

The other within: Agency and resistance under conditions of exclusion

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journals.sagepub.com/home/psc**José Medina** 

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Abstract

This essay puts in conversation some of Seyla Benhabib's insights about exiled, stateless and migrant populations with ongoing discussions in critical race theory about the racial exclusions of indigenous populations and populations of colour not only in the foundations of Western modern states but also in their contemporary functioning today. The essay locates these exclusions not only in the *failures* of states but also in their proper functioning, that is, in their very design and constitutive structures, focusing for this purpose on what is described as *constitutive exclusions*. The essay argues that the relationship between legal agency and social and political agency needs further articulation within Benhabib's *jurisgenerative* politics in order to properly address constitutive exclusions.

Keywords

agency, critical race theory, political exclusion, resistance, social death

My commentary will try to stage a dialogue between Seyla Benhabib's *Exile, Statelessness, Migration* (2018) and critical race theory. My aim is to put in conversation some of Benhabib's provocative insights about exiled, stateless and migrant populations with ongoing discussions in critical race theory about the racial exclusions of indigenous populations and populations of colour not only in the foundations of Western modern states but also in their contemporary functioning today. I will be locating these exclusions not only in the *failures* of states but also in their proper functioning, that is, in their very design and constitutive structures, focusing for this purpose on what I will describe as *constitutive exclusions*.

Constitutive exclusions are those that cannot be properly located simply *outside* the legal and political structures of states or international organizations (in a political or legal

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limbo) but within the very fabric of national and international political entities and within the very frameworks of state law and international law. Repairing these constitutive exclusions does not simply call for an expansion of the state and supranational entities such as the European Union. Properly addressing constitutive exclusions requires more than simply *more inclusion* in the political communities in question as they have been set up. It requires radically rethinking and reconfiguring what inclusion means and what those political communities (and their bounded existence) are. The troubling suggestion here is that the figure of the *non-citizen* may be more than a contingent or accidental outer limit to political inclusion in the modern state. As discussions of *social death* in critical race theory (Brown 2009; Patterson 1985) and discussions of geopolitical exclusions in postcolonial states in decolonial theory (Dussel 2013; Mbembe 2001) underscore, the exclusions of colonized populations, of enslaved populations, of imprisoned populations and of so-called *illegal aliens* may be more than accidental failures of the state: they may be *constitutive* failures; or, put differently, they may be the *conditions of possibility* of its success or of its proper functioning. These constitutive exclusions seem to give shape and form to the past and present of political inclusion in modern states, informing what *citizenship* means. Constitutively excluded populations are, on this view, those on the backs of which the privileges of the citizen have been built and maintained.

It is not surprising that liberatory social movements that denounce the constitutive exclusions of modern Western states tend to manifest themselves in purely negative, destructive and anarchic ways, with slogans such as ‘Make yourself ungovernable!’ or ‘Down with the state!’ But is the anti-institutional and anti-state politics of these social movements enough for the political liberation of exiled, stateless and migrant populations? We can say ‘down with the state!’ all we want, but state structures are not going away any time soon. I will not be arguing here for a complete dismantling of the legal and political structures of states or international organizations. Rather, with critical race theorists and legal scholars such as Kimberlé Crenshaw (1989) and Patricia Williams (1992), I want to suggest that the challenge for us is how to think about these legal and political structures differently and how to inhabit them critically in order to work toward a *radical* transformation of political inclusion. I want to identify the conceptual resources and suggestions that we can find in Benhabib’s discussions for a radical politics of inclusion and where her discussions may need to be deepened or further elaborated to address the predicament of those who have been *constitutively* excluded from political communities. The aim of my critical engagement with Professor Benhabib is to broaden the scope of her discussions of exclusion and to invite her, through the foregrounding of constitutive exclusions, to elaborate further her insights about the agency and resistance of the excluded. I will raise two sets of open-ended questions: first, questions concerning the value and impact of foregrounding the constitutive exclusions of colonized populations, of enslaved populations, of imprisoned populations and of so-called *illegal aliens*; and second, questions about what the agency of these excluded populations can tell us about possibilities of resistance and transformation, including here legal resistance and legal transformation – and I am thinking specifically of Benhabib’s original and fruitful concept of *jurisgenerative* politics, to which I will return later.

