that it does not in fact do so.

One potential ground for harm to the intrinsic value of democracy relies on a claim of equality. If capacity for political participation is relevant to political inclusion, then it might be argued that including the incapable undermines equality between citizens

by ignoring a relevant difference between the capable and the incapable. Whether such an objection is capable of developing into a reasoned objection relies, in the first instance, on a clarification of the grounds of equality under consideration. If we take citizenship to be the domain under which equality operates here, the objection cannot even get started, as citizenship itself has no capacity requirement. In this instance, whether a particular citizen has participatory capacity is strictly irrelevant to their rights *qua* citizen. What is required for this objection is a capacity-dependent ground of inequality. There is at least one other important issue with this line of argument. We do not in fact care whether members of some groups are capable or not. Those who pass the SAC standard are included without consideration of capacity. Unless we are willing to institute a universal testing regime to ensure that the incapable are in fact identified and excluded, acting on this objection would simply reinforce an existing inequality between included and excluded incapable citizens.<sup>23</sup>

Alternatively, if the intrinsic value of democracy arises from *public justifiability*, including the incapable may undermine this value. This would occur if, for example, we took public justifiability to be a function of the support of the majority of the capable citizens of a particular state, for a given policy. Worries about public justifiability are, for example, tied to concerns about declining voter turnout, in that once voter turnout reaches a sufficiently low level, it can no longer be said that a majority of the public supports the government; only that a majority of those who vote support the government. This distinction may be significant.<sup>24</sup> So, if we grant the right to vote to incapable actors, who then do not use it, the voter turnout, as a percentage of those eligible to vote, is lowered, triggering the concern raised above. Alternatively, if we grant the incapable the right to vote, and they proceed to use it as they wish, a related but distinct concern is triggered, namely that the possibility is raised, that a particular action is undertaken, or a particular person elected, as a result of the political actions of declaredly incompetent actors; actors whose opinions we are all agreed ought not to be relied upon in decision-making. While this concern would be damning if accurate, I do not believe it is. There are a number of factors at play here. First, we must consider the actual standard required for political inclusion amongst those who satisfy the SAC requirements. In short, there is no lower bound for inclusion for anyone who is considered to be a sane adult citizen of a particular democratic state. No stupidity is too great, no delusion too intractable, to warrant us denying these individuals the right to vote.<sup>25</sup> The public justification account relies on the votes of the incapable being worse than the votes of the capable, and this is not a good assumption. Some capable actors will attempt deliberately to undermine the system, as occurs for instance in intentional informal voting, which in Australia can comprise a significant proportion of the total number of votes received. For the 2010 Federal election, 5.55% of votes cast were found to be informal, and 48.6% of those, 2.7% of the total number of votes cast, were assumed to be intentional instances of informal voting.<sup>26</sup> Australia has compulsory voting, which is sometimes offered as a solution to diminishing turnout, but which, I believe, does not in fact resolve the issues of public justifiability which it seeks to resolve.<sup>27</sup>

To expand on the extent of the capacity standard; in New Zealand, no adult citizen fails it unless they happen to commit criminal acts they would have been culpable for, but for their cognitive impairment. While we (unjustifiably) apply a different, stricter standard to young people, I shall set that issue aside for the time being. Anyone truly

incapable is therefore casting a random vote, as, potentially, are some of those taken to be capable. By comparison, it is possible for a capable political actor to deliberately miscast their vote. For example, a Green party supporter might lose a bet with a supporter of the ACT party (an essentially Libertarian party in New Zealand), the wager being to cast a party vote for the other party in question. This miscast vote is *worse* for democracy, on instrumental grounds, than a vote cast by an incapable agent, yet it is acceptable.

We might argue that democracy provides instrumental benefits. These claimed instrumental benefits of democracy could include the provision of better laws, and the improvement of the character/self of the participants. To the extent that including incapable actors makes worse laws more likely, or better laws less likely, this too would relevantly harm democracy. Including the incapable could result in this kind of problem in the following way:

One incapable voter, casting a random vote, results in Party A gaining the narrowest possible victory over Party B.

Party A then enacts demonstrably worse policies (measured as you will) than Party B would have enacted, had the incapable voter not cast the deciding vote.

