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## Voting from prison: against the democratic case for disenfranchisement

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### ABSTRACT

This article critically analyses and discards two democratically justified cases for the disenfranchisement of prisoners. These cases are offered in relatively recent published works by Peter Ramsay and Claudio López-Guerra, which – unlike other approaches – take the democratic challenge to disenfranchisement very seriously. Their arguments are based on a diagnostic of the conditions of imprisonment, which concludes that prisoners' electoral participation is problematic for democracy because it endangers electoral integrity. This article argues against their positions and suggests that for prisoners to be treated as democratic citizens they must be recognized as electors and given an opportunity to vote. Firstly, it will be affirmed that prisoners cannot be made responsible for the conditions of their imprisonment and that prisons must adequately meet democratic requirements. It will also be affirmed that, if these requirements were fulfilled, the conditions of prisoners in a democratic prison would not be sufficiently different, in relevant aspects, from the conditions of other enfranchised people. Secondly, it will be asserted that, at least at to some extent, their arguments underestimate the possibilities of prison reform and electoral regulation to overcome the democratic problems of coercion and manipulation, which they target as two main problems of enfranchisement.

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### Introduction

Many convicted offenders around the world do not vote in elections; they have been legally deprived of their voting rights as a consequence of their criminal convictions. Most countries restrict this measure to those serving prison sentences. That is why this practice is usually referred to as prisoner disenfranchisement. Theoretically, this practice embodies a tension between the idea of universal democratic participation and the exclusion experienced by those who break the most serious rules prescribed by a community. This article addresses this tension, which has been mainly articulated in legal terms as a conflict between the fundamental right to vote and the public's interest in excluding prisoners from the exercise of said right. The traditional legal claim that disenfranchisement is a legitimate practice has been based on the notion that the

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electorate has to hold a minimum degree of civic virtue (and that prisoners are not virtuous) (see e.g. Manfredi, 2009) or on the idea that disfranchisement is an expression of a legitimate additional punishment or civil sanction for serious offenders (see e.g. Hampton, 1998). This article departs from the analysis of framing the problem of disenfranchisement in a legal and constitutional perspective, and adopts the more flexible theoretical approach. It also departs from the premise that disenfranchisement must be justified in terms of electoral capacity or additional punishment.

Ramsay and López-Guerra argue that the conditions of limited or non-existent freedom in which prisoners live are not compatible with the claim that prisoners are members of an authentic self-governed community. Thus, persons living under such conditions must be excluded from the franchise to protect the purity of the electoral process. This argument is referred to as the democratic case for disenfranchisement or *democratic disenfranchisement* because, unlike arguments based on punishment and capacity, it is based on the premise of the value of prisoners' democratic participation and embraces democracy, not virtue or desert, as the value that is served by disenfranchisement.<sup>1</sup> The main implication of this difference is that democratic disenfranchisement, due to its commitment with democracy, seems less vulnerable to criticism which indicates that disenfranchisement embodies punitive forms of degradation and political exclusion (see e.g. Pettus, 2013).

The arguments of Ramsay and López-Guerra are presented in the first section. They are then critically examined in the following sections, where two serious problems that affect the premises and consequences of their arguments are brought forth. The second section introduces the need for democratic conditions of imprisonment, and the third section argues that electoral coercion and manipulation are limited threats to electoral integrity. Finally, the last section of the article argues that there is no strong case for disenfranchisement in the context of a community with an inclusionary democratic commitment; this is because democratic disenfranchisement is affected by the exclusionary and degrading consequences resulting from justifications of disenfranchisement based on punishment or capacity.

## A democratic case for prisoner disenfranchisement

The arguments offered by Peter Ramsay and Claudio López-Guerra contend that disenfranchisement must be justified in terms of the regulation of an electoral franchise that maintains the integrity of the democratic electoral process. Their justification places the rationale of prisoner exclusion precisely on the subordination they experience and the restriction of liberty to which they are subjected *as prisoners*. This constitutes a special argument for two reasons: first, they explain disenfranchisement as a consequence of imprisonment and not as a consequence of the criminal conviction, and, second, they argue that democracy demands disenfranchisement, rather than deeming disenfranchisement to be a practice that runs against democracy.