Benhabib elucidates brilliantly the different forms that the conditions of exile, statelessness and forced migration can take through an analysis of key ideas and views in the political thought of Jewish European exiled philosophers in the 20th century. She also draws very interesting connections with the refugee crisis of the 21st century and with other forms of exile and statelessness that have been prevalent in the modern and post-modern world. But, although Benhabib focuses on transnational forms of displacement and I am also interested in the global nature of the predicament of the excluded from political communities, I want to foreground what I would describe as *internal* exile and statelessness in order to highlight how constitutive exclusions operate within the social and legal fabrics of a political community.

Discussions of political exclusion should begin with *internal* exile and statelessness for two reasons. In the first place, exile and statelessness *begin at home*, that is, they always start with an internal form of exclusion. As Benhabib puts it in the introduction, the exilic condition that ‘all thinkers considered in this volume were cognizant of and that is reflected in myriad ways in their writings’ is the ‘*condition of becoming a stranger in one’s own land* because one did not belong to a national “family writ large” (or “Christianity writ small”)’ (emphasis added, p. 3). There are excluded subjects who can escape and, if lucky enough, may find a home elsewhere; and there are excluded subjects who – sometimes for contingent reasons but sometimes for structural reasons – are stuck in the very community that rejects them or disowns them, being doomed to live the life of the excluded, of the *other within*, in the very community that excludes them, in some ways facing a living death or *social death* (as described by Orlando Patterson), but in other ways, being very much alive and in fact providing the sustenance for the life of the community. The history of American wealth as we know it could not have happened without colonial displacement, without slavery, without segregated wages, without the forced labour of imprisoned populations and without the undignified wages of undocumented workers.

In the second place, I want to foreground internal exile and statelessness, because these forms of constitutive exclusion are structural and systemic and they affect the standing of all, both citizens and non-citizen alike. Far from being a transitory predicament and a transient status, the constitutive exclusion of internal exile and statelessness has structural features and leaves indelible marks on those who suffer from it and moral and political stains on those who benefit from it. I am particularly interested in cases in which exclusion becomes a permanent or semi-permanent condition: the condition of those who are non-accidentally stuck in the status of the non-citizen so that such status cannot be shaken off or it can only be shaken off at a high price, such as being doomed to second-class citizenship or to a form of citizenship under surveillance or under tutelage. And I am here thinking specifically about the *afterlife of slavery* – in Jim Crow laws, in the 13th Amendment and in the exploitation and the right curtailment of imprisoned populations; but I am also thinking about the *afterlife of colonization* – in the confinement in reservations of indigenous populations, in ongoing forms of ecological and economic displacement and so on.

The reason why there are forms of exile and statelessness that begin at home and leave indelible marks is because they shape that *home*, because they come to define the terrain of that *homeland*, that is, because they are *constitutive* exclusions. Constitutive exclusions are those internal exclusions that are not arbitrary or accidental, but very much a

necessary part of how membership in a community has come to be defined. The crucial dependence of American citizenship on the figure of *the non-citizen*, both its conceptual dependence and its material dependence, is a perfect illustration. Judith Shklar's analysis in *American citizenship: The Quest for Inclusion* (1998) suggests that the development of the idea of *the citizen* in the United States went hand in hand with the development of chattel slavery, that is, of the commodified non-citizen. According to Shklar, the standing of the American citizen was defined by the right to vote and the right to earn wages; and this standing was erected and rendered meaningful through its counterpoint or, as Shklar puts it, 'its absolute denial' (p. 1): the subject without rights and without the possibility of acquiring rights, in particular, the rights to vote and to earn wages. What did it mean for enslaved subjects, from the position of the non-citizen, of not having legal standing, to exercise 'the right to have rights'? This struggle was not only to abolish their condition of non-citizenship but also to abolish (or at least radically transform) the condition of citizenship as instituted, that is, as a privileged standing defined by the exclusive rights of voting and earning wages.