Here, there is clearly a case of harm to the instrumental value of democracy. Because of the action of the incapable voter, Party A gains power and the ability to enact their harmful policy, while Party B cannot prevent Party A from doing this, nor implement their own, less harmful policy. While we should remember that Democracy doesn't guarantee optimal outcomes, but rather inclines or tends us towards better ones, this is clearly an instrumental harm. However, it is unlikely to be an actual, rather than a potential harm. The narrowness of margins in the hypothetical is necessary for the hypothetical to work, but also weakens it substantially. It makes clear that a large minority want the 'harming' party to succeed, even absent the incapable voter. Situations like this are perhaps more likely to arise in local than national elections, given the lesser turnout in these elections. In the hypothetical, the incapable voter is portrayed as being the marginal case, the one voter on whom responsibility for the worse outcome rests. But each voter who votes for the worse outcome is responsible to an extent, and while the incapable voter voted in that way by chance, in that they had no deliberate intention to generate the particular outcome under discussion, each of the capable voters considered voted for the worse outcome deliberately. I would argue that in this type of case, the capable voters are more at fault than the incapable ones. It is they who could be induced, by public education, for example, to vote in line with their own interests, or the interests of those they care about, rather than according to the desires of the harmful political party. As such, this consideration provides us with reasons to argue for more voter education, but not with reasons to exclude the incapable.

One might argue that the above is a point in favour of the introduction of trusteeship or surrogate voting for the incapable, as a solution intermediate between their continued exclusion and their full integration into the franchise. However, the usefulness of surrogate voting is not clear. While Martha Nussbaum claims that it is essential to the protection of the rights of the cognitively impaired,<sup>28</sup> Barclay and Kacey

Warren have both claimed that it does not provide the purported benefits. Barclay claims that '[v]oting via a guardian does nothing to express the important capabilities that make voting an essential entitlement for a life of human dignity according to Nussbaum's capabilities approach.'<sup>29</sup> Warren agrees, claiming that political surrogacy 'does not and cannot make political participation feasible for those with profound cognitive impairments.'<sup>30</sup> There are also some worries about the motivation for assigning a trustee. For example, determining the level of cognitive disability which triggers the assignation of a trustee could, as a practical matter, be difficult. If the desire to vote against one's best interests triggers political surrogacy, many of the least well off in our societies, who vote for right wing political parties, would fall afoul of the requirement. Yet, I take it we ought not to deny them the vote in favour of trustees. And if they ought to be able to vote against their interests, then someone who simply votes randomly is at least in some respects voting in a superior manner to them, as they may or may not vote against their interests, depending on how they end up casting their vote. Where that is true, we would be engaging in political surrogacy for those who demonstrably vote better than others, to whom we do not require surrogates. As such, I feel that political surrogacy, while nobly intentioned, is more fraught than it at first seems.

We ought also to consider the distribution of votes cast by the in fact incapable, before determining whether, on instrumental grounds, their inclusion would undermine the value of democracy. If the state in question runs a first past the post system, under which the winner is decided by simple majority of the votes cast, the net effect of any sufficiently large number of random votes is neutral. They will balance out amongst the dominant parties in equal numbers. Votes for the smaller parties, which will occur in equal numbers as votes for the larger parties, will simply be discounted, as are the votes cast by capable actors for smaller parties. If there are only a small number of random votes being cast, the chance that these will pool disproportionately to one of the major parties is increased, as small sample sizes are more likely to deviate from expected outcomes due to the law of large numbers. The law of large numbers says that as your sample size grows, the sample will increasingly resemble the statistical average distribution. In the case of randomly allocated votes, each option will on average receive an identical number of votes, thus not altering the final result. So, in such a system, it is in fact beneficial, if we have any random votes in the system, to have as many of them as possible.