<sup>1</sup>A different case for democratic disenfranchisement has been offered by Altman (2005) and Büllow (2016). They have focused on the justification of a community's collective right to disenfranchise convicted criminals, instead of on certain goals that are pursued by disenfranchisement as an institutional practice. They have recently been under criticism by Matt S. Whitt (2017).

### *Ramsay's theory of democratic disenfranchisement*

Ramsay (2013a, 2013b) argues that prisoner disenfranchisement is the natural consequence of a conception of democracy committed to the idea of self-government. According to Ramsay, offenders currently serving sentences in prison are paradigmatically deprived of civil liberties and therefore enfranchising them would subvert the democratic idea of a self-governing community composed of subjects who are considered equally free. Disenfranchisement is, thus, the logical consequence of imprisonment in democracy. He sustains that without disenfranchisement the right to vote is depoliticized and civil liberties are not regarded 'essential' for democracy.

### *Representative democracy, civil liberties and the right to vote*

Ramsay's proposal rests in a conception of democracy that implies a 'rigorous protection of civil liberties' and where 'the right to vote and to stand for election must be complemented with freedom of conscience, freedom of speech, freedom of association, assembly and movement' (2013a, 426). His commitment to civil liberties implies, firstly, that only those who have committed an offence which involves a 'deliberate violation of the rights necessary for democratic citizenship' should go to prison, setting the threshold for incarceration relatively high and openly repudiating the trend of incarceration based on the safeguard of a presumptively fundamental right to security (Ramsay, 2013c). For Ramsay, disenfranchising prisoners is based on the importance of safeguarding the freedom of citizens from discretionary actions of the executive branch. His view implies the critical claim that disenfranchisement 'is not unfair to the prisoner, unless the imprisonment itself is unfair' (2013a, 422).

Secondly, he sustains that, under a democracy, citizens must be in a position of independence from the government. This is the central claim of the notion of democracy as being self-government linked to representation, whereby people participate in democracy by electing representatives. In such a model of democracy, the *independence* granted by civil liberties is a crucial requirement for citizens to be able, in certain respects, to *control* the government and not the other way around. Civil liberties frame that independence by allowing citizens to 'innovate political ideas, debate and propagate them, organize around them, and so on' in an 'uncoerced political process' (2013c, 226). In this context, that is, where citizenry is independent from the government and immune from its control, the elected representatives must represent the will of the people as they are elected and held accountable by the people. Within this democratic framework, the right to vote is fundamental because without the vote authorities would presumably serve their own interests. Civil liberties are also fundamental for democracy because without them the government, even if it were elected, would exercise an unlimited control over citizens. The mutual control between citizens and government in a democracy is therefore equilibrated by civil liberties (which limit the control of the government over citizens) and voting rights (which enhance the control of citizens over the government). When civil liberties are seriously limited to the extent of impeding citizens' independence from the government, the right to vote does not express the will of the citizens, rather the will of the government, which is in fact exercising control over the people (2013c, 223–6). Therefore, the value of voting *depends* on the protection of civil liberties.

This democratic model contrasts with what Ramsay calls *post-democracy*. Post-democracy can be described as an alternative political regime that differs from democracy in two main elements that mirror the elements of democracy as self-government. First, under post-democracy, ‘a minimalist conception of representative democracy has [...] entirely marginalised the connection between political representation and the self-government of the people’ (2013b, 13). Democracy is minimized because there is no political competition (rather only a ‘contest over technical competency’), and, therefore, the critical dialogue between representatives and their constituency cannot take place beyond the margins of political alienation (2013c, 230–1). This, in turn, has an impact on the second element. In post-democracy, ‘people can be imprisoned when they have not violated the ‘social contract’ and civil liberty is not regarded as absolutely essential to political citizenship’ (2013a, 424, 433–4).