The constitutive exclusion of the non-citizen cannot be dismantled with the stroke of a pen by signing it into law – this is the myth of the Emancipation Proclamation, the myth of Lincoln as the Great Emancipator. Abolition is not achieved by legislative fiat, through a formal legal act that opens the door of political inclusion to all. Abolitionism is a constant and yet unfinished struggle of overcoming forms of subjection built into our democratic structures. As Angela Davis (2016) suggests in *Freedom is a Constant Struggle* (echoing Orlando Patterson), freedom was first imagined in American democracy not by the founding fathers but by slaves; and it is their struggles for emancipation and the struggles for liberation of oppressed and excluded peoples that have given (and continue to give) concrete shape and meaning to the idea of the free citizen. As Davis emphasizes, the abolitionist movement continues today in ongoing struggles such as the fight against mass incarceration and the curtailment of rights of imprisoned populations, the fight for making voting equality a reality, the fight for access to housing, healthcare and decent wages and so on. Abolitionism is the constant struggle to undo constitutive forms of exclusion. Constitutive exclusions and configurations of the non-citizen that call for abolitionist struggles are still present in the contemporary political landscape. Today, most states in the United States ban convicted felons from voting not only while incarcerated but also thereafter (in some states temporarily, in others permanently). And although the right to earn wages is formally restored after completing one's sentence, employment practices make it very difficult for formerly incarcerated individuals to be able to work for dignified wages or even to be able to work at all. Today, the undocumented worker or so-called illegal alien is permanently banned from voting and from earning decent wages; and now there are voices within the Republican party calling for making this status permanent (by closing paths to citizenship) and even for extending this status of permanent non-citizenship to the descendants of the undocumented (by rescinding the 14th Amendment).

Abolitionist struggles are where the resistant agency of the excluded is mobilized and put to use not just for inclusion in existing configurations of citizenship but for building new configurations from the ground up, for anticipating an idea of justice yet to come, as Benhabib puts it in her account of *jurisgenerative politics*. Is the provocative and useful concept of *jurisgenerativity* apt to address *constitutive* political exclusions? Can it be

extended to include the critical and resistant agency of *constitutively* excluded groups? I will return to and conclude with these questions about how to think of the legal dimension of inclusion/exclusion in relation to the political agency of constitutively excluded subjects. But let's pause to reflect on the issue of agency from the point of view of constitutive exclusions.

In calling attention to the constitutive aspects of exclusion in the permanent (or semi-permanent) condition of colonized, enslaved, imprisoned or undocumented subjects, I don't want to put the emphasis on the 'social death' and lack of agency of these subjects but rather on their vibrant (even if challenging) social life and their resistant agency (Brown 2009). I want to call attention not only to how they are an essential part of the material life of society but also to how they create alternative communities – *communities of resistance*, to echo Chandra Mohanty's phrase in *Feminism Without Borders* (2003) – in the interstices of the social fabric and how these communities and their resistant agency constitute the agential and normative basis for political transformation and for forging alternative forms of inclusion. Benhabib's book makes very clear that there are two dangers we must avoid in theorizing the exilic and stateless conditions: the danger of depicting these subjects as abject subjects without agency; and the danger of depicting these subjects as objects to be managed, represented and protected. The latter danger is addressed in Benhabib's discussions of 'the critique of humanitarian reason': 'The protection of the right of the stateless has become a shield in order to hide the ideological pretensions of humanitarian reason, which reduces refugees to objects of pity and robs them of their political agency' (p. 6). The former danger is addressed in Benhabib's critical remarks about Arendt's lack of attention to the agency of excluded subjects. Benhabib contrasts 'the initiative, enterprising spirit, fluidity, and resistance of today's undocumented migrants' with 'the lack of agency of the stateless described by Hannah Arendt' (p. 122).

In relation to the agency of the excluded, I want to raise two questions/suggestions for Benhabib and for her readers. In the first place, I want to raise a question about the relationship between individual and collective agency: what can we say about the kinds of political agency and the possibilities for resistance and transformation that arise in exile, statelessness and migration if we shift the focus from the agency of particular individuals to the collective agency of groups and social movements? There is a sharp contrast between the exceptional individual agency of the émigré intellectuals discussed by Benhabib and the collective agency of outcasts, refugees and displaced populations (whether they remain trapped as *the other within*, they are on the run or they are stuck in internment camps). Benhabib remarks that 'some things have changed in our world' and that now 'the refugee, the asylee, and the stateless person are increasingly political actors who claim the "rights that they do not (supposedly) have"' (p. 119). But what is it that has changed? One of the things that might contribute to this change is the mobilization of collective agency in social movements and activist organizations, which creates new possibilities for resistance and transformation. Benhabib calls attention to 'Les Sans Papiers' in France, the 'Dreamers' and DACA recipients in the United States and 'Los Indignados' in Spain, and how they demand rights that they are not acknowledged as having according to the states in which they reside. The empowerment of these excluded voices becomes possible through organized activism and the mobilization of civic society. As Benhabib puts it, in today's societies, excluded subjects 'do not hesitate to invoke "the rights that they do not have"'

even in the face of hostile state resistance ‘because of the remarkable solidarity exercised by many civil society groups and organizations’ (p. 119).