The situation is more complex in proportional representation systems, such as are used in Germany and New Zealand. In these systems, the effect of enfranchising the incapable will benefit the smaller parties. So for example, in an election featuring five political parties and random votes, each party will get 20% of the vote. Those who would get less than 20% of the considered vote thereby gain at the expense of those who get more than 20% of the considered vote. Whether this result in fact alters outcomes depends on the number of votes cast, the number of parties involved, and the margins of victory. To illustrate the issues, consider the 2011 New Zealand election. In this election thirteen parties competed for the party vote. Had the entire country voted randomly, each party would have received 7.69% of the total vote. The closest minor party to not gain seats in the house was the Conservative party, with 2.76% of the party vote. In order to gain seats in parliament without having one at least one geographic seat, a party must gain 5% of the party vote. In this case, even if 20% of the total number of votes cast were cast randomly, the boost to the Conservative party

would not have been sufficient to get them into parliament. I take it that 20% is much greater than even the most pessimistic calculation of the number of in fact incapable citizens in modern liberal democratic states.

Some further objections include the concern that the incapable might not act randomly, but act as someone else tells them to. If this is so, then rather than the random distributions I have discussed above, we could see a concerted effort by some particularly devious party to target the included incapable, and artificially inflate their vote totals. This might seem like a concern, but it is in fact something which is an accepted part of our political system as it stands. We neither ask nor care whether someone is voting through well considered deliberation, or as their religious leadership tells them to, as their political ideology requires, or simply as someone they admire has claimed to be voting. Discriminating against the incapable for doing what the devout, the ideologically compelled, and the unconfident do freely would not be defensible. As noted earlier, the likelihood of this being relevant is increased in local as opposed to national elections. However, the ideal solution to this concern is not to prevent people from voting, but to encourage more people to vote, thereby diluting the impact of the interest group in question (whether the group is a congregation voting according to their command, or a group of incapable voters being coerced to vote in a particular way). Our democratic systems are not optimising ones, and there seem to be good reasons not to want them to be. We already accept much inefficiency for the sake of inclusion amongst those who are currently included, and the inefficiencies we have vastly overshadow the additional ones that we risk developing through the inclusion of the incapable. It does not seem likely that including the incapable will push our systems over the edge, or upset the fine balance of inefficiencies which currently exists.

One further set of concerns, though, addresses not democracy itself, but the effect that the inclusion of incapable voters would have on the position of those capable voters who are currently included. That is, do we harm capable voters by including incapable voters? This could occur either through vote dilution, or through the devaluation of the idea of the vote. In a vote dilution situation, each vote is worth less when we increase the total number of votes cast. In a vote devaluation situation, the value of having a vote is tied to the requirements for being granted it, so the question is raised, what value does it have if it is given to just anyone? I believe that these objections both suffer the same fault, in that they overstate the actual value of voting, and underplay the symbolic value of voting. The vote dilution objection proves too much, as it implies that we harmed men by including women in the franchise, harmed 'white' people by including 'people of colour' in the franchise, and so on. While this is true in a strict sense, in that the value of each individual vote was lessened each time the franchise was expanded, and lessened still further by the on-going population increase common to most democratic societies, it is clearly not the problem it is made out to be here. Vote dilution is not intrinsically wrong, so appeal to it alone cannot provide an objection to the current proposal. Much the same analysis can be made of vote devaluation, and to the same end. A cognate worry might be that the inclusion of young citizens and the cognitively disabled will cause some of the currently included to embrace non-democratic means of opposition to the inclusion, such as manipulation and intimidation of those young and cognitively disabled who attempt to vote. This is though no reason not to allow the young or the cognitively disabled the right

to vote. Rather, it is a reason to protect their right to vote against those who would illegally attempt to prevent them from exercising it.

There are also particular circumstances in which we might think that granting the right to vote to incapable actors could harm them. So, for example, under the Australian system as it stands, concurrent with being granted a right to vote, citizens are compelled to vote. There is a penalty regime in place to punish those who do not participate in elections. Compelling the incapable to vote could clearly harm them. Australia, for example, might want an exception to the penalty regime for non-participation, if it had truly universal enfranchisement of citizens. But outside of these specific situations, for which legislative fixes could easily be tailored, there do not seem to be clear harms to the incapable arising from inclusion, nor benefits arising from exclusion.