### *Ramsay’s case for democratic disenfranchisement*

The opposition between democracy and post-democracy serves as a background to one case for democratic disenfranchisement. Prisoners can neither freely exercise their civil liberties nor enjoy independence from the government, and are therefore denied the preconditions required to participate in collective self-government. Within this context, the right to vote becomes a mere symbol, unrelated to aspirations for self-government and linked only to the very thin conception of post-democracy.

First, imprisonment involves, by definition, the suspension of the right to liberty. This right is the precondition for the exercise of other liberties which frame the process of deliberation that in turn avails the democratic importance of the right to vote. This implies that ‘[w]ithout the freedom to innovate, communicate, debate and organize around political ideas there is no possibility of the people collectively ruling themselves by being the true authors of the laws that they will obey’ (2013b, 9). Imprisonment therefore eradicates the possibilities of participation in self-government.

Second, the control that the government exercises over prisoners’ lives – whose liberties are under the government’s discretionary powers – seems to suggest that the government can use its influence in its own favour, thereby affecting the integrity of the democratic process (2013a, 425–6). Manipulation and coercion by the executive branch can be the result of an illegitimate use of ‘its police powers, vast budgets and patronage’ (2013a, 425). Prisoners are, ‘therefore, unable to influence the preferences of others and expose their own preferences to the influence of others, except in ways controlled by executive agents’ (2013a, 429).

By conceding prisoners the right to vote, even if they are free to vote as they wish, the meaning of the vote is devaluated and understood as a mere post-democratic activity. This is because prisoners are *neither equal nor free* from the influence of executive power. Indeed, the underlying logic of ‘democratic disenfranchisement’ is in tension with a post-democratic understanding of citizenship, in which citizens do not need to participate in self-government or exercise any civil liberty beyond the freedom to inspect the legally permissible range of political products and to sufficiently debate their merits so that they may make a choice as to which product(s) they would like to support. Ramsay consequently claims that a voter cannot be in prison because that would *subvert* the logic of democratic self-government; the case of a voter being in prison ‘logically eliminates the civil liberties from democratic citizenship’ (2013b, 9–11)

and ‘*implicitly legitimates* these anti-democratic conditions by uncritically assuming their normality’ (2013a, 434). On the contrary, ‘disenfranchisement *honours* the democratic rights of all citizens, including those of offenders who have chosen to suspend their citizenship’ (2013a, 434). In sum, he suggests that those who advocate for prisoner enfranchisement should advocate the consolidation of a post-democratic regime.

### **López-Guerra’s argument against voting from prison**

Though coming from a different tradition of thought, López-Guerra (2014) has presented a similar argument. His argument is grounded in a fundamental distinction regarding the restrictions that can affect prisoners’ right to vote. He argues that the right to vote includes two dimensions that must be considered for an adequate assessment of disenfranchisement: first, the right to enfranchisement and, second, the right to have the opportunity to vote. Restrictions to the first dimension (the right to enfranchisement) must strictly be reasons of principle. In other words, people excluded from the franchise do not deserve the entitlement to vote. In contrast, restrictions to the second dimension (the right to the opportunity to vote) are pragmatic and related to the consequences of developing mechanisms that allow people the ability to exercise their right to vote (2014, 118–124). According to this distinction, the right to enfranchisement only gives a *prima facie* and not a definitive – all things considered – right to vote because this *prima facie* can be limited by considerations relative to the operation of the electoral process. In the concrete case of prisoners, these pragmatic arguments relate to the problems surrounding a *vote from prison* and not necessarily with the traditionally punitively framed problem of *prisoners’ voting*. Even if in principle prisoners are entitled to cast the ballot, they are still impeded from doing so for other pragmatic reasons. While the traditional pragmatic arguments to deny voting from prison are not conclusive and commonly imply preconceptions about prisoners being less worthy members of society, the argument of López-Guerra against voting from prison is completely different. Similar to Ramsay, he appeals to the conditions of imprisonment and the relationships generated within prison. Some context is necessary to introduce his point.