How is resistant agency mobilized at the collective level for exercising ‘the right to have rights’? What is the social (if not legal) standing that groups need to have in order to exercise that right? Benhabib makes it clear that ‘taking the standpoint of the other’ is not just a moral achievement but a political one that requires collective efforts at resistance and struggle: ‘attaining such reciprocal respect and the ability to overcome thoughtlessness were not just moral qualities of the individual but required the political task of world-building through practices and institutions’ (pp. 78–9). But more needs to be said about the in-group and out-group communicative interactions needed for *judgment*, *worldliness* and *enlarged mentality* to be achieved by collective subjects (and not just individuals) and about how these collective achievements can lead to transformative dynamics in the legal and political domains. A detailed account of activism and of the communicative dynamics and techniques of social movements is needed for a full picture of the collective political agency of constitutively excluded groups.


In the second place, I also want to raise a question about the complicated relationship between legal agency, on the one hand, and social and political agency, on the other. How does jurisgenerativity relate to the ‘right to have rights’ as exercised by subjects without legal standing such as non-citizens or by groups and social movements such as the abolitionist organizations and practices that Angela Davis describes as struggling to overcome the afterlife of slavery (e.g. in anti-prison activism)? How does the constitutively excluded participate in jurisgenerative politics and in the resistance against jurispthic state formations? On the side of resisting the jurispthic, Benhabib remarks that ‘the condition of exile, refugee, and statelessness [is] the prism through which to reflect upon the dysfunctionalities of nation-state system’ (p. 189). On the side of active participation in jurisgenerative politics, Benhabib attributes agency both to excluded subjects and to dissenting citizens: ‘In acts of civil disobedience, the citizens once again become the legislator and permit themselves to judge the terms of the original social contract and of constitutional essentials’ (p. 193). This connects quite directly with ongoing discussions in critical legal studies about how those excluded from the law can become the authors of the law.

Critical legal scholars have emphasized that transformative legal agency can come from the *extralegal and paralegal* forms of agency that are forged and exercised outside the law and in the interstices of legal frameworks. Think here of Crenshaw’s critical work in anti-discrimination law to call attention to the difficulties of women of colour in raising claims about their discrimination not just as women or as people of colour, but as women of colour. This kind of critical work in anti-discrimination law makes the point that the law has to be held accountable and be responsive to the experiences of those who experience discrimination, instead of subjects who suffer discrimination having to make their voices and claims fit the narrow and reductive moulds and frames set by the law. Social movements and activist organizations certainly play a critical role in breaking the ‘silences’ of the law and in making visible the forms of *jurispthy* that leave the stateless and the undocumented vulnerable and unprotected against state violence. But, beyond this, what are the positive roles that movements of resistance and activist organizations can play in jurisgenerative politics to address the constitutive exclusions of limited citizenship and non-citizenship? Benhabib writes:

“by *jurigenerativity* I mean that law can also structure an extralegal normative universe by developing new vocabularies for public claim-making – by encouraging new forms of subjectivity to engage with the public sphere and by interjecting existing relations of power with anticipations of justice to come.” (emphasis original, p. 121)

But I take it that this ‘extralegal normative universe’ is not produced and structured by the law itself but by the social and political agency of plural communities, including excluded communities, which exist not only in excess of legal frameworks but also within the interstices of those frameworks. How does the agency of the excluded contribute to this ‘extralegal normative universe’? How does the resistant agency of the non-citizen who has no legal standing figure in extralegal and paralegal domains of social and political life? And how can that agency and those domains be connected to legal agency and legal domains without falling into the traps of ‘humanitarian reason’? Benhabib’s analyses of exile, statelessness and migration give us powerful tools and suggestions for addressing these questions. But more needs to be said in order to foreground the collective agency of constitutively excluded groups and to show how their resistance outside the law and state institutions can be mobilized for a *radical* transformation of political inclusion that can build, from the ground up, new configurations of citizenship, instead of simply broadening the existing ones. Deepening and radicalizing Benhabib’s juris-generative politics along these lines can help us make sense of the challenging quest for inclusion as a never-ending process of anticipating forever more radical ideas of *justice yet to come* in the light of the liberatory struggles of exiled, stateless and migrant populations.

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