It seems then that less harm is done by false inclusion than by wrongful exclusion, firstly because of where the importance of political participation lies. I claim, in support of privileging the 'all' over the 'only', that most of the value of a right of political participation lies in the recognition granted to a person as a relevantly equal political actor within a democratic society, rather than in the ability, through political participation, to shape the outcome of political decision-making. This is because, especially when considering voting, the marginal utility of any given vote is miniscule. In the vast majority of instances, an individual's vote simply does not matter. Proponents of the rational voter model have suggested that it is rational not to vote; the chance of making any difference is so small that the time it would take is simply better spent doing anything else.<sup>31</sup> Even where the cost of voting is small, the expected benefit to you is tiny because you have such a tiny chance of casting a deciding vote. So, if we accept this description of the value of voting, not including all capable actors results in rights violations being committed against those capable and excluded, and thus a significant level of wrongness. Over-inclusion by contrast has marginal negative consequences. As such, we ought to treat the inclusion of all capable as significantly more important than the exclusion of incapable actors. We should privilege 'all' over 'only'.

What this means for the importance of including all or including only the capable, is that rather than displaying any of those characteristics of ideal citizens, the people being excluded are not going to be acting in a concerted manner such that the interests of any particular identifiable group of citizens are undermined by the inclusion of this incapable actors. Those excluded from a democratic system reliant only on a minimal conception of rationality to facilitate participation, will be incapable of maintaining particular positions. Their inclusion results in the addition (if they choose to participate) of essentially random votes (or whatever the measure is for a particular instance of participation). This means that, if we refer back to the discussion of the marginal utility of individual votes, we see that their involvement is exceedingly unlikely to disrupt the outcome. Further, the inclusion of any reasonably large number of these incapable persons increases the chance that their votes will cancel each other out. Take the example of tossing a fair coin. It is far more likely that a perceived unfairness will result from a small number of coin tosses than from a large one, as in the long run, the distribution of results will move towards the theoretical average, while for any small case, variation away from the average is more likely to be observed.

#### 4. Harms of Exclusion, Benefits of Inclusion

A democratic state that engages in the exclusion of some of its citizens, or more broadly, some of those affected by its actions or subject to its authority,<sup>32</sup> may in doing so be violating an expectation of equal treatment. This is a stronger ground for raising an equality objection than was the claim of harm resulting from inclusion of the incapable, above. Citizens of the state have differential access to certain of their basic rights, namely the right to vote. However, whether this is sufficient to constitute a harm arising from the exclusion of incapable actors from participation depends on features of the expectation of equal treatment. If we cause no harm to the incapable by excluding them, this provides reason not to worry about the expectation. Similarly, if we take the expectation of equal treatment to be defeasible, then simply pointing to the features the in fact incapable lack can justify their exclusion – the expectation no longer applies.

A stronger objection to the exclusion of the incapable arises from the consequences of exclusion for particular identifiable groups in society. Exclusion silences, or undermines the ability of these groups to speak. So, for example, when the young are excluded from political participation, their parents have to divide their interests between themselves and their children, thus diminishing both. A parent who is forced to choose between what is best for themselves and what is best for their child, is then harmed by the exclusion of their child from participation in a way that the non-parent cannot be. The same type of situation arises in the cases of people with cognitive disabilities. Where those with cognitive disabilities are excluded, they and their caregivers are similarly denied voting power.<sup>33</sup> The cognitively disabled cannot vote at all, while the caregivers must weigh both their own preferences, and those of the silenced others, in determining how to act. As such, this is at least one example of an identifiable, if difficult to quantify, harm, arising from the exclusion of the in fact incapable from political participation. The harm falls not only on those excluded, but also on those who are connected to them. One suggestion to overcome this harm is the development of proxy voting systems, whereby surrogates or trustees cast votes on behalf of the incapable.<sup>34</sup> Such an approach would, if suitable surrogates could be found, who could in fact be trusted (in the context of a secret ballot) to cast votes in the interests of those they have charge over, provide some advantages. However, the suggestion is not without its critics.<sup>35</sup> Barclay, for example, is deeply suspicious of proxy voting as a solution to the exclusion of the cognitively disabled, claiming that it jeopardises the integrity of the vote.<sup>36</sup> She instead suggests, and I agree with her, that all efforts should be made to enable persons with disabilities to vote for themselves, and that if these efforts fail, 'it will be false to argue that she has been *unjustly* excluded'.<sup>37</sup> I do not want to enter into a detailed discussion of the strengths and weaknesses of the positions on proxy voting here, but would note that my suggestion of giving the incapable a right to vote provides them with access to a Human Right that proxy or surrogate voting does not, while the other interests that are meant to be protected via surrogate voting could perhaps be protected via other means. It is not clear to me that the protection of the interests of the incapable ought to be contingent on the recognition of those interests through democratic processes. Rather, the protection of the interests of the incapable, including particular interests that require more intensive protection, ought to be a priority of a just state, independent of voting outcomes.