An abusive relationship between authorities and prisoners can lead to a conflict between (1) the positive democratic value of the inclusion of prisoners in the franchise and (2) the need to guarantee the value of political equality, which would be undermined in those cases in which ‘public authorities coerce or induce prisoners to vote in specific ways’ (Beckman 2009, 129). Under certain conditions, disenfranchisement could effectively help to guarantee political equality and electoral integrity, but at the cost of limiting the inclusion of prisoners within the franchise.

Two kinds of abuse can be identified in cases of electoral coercion committed by executive authorities. First, the value of political equality is undermined by illegally granting more votes to the electoral option preferred by the authorities, affecting the integrity of the election and in certain cases even the final result. Second, coercion also attacks the autonomy of the prisoners by forcing them to vote and not granting them the opportunity to form, via critical exercise, their own reasons for voting. They are not voting in the sense of freely and equally expressing their political views, but only physically casting ballots according to someone else’s preferences. Disenfranchising prisoners, therefore, makes the abuse of authority against electoral integrity impossible,

but only at the cost of eradicating every possibility for the political autonomy of prisoners to be expressed. The principle of political equality is protected at the expense of the prisoners' political freedom. However, as Beckman (2009, 129) suggests, if it is acknowledged that it is not the prisoners' right to vote that causes the problem but the fraudulent conduct of the authorities, the solution must involve acting against the fraud rather than against the victims of the fraud. His suggestion is that 'to a large extent, the lack of opportunities for political participation can be mitigated by organising the penal system in the right way' (124).

López-Guerra (2014) offers a contextual objection to Beckman's conclusion by arguing that 'with the exception of some developed countries, the conditions in many prisons around the world are such that the risk of coerced voting is very high' (128). The possibility of avoiding the electoral abuse, therefore, would depend on the conditions of the particular prison system and should be decided on a case-by-case basis. In some cases, electoral fraud may be committed directly by prison authorities under the control of the government; in other cases, a lack of control over conditions inside the prison may allow criminal organizations operating inside to sell prisoners' votes to the highest bidder. No prison reform can be expected to fully eliminate the factual basis of López-Guerra's contextual objection or fully improve prison conditions. Thus, there is a case for disenfranchisement in those contexts in which prison conditions are likely to lead to voting fraud and are unlikely to change. However, López-Guerra emphasizes that this is not a justification for excluding prisoners from the franchise but simply a justification for not adopting a device to allow voting from prison. Excluding prisoners from the franchise, he maintains, would send the message that prisoners deserve political exclusion, whereas the second 'is an indicator of unacceptable life conditions [...which] does not speak negatively of inmates, but of the society where they live' (129).

The main difference between the proposals of López-Guerra and Ramsay can be summarized as follows. López-Guerra considers that the reason to exclude prisoners from voting is the particular conditions of prisons. Therefore, disenfranchisement must be evaluated empirically and will depend on the probabilities of electoral coercion in each prison. On the other hand, Ramsay's proposal has universal application and points to the conditions of a lack of independence vis-à-vis the government that affect all those who are in an institution with the characteristics of a prison. His proposal does not require an empirical evaluation and would affect even those inmates in prisons with high standards of respect for human rights.

### **Prisoners should be treated as citizens**

The previous section presented a democratic case for prisoner disenfranchisement grounded in the arguments developed by Ramsay and López-Guerra. The following two sections argue against their cases. The decisive question of whether institutions of democracy must be framed considering the circumstances of prisons, or whether imprisonment ought to be brought in line with democracy, remains crucial to address the issue of disenfranchisement. The kinds of relationships that Ramsay assumes are incompatible with democratic citizenship are not inherent to prisons; they are similar to relationships found outside of the prison system, even in a reasonably healthy democratic regime. In a democracy, prisons cannot be



considered a place in which authoritarianism and arbitrariness are tolerated, but rather as part of a continuum of tensions between state authority and individual freedom. In particular, this section argues against Ramsay's claims that prisoners are necessarily deprived of all dimensions of the right to liberty by the fact of imprisonment and that the right to liberty is essential to the enjoyment of all the other democratic rights. I argue that a democratic punishment must show a commitment to the exercise of democratic rights within prison.

### *Towards a democratic prison*

Notwithstanding the attractiveness of theoretical models that explain imprisonment as a disciplinary technique (see e.g. Garland, 1990, ch. 6 & 7), which seems to be at the core of Ramsay's description of the reality of prisoners' conditions, the rationalization of imprisonment is currently grounded, for the most part, in the discourse of human rights, which is founded on human dignity (see e.g. van Zyl Smit and Snacken, 2009, 63–85; Lippke, 2002). This discourse has pushed imprisonment towards the narrower proposition of a measure which does not involve the regulation of all aspects of a prisoners' life, 'creating a climate for the realization of prisoners' autonomy' and with the 'aims to transform as much as possible these power relations' found in prison 'into juridical relations' (70–1). The impact of the human rights discourse is true even if there is a great divide between current prison institutions and an ideal model. It is correct to say that, consequently, imprisonment can be portrayed as a historical institutional practice that is on track to be adapted to a democratic framework.

In more concrete terms, from the point of view of a critical project of democratic punishment, imprisonment must be adapted to democratic principles in order to constitute a legitimate form of punishment. This means that imprisonment must be compatible with the recognition of prisoners as members of the community to which they belong (see e.g. Duff, 2001). For this purpose, a democratic configuration of imprisonment demands that prisoners still be regarded as both legal persons *and* citizens. The delimitation of their legal status and the protection of their rights, on the one hand, and the preservation of their political rights, on the other hand, are fundamental for understanding that offenders are being punished for what they have done and not for what they have become (Foucault, 1995, 251). In contrast, naturalizing a disciplinary model of prison clashes with the democratic commitment of punitive institutions, conceptually impeding the acknowledgment that prisoners are equal members of our community.<sup>2</sup>

A first and fundamental step in this regard is to recognize prisoners' legal status as rights holders. For this purpose, it is essential to separate the limitation of the offender's liberty imposed by the criminal conviction from that residual liberty that is unaffected by the punishment, especially as the latter can be subject to limitations

<sup>2</sup>Corey Brettschneider (2007, 2010) has developed a democratic theory of punishment in which this must be justified to offenders qua citizens: 'Society's interest in security legitimizes punishments that restrict criminals' freedom of action, but legitimate punishment also requires a commitment to preserving criminals' moral status as citizens. This requirement entails limiting cruel and unusual punishments and preserving democratic rights to the greatest extent possible'. I generally agree with Brettschneider but I think his argument is not relevant here because it does not focus in the circumstances of deprivation of liberty that are the core of democratic disenfranchisement, but in the legitimization of punishment.



as a consequence of the needs of prison administration and only for those purposes. Justificación de este principio. This distinction implies that the offender's liberty ought to be considered divisible and that it should be accepted that imprisonment only affects the offender's liberty in some regards and not in its entirety (Lazarus 2016). Framed in other terms, a democratic conception of imprisonment demands that prisoners be considered *rights holders* and therefore excludes the radical scenario in which the prisoners' status is reduced by depriving them of their entire liberty and abandoning them to the discretion of authorities. This conception of imprisonment as the suspension of some aspects of the right to liberty opposes Ramsay's conception of imprisonment as a total suspension of the right to liberty and consequential suspension of other liberties. Designing legal mechanisms to guarantee the prisoners' enjoyment of liberties and to defend them from arbitrary state interference may throw a punch to Ramsay's argument. For example, an independent judicial review system that oversees whether prisoners' liberties are being respected could also have the potential to guide the prison system towards the creation of internal policies which are more respectful of those liberties. There is no space here to more accurately develop the functioning and effectiveness of the aforementioned mechanisms that could be carried out by an independent judicial review, but it can be imagined how they may improve the conditions of freedom and independence within prison.