There are also a number of indirect, but no less relevant harms, which seem to be generated by the practice of excluding incapable actors from political participation. The first of these is inconsistency. Due to the way in which practices of exclusion are structured in modern liberal democratic states, not all the in fact incapable are excluded. Young people as a group are excluded en masse, and as a result, those young people who are in fact incapable of political participation are excluded. However, there is no mechanism in place to exclude the in fact incapable elderly from political participation, other than through declarations of cognitive incapacity. As Appelbaum, Bonnie and Karlawish have shown, many elderly people who in fact cannot perform the basic requirements of political participation nevertheless continue to desire to participate, and are allowed to do so by the state.<sup>38</sup> This inconsistency results in a more culpable situation of unequal treatment than the one discussed above, as here, the inequality is not mitigated by a difference in capacity. Both the included and excluded have the same capacity, but some are included for structural reasons. We have, as Nussbaum, Warren and others have argued, good reasons to make available as wide an array of means of participation as is practicable, in order to ensure that those who lack particular communicative capacities have access to alternative means of expressing their voting preferences. This example simply notes that by providing these further means, we have made possible continued voting by those who no longer have the cognitive capacity to vote well, and have thereby made the continued refusal to let others, similarly situated, vote at all, less conscionable.

A further spill-over effect of the exclusion of the incapable is biased political outcomes. Those who form part of the voting public, have more influence over policy than those who do not. To demonstrate how this discrepancy causes harm, consider the comparative expenditure on services for young and old citizens in the United States. In 2009, the US spent \$2.4 on the elderly for every \$1 spent on children. This discrepancy expanded to \$7/\$1 at the Federal level.<sup>39</sup> Politicians from any party have reason to act in ways beneficial to the elderly, who vote, while lacking reasons to act for children, who do not. While it can be claimed against this that children have parents who vote on their behalf, this harm links to the harm of silencing identifiable groups, discussed above. Because young people are silenced in this way, parents of young people have to consider the wellbeing of multiple people in forming political intentions and in acting upon them.

Marginalisation also occurs when we exclude incapable actors from political participation. Young people (those below the voting age) comprise around 20% of the population of most modern liberal democratic states, and their views and opinions are systematically ignored, or when heard, given lesser weight than those of the voting public, even on issues that are directly relevant to young people, such as schooling. While much of this objection could be overcome by the institution of methods of political inclusion which in fact distinguished between the capable and incapable,<sup>40</sup> rather than simply assuming all young people to be incapable, there would still be a small group of young people, particularly at the primary school age group, who are in fact incapable and excluded, and their perspectives and desires would remain marginalised. This group is, however, much smaller than is commonly supposed.<sup>41</sup> Absent compulsory voting, they are also highly unlikely to participate. As such, even the inclusion of those few young people who are in fact incapable would not have a significant impact on our democratic processes.

To summarise the harms generated by the exclusion of the incapable from political participation, this exclusion marginalises and renders invisible particular segments of society. It presents harms to the ability of both those excluded to have their perspectives, opinions and desires heard and considered by society and by the government, and to the ability of those connected with the incapable to do the same. It generates marginalisation and silencing of the excluded incapable, while privileging those incapable who have not been detected, and who are as such still included. I turn now to look at the potential benefits (other than the removal of these harms) which could arise from including even the incapable.