A second step in building a democratic prison is the recognition of prisoners as citizens. In a democratic prison regime, which takes the need of civil liberties seriously, prisoners should be guaranteed all civil liberties and political rights compatible with the needs of the prison administration (see e.g. van Zyl Smit and Snacken, 2009, 65–9). Freedom of information, expression, reunion, and association cannot be limited without clear reasons concerning the administration's objectives (Foster 2002). For example, freedom of reunion in a protest against the prison authorities might be reasonably limited based on arguments of security, but when prisoners organize a meeting to listen to and speak with their democratic representatives there seem to be no good reasons to apply such limits (Lippke, 2007). In sum, prisons can be organized in such a way to respect certain key aspects of prisoners' civil liberties, generating spaces for meaningful political participation. Enfranchisement completes the recognition of prisoners as citizens whose voice and interest must count equally.

### ***Imprisonment and political equality***

No matter the persuasiveness of the proposal of a democratic prison, its consequences to enfranchisement still face some objections. The first objection to democratic disenfranchisement can be framed in the language of political equality. It could be claimed that the extent to which civil liberties could be exercised according to the notion of political equality would be considerably limited and poor, allowing for the argument that the limited freedom enjoyed by prisoners affects their position of political equality in relation to all other citizens. At best, prisoners would qualify as second-class citizens (Ramsay, 2013b, 11, 2015, 8). The following observations are therefore necessary.

Firstly, the enjoyment of civil liberties is not an all-or-nothing affair, neither inside nor outside of prison. The extent to which somebody can speak, meet and build associations is always limited by state regulations that protect other important social

and individual interests. For example, the right to freedom of expression is limited by national security laws and libel and hate speech regulation. The right to assembly, in turn, is limited by the need for administrative permits and for restricting demonstrations to a certain size or certain zones. In the case of prisoners, such regulation might be more intrusive, thus restricting their liberties considerably. However, civil liberties outside prison walls can also be similarly affected by arguments of security or other deliberations of public interest. This demonstrates that people's liberty can be restricted in several forms and in varying degrees, thereby affecting the possibilities for its exercise. It is simply wrong to sustain that prisoners lack all liberty and that free citizens enjoy full liberty. Civil liberties have never been absolute, and sustaining this claim does not mean we must endorse a post-democratic society as described by Ramsay. Based on the previous observations, one must be critical of the claim that imprisonment *necessarily* involves the loss of civil liberties or that the liberties which prisoners enjoy would only constitute an executive licence. That assertion can indeed be correct and accurate regarding a concrete prison regime, but as a general claim it must be regarded as false.

Secondly, even if it is accepted that the degree of freedom enjoyed by prisoners will never be comparable to the degree of freedom experienced by citizens outside prison, this difference does not need to lead to disenfranchisement based on a lack of political equality. Political equality, in Ramsay's terms, requires that 'citizens have the formal status of rulers' and that 'equal influence over policy and the making of the laws' is granted to every citizen (2015, 7–8). However, even with these two core elements of political equality, this equality can be understood in two different ways: as a point of departure or as a point of arrival for democratic citizenship. If it is understood as a precondition for enfranchisement (departure), it is essential to ask whether the degree of freedom enjoyed by prisoners is sufficiently similar to other enfranchised citizens. The answer would be that within the premises of a democratic prison prisoners would not be in conditions of political participation that are qualitatively different from other citizens. On the other hand, political equality can also be understood as the regulative ideal, a point of arrival, that demands the creation of democratic prisons and the enfranchisement of prisoners on the same grounds, under which the latter does not depend on the former. Prisoners must be treated as citizens and should be granted the means to act in equal terms regardless of whether or not they actually enjoy equal political influence; this is because political equality recognizes all persons as members of a democratic society. Although this second conception of political equality (as a point of arrival) is more favourable to enfranchisement, it can be argued that no conception of political equality is an obstacle to enfranchising prisoners.

### **Disenfranchisement as punishment**

The second objection to democratic disenfranchisement is partially related to the first. Ramsay might argue that, despite the respect for civil liberties that a democratic prison guarantees, prisoners will always be in a position of dependence on the authorities because imprisonment coincides with a *formal denial* of civil liberties, which in turn coincides with the formal denial of political equality. Here the word 'formal' is very important as it implies that the denial of civil liberties, and therefore the denial of

political equality and citizenship, is deliberate and intended, and not a secondary and unintended consequence of imprisonment. In this argument, therefore, disenfranchisement is ultimately disconnected from the *fact* of prisoners' lack of liberty. Instead, it is clearly connected to the status produced by the formal act of criminal conviction; therefore, all the exclusionary and degrading problems affecting punitive conceptions of disenfranchisement must be duly considered.

This idea that disenfranchisement follows the formal denial of liberties has a systematic position in Ramsay's account of imprisonment and account of the relationship between citizenship and the commission of a criminal offence, in which he sees the punishment of imprisonment to be a formal denial of liberty. The justification for imprisonment as punishment, he sustains, is founded on the *suspension of citizenship* experienced by the inmates. The radical deprivation of liberty implied by imprisonment is not compatible with the idea of democratic citizenship. This is an argument for a more lenient use of imprisonment, but it also implies a radical conclusion regarding those who are imprisoned. The radical consequence of exclusion from citizenship is justified by Ramsay when he argues that the commission of a criminal offence is considered a *self-exclusion* from citizenship. Only on these grounds can Ramsay envisage the justification of the convict's deprivation of liberty: '[i]mprisonment does not violate the citizenship of those who deny the rights of citizenship [, it is only] symbolically and practically implementing the offenders' own negation of citizenship' (Ramsay, 2013a, 428). This idea regarding the (temporary) loss of citizenship due to a criminal conviction posits serious questions as to the relevance of the democratic explanation based on the relationship between civil liberties and the right to vote. If those correctly imprisoned are non-citizens during their sentence, then one might sincerely question why disenfranchisement should be explained in relation to the lack of civil liberties. The right to vote is, on the same grounds as civil liberties, a right of democratic citizenship. Under this model, the justification of disenfranchisement as an expression of the demands of self-government seems redundant: if the consequence of a criminal conviction is the suspension of citizenship, this is the fact that authorizes both imprisonment and disenfranchisement.

Ramsay seems committed to the understanding of disenfranchisement as the normative consequence of the act committed by the offender. Ultimately, he sees disenfranchisement as a part of the punishment. It was mentioned in the introduction that one of the distinctive features of democratic disenfranchisement is that disenfranchising prisoners is meant to protect democracy rather than further punish offenders by excluding them from the franchise. Ramsay's proposal of democratic disenfranchisement thus lacks an important part of its democratic appeal as he argues in favour of disenfranchisement not to protect democracy but rather to punish offenders.

### ***Disenfranchisement and prison reform***

Finally, a third objection to democratic disenfranchisement must be addressed. Democracy not only demands enfranchisement but also prison reform. It must be acknowledged that regimes of democratic prisons such as those argued above are not necessarily in effect; they are mainly projects, not realities. A democratic conception of imprisonment suggests that prison conditions are what must be modified and adapted

to the requirements of democracy. What is to be done about disenfranchisement in such cases where democratic prisons do not exist? More importantly, what should be done in the meantime, while waiting for a democratic prison reform? Prisoners cannot be victims of the inaction of the political system in bringing about prison reform.