Firstly, by including the incapable, a state which does so presents the existence of incapable citizens to those capable citizens who are currently included by default. There is a saying, 'out of sight, out of mind', which captures the current status of the politically excluded. Inclusion of them would cause this to collapse. This benefit can be developed into a case for epistemic benefits to democracy itself. For example, we might think that democracy is valuable instrumentally, in that it brings about better outcomes for more of the population, than do other possible forms of government. Capable voters are epistemically advantaged when forced to acknowledge the existence of the incapable in society. They are made aware both of the existence of these incapable actors, and of the positions, desires, and goals of these incapable actors. When determining how to vote, or what they want to do, capable actors who are exposed to the presence of the incapable in society, have better knowledge of the effect of their decisions, than those who are not so exposed. Inclusion provides this exposure.<sup>42</sup>

We might also claim that the right to vote has power in and of itself. Primarily, such power is symbolic, in that it represents the standing of the citizen who holds it, both as a participant in governance, and as a human being, equal to others who have the same right. There is also some marginal actual power involved, in that for any particular individual, there is some small chance that your vote could make a difference to political outcomes.<sup>43</sup> Exclusion from the franchise denies the incapable access to this power, both symbolic and actual.

Finally, we might consider the direct benefits accruing to the presently incapable from their potential political inclusion. For at least some incapable agents, such as young children, inclusion despite their incapacity would enable them to learn the required capacity for meaningful and engaged participation.<sup>44</sup> Much of the recent work on the comparative political apathy of (particularly) 16- and 17-year-olds has focused on this concern, and it seems an important one. If you as an individual know you are not entitled to engage in some particular activity, you have a strong disincentive to care about that activity. Some of the excluded incapable, such as children, have no incentive to learn about politics simply because it will under the current system be years before the knowledge could do them any good.<sup>45</sup>

## **5. Conclusion**

The number of in-fact incapable actors is significantly lower than the number of people who are currently excluded from formal means of political participation. The accepted standard for capacity for political participation is minimal, and many of those

excluded in virtue of their age could in fact satisfy the standard if they were subjected to the same restrictions as adults.

There are two ways to resolve the problem I have outlined in this article. One possibility is to defend the incapacity exclusion, and try to apply it equitably. Utilising this approach, we could avoid the issues of inconsistency and inequity which I have discussed, but I believe this approach would not only continue to generate many of the harms I have identified of marginalisation and silencing of particular identifiable groups in society, it would exacerbate these problems by excluding more.<sup>46</sup>

The other possibility is that we could abandon the capacity requirement, and instead allow all citizens to vote, regardless of their age or cognitive capacity. As I have argued here, there are no significant harms to either individuals within a state which chooses this path or to the status of democracy itself that are likely to arise from this change in our inclusionary measures. Further, this approach would serve to eliminate many if not all of the harms I have identified as arising from the current practice of exclusion of some in-fact incapable citizens from participation. This possibility is compatible with retaining some exclusions from political participation for criminals. The suggestion is not that all citizens must always be included regardless of their actions, only that our default perspective should be inclusion for all citizens. Particular citizens imprisoned for particular crimes may still have certain of their rights, in this case, their right to vote, suspended.<sup>47</sup>

Our current practice of political exclusion is grounded on a principle which generates uncertain benefits and is inconsistently applied. Including the incapable does little actual harm and generates significant benefits. The inconsistency undermines the practice of exclusion. We ought then to enfranchise at least all resident citizens of a state, regardless of their capacity. While I further believe that we should also enfranchise permanent residents and citizens living abroad who maintain connections with the state, I leave defence of these claims for another time.<sup>48</sup>

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## NOTES

- 1 Claudio Lopez-Guerra, 'Enfranchising minors and the mentally impaired', *Social Theory & Practice* 38,1 (2012): 115–138, at p. 116.
- 2 Only four states (Canada, Ireland, Italy & Sweden) had no restriction on voting for those with cognitive impairments, as of 2001. See André Blais, Louis Massicotte & Antoine Yoshinaka, 'Deciding who has the right to vote: A comparative analysis of election laws', *Electoral Studies* 20,1 (2001): 41–62.
- 3 In the vast majority of modern liberal democratic states, the age of participation is set at eighteen (see Blais, Massicotte & Yoshinaka op. cit.). Austria has recently lowered the age to sixteen. I have argued (in Nicholas Munn, 'Capacity testing the youth: a proposal for broader enfranchisement', *Journal of Youth Studies* 15,8 (2012): 1048–1062) that other states should do the same, or reduce the age even further.
- 4 Relatively few countries allow non-citizens to vote. See Rainer Bauböck, 'Expansive citizenship – voting beyond territory and membership', *PS: Political Science & Politics* 38,4 (2005): 683–687. New Zealand for example allows permanent residents to vote. New Zealand also excludes non-resident citizens from voting, which may itself cause harms. I reserve this discussion for another time.
- 5 I argued in Munn 2012 op. cit., that this presumption is deeply flawed.

- 6 Many, particularly in the US context, argue that disenfranchisement itself is not relevantly a punishment. It is sometimes characterised as a ‘civil disqualification attending conviction’, see Martin Wasik, ‘Civil disqualifications attending conviction: a suggested conceptual framework’, *Cambridge Law Journal* 56,3 (1997): 599–626.
- 7 Ian Shapiro, *Democratic Justice* (New Haven, CT: Yale University Press, 1999), pp. 68–69.
- 8 Linda Barclay, ‘Cognitive impairment and the right to vote: a strategic approach’, *Journal of Applied Philosophy* 30,2 (2013): 146–159; Kacey Warren, ‘Does Nussbaum’s capabilities approach support political surrogacy?’, *Social Philosophy Today* 31 (2015): 111–125; Martha Nussbaum, ‘The capabilities of people with cognitive disabilities’, *Metaphilosophy* 40,3–4 (2009): 331–351; Eva Kittay, *Love’s Labor: Essays on Women, Equality and Dependency* (New York: Routledge, 1998).
- 9 Barclay op. cit., p. 151.
- 10 Louis Massicote, André Blais, Antoine Yoshinaka, *Establishing the Rules of the Game* (Toronto: University of Toronto Press, 2004).
- 11 Munn 2012, op. cit.; Nicholas Munn, ‘Capacity-testing as a means of increasing political inclusion’, *Democratization* 21,6 (2014): 1134–1152.
- 12 Massicote, Blais & Yoshinaka op. cit.; Nina Kohn, ‘Cognitive impairment and the right to vote: rethinking the meaning of accessible elections’, (2009). [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1342681](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1342681)
- 13 Carl Cohen, ‘On the child’s status in the democratic state: a response to Mr. Schrag’, *Political Theory* 3,4 (1975): 458–463.
- 14 Stephen L. Elkin & Karol Edward Soltan (eds), *Citizen Competence and Democratic Institutions* (University Park, PA: Penn State Press, 1999), p. 386.
- 15 David Archard, *Children: Rights and Childhood* (London: Routledge, 1993).
- 16 Archard op. cit.
- 17 Jason H. Karlawish et al., ‘Addressing the ethical, legal, and social issues raised by voting by persons with dementia’, *JAMA: The Journal of the American Medical Association* 292,11 (2004): 1345–1350.
- 18 *Doe v Rowe*, 156 F Suppl 2d 35 (D Me 2001).
- 19 Paul S. Appelbaum, Richard J. Bonnie & Jason H. Karlawish, ‘The capacity to vote of persons with Alzheimer’s disease’, *American Journal of Psychiatry*, 162 (2005): 2094–2100, at p. 2097, citing Alexander Keyssar, *The Right to Vote: The Contested History of Democracy in the United States* (New York: Basic Books, 2000).
- 20 I do not take a position on the value of democracy here. I hope to show that, whether we take democracy to be instrumentally or intrinsically valuable, this does not alter the calculus for inclusion.
- 21 See David Estlund, *Democratic Authority: A Philosophical Framework* (Princeton, NJ: Princeton University Press, 2007).
- 22 See Charles R. Beitz, *Political Equality: An Essay in Democratic Theory* (Princeton, NJ: Princeton University Press, 1990); Thomas Christiano, *The Rule of the Many: Fundamental Issues in Democratic Theory* (Boulder, CO: Westview, 1996); Robert E Goodin & Diane Gibson, ‘Rights, young and old’, *Oxford Journal of Legal Studies* 17,2 (1997): 185–203.
- 23 Jason Brennan has suggested an approach along these lines, in ‘The right to a competent electorate’, *The Philosophical Quarterly* 61,245 (2011): 700–724. I do not think his suggestion succeeds, but reserve this discussion for elsewhere.
- 24 See Lisa Hill, ‘On the reasonableness of compelling citizens to ‘vote’: The Australian case’, *Political Studies* 50 (2002): 80–101.
- 25 Again, this is a description of the situation as it is, not (necessarily) as it should be.
- 26 Australian Electoral Commission, ‘Analysis of informal voting, House of Representatives, 2010 Election’, *Research Report Number 12*, 29 March, 2011.
- 27 This too is an argument for another article. In short, the benefits of compulsory voting for turnout are not unique to compulsory voting, as they are able to be achieved through other means such as voter education, and the provision of a range of methods for casting votes (such as early voting, postal ballots, and similar initiatives). Further, compulsory voting undermines the public justifiability of the outcomes of elections, compared to those of jurisdictions without compulsory voting, simply insofar as there is less reason to believe that the votes cast are being cast freely, rather than under duress. The act of compulsion has a negative effect on the justifiability of the outcome.
- 28 Nussbaum op. cit.
- 29 Barclay op. cit., p. 151.
- 30 Warren op. cit., p. 116.