In this line, the demands for enfranchisement may produce criticism from those who advocate for penal reform because the claim for enfranchisement could produce counterproductive effects. If the key idea behind the claim for enfranchising prisoners is that prisoners must be regarded as free and equal, just as the rest of citizens, this idea may obscure the conditions of inequality and limited liberty under which prisoners live. The critics are therefore afraid of inverting the priorities of prison reform. In other terms, substituting the exclusionary problem of imprisonment with the exclusionary problem of disenfranchisement, via eliminating the latter by granting prisoners the right to vote, may lead some to suggest that the problem of exclusion has completely disappeared and that improving the conditions of imprisonment is still an urgent affair (Ramsay, 2013a, 424). To argue that enfranchisement may undermine prison reform is, however, contentious. It is plausible to sustain that the recognition of prisoners as citizens may help the cause of penal reform. Identifying prisoners as equally respectable members of society and relevant political actors is likely to result in a more dignified treatment. The equal respect that citizens owe one other is recognized in the vote. The opposite may be said about their exclusion from the franchise. If the right to vote is a symbol of equality and respect, disenfranchisement is likely to contribute to the proliferation of discourses of penal sadism and therefore undermine the improvement of prison conditions. To conclude this point, if we value the right to vote for its contribution to the idea of self-government and democracy, its exercise cannot be subordinated to the aims of prison reform and disenfranchisement cannot be used as a symbolic point to push for better prison conditions.

### Public authority and electoral influence

The previous section claimed that there is not necessarily a relation between imprisonment and the loss of civil liberties (which are required for participation in democracy), but that such relation is dependent on the context. However, it must be acknowledged that if voters become the object of coercion, there could well be good reasons to restrict voting from prison. Here is where the arguments of Ramsay and López-Guerra tend to coincide. Coercion may demand a preventive measure: in order to respect democracy as the self-government of citizens, prisoners must be disenfranchised. This affirmation leads to the question of how the 'integrity and effectiveness of an electoral procedure' may be 'undermined by allowing citizens in the wholly dependent condition of prisoners to vote' (Ramsay, 2013a, 430).

The relationship between executive authorities (and eventually other powers within prisons) and prisoners can take two forms that can be claimed to undermine electoral integrity. The first is a strong form of intervention which I call *electoral coercion*. The second is a weak form of intervention that I call *electoral manipulation*. The first case of intervention is conducted by violating the right to vote as a negative liberty: the elector is impeded from voting for his own preference and forced to vote for somebody else's preference. In the second case, manipulation is not necessarily directed at

electoral preferences but at the ‘circumstances in which these preferences are formed’ (Ramsay, 2013a, 425). The elector has been influenced and persuaded to prefer an electoral option that without manipulation he would not prefer. The line between the two forms of intervention can, of course, be fine in some cases; however, it is important to distinguish between these forms because they require different responses. I argue that the solution to the first kind of intervention is not disenfranchisement but electoral reform. Concerning the second case, I support the view that prisoners who are under some form of manipulation are not in a fundamentally different position from other persons living outside of prison.

### *The case of electoral coercion*

The case of electoral coercion has been convincingly presented by López-Guerra, who argues that, despite disenfranchisement being *prima facie* unfair, disenfranchisement is necessary under certain conditions in order to maintain electoral integrity. These conditions are contexts in which electoral coercion is common and prison reform is unlikely to occur.

It must be emphasized, to start with, that this is far from constituting a general objection to voting from prison and applies under certain very specific circumstances. In this regard, it is also of utmost important to carefully distinguish (1) those countries in which electoral coercion or electoral fraud are widespread from (2) those countries in which this situation affects only certain groups, such as prisoners. In the first case, arguments based on equality and electoral integrity are redundant because excluding prisoners in those countries does not help to guarantee electoral integrity whatsoever. In this case, prisoners’ inclusion in the franchise can at least pursue their inclusion via a democratic formality and their recognition as equal citizens. In the second case, however, the prospects for prisoners voting are not as dismal as López-Guerra claims.

The case in which problems of coercion affect the prison system but not the electoral system