- 31 Most famously, Anthony Downs, *An Economic Theory of Democracy*, (New York: Harper, 1957); see also William Riker & Peter Ordeshook, 'A theory of the calculus of voting', *The American Political Science Review* 62,1 (1968): 25–42.
- 32 I will refrain here from entering into discussion of how best to frame the control over people by states, but important alternatives are offered by Robert E. Goodin, 'Enfranchising the earth, and its alternatives', *Political Studies* 44,5 (1996): 835–849, and Nancy Fraser, 'Abnormal justice', *Critical Inquiry* 34,3 (2008): 393–422.
- 33 Some discussion of this occurs in Nussbaum op. cit.
- 34 Nussbaum op. cit.
- 35 Kacey Warren, *Recognizing Justice for Citizens with Cognitive Disabilities*, (New York, Lexington, 2015)
- 36 Barclay op. cit.
- 37 Barclay op. cit., p. 155.
- 38 Richard Bonnie & Jason Karlawish, 'Voting by elderly persons with cognitive impairment: Lessons from other democratic nations', *McGeorge Law Review* 38 (2007): 880–916; Appelbaum, Bonnie and Karlawish op. cit.
- 39 Julia Isaacs, Katherine Toran, Heather Hahn, Karina Fortuny & C. Eugene Steuerle, 'Kids' share 2012: report on federal expenditures on children through 2011', <http://www.urban.org/UploadedPDF/412600-Kids-Share-2012.pdf> Accessed 14 May, 2013.
- 40 See Munn 2012 op. cit.; Munn 2014 op. cit.
- 41 Munn 2012 op. cit.; Munn 2014 op. cit.
- 42 This claim arises out of Standpoint Theory, applied here to the particular disadvantage of political incapacity. An overview can be found at Tracy Bowell, 'Feminist standpoint theory', *Internet Encyclopaedia of Philosophy* (2011), <http://www.iep.utm.edu/fem-stan/>
- 43 Subject, of course, to the detailed literature discussing whether and under what conditions exercising this right is a rational action for any citizen to perform. See Downs op. cit. for the start of the debate. More recent contributions include: Timothy J. Feddersen, 'Rational choice theory and the paradox of not voting', *The Journal of Economic Perspectives* 18,1 (2004): 99–112; Robert Urbatsch, 'The paradox of voting intelligently', *Public Choice* 150,3–4 (2012): 511–524.
- 44 Andrew Rehfeld, 'The child as democratic citizen', *The ANNALS of the American Academy of Political and Social Science* 633,1 (2011): 141–166.; Gerison Lansdown, 'Promoting children's participation in democratic decision-making', *UNICEF Innocenti Insight* (2001).
- 45 Vivian E. Hamilton, 'Democratic inclusion, cognitive development, and the age of electoral majority', *Brooklyn Law Review* 77 (2012): 1447–1513.
- 46 A resolution of this kind has been suggested by Jason Brennan (op. cit.), who argues for a higher standard for inclusion than currently practiced.
- 47 See Nicholas Munn, 'The limits of criminal disenfranchisement', *Criminal Justice Ethics* 30,3 (2011): 223–239.
- 48 I would like to thank the editors and reviewers from the *Journal of Applied Philosophy* for helpful comments on earlier versions of this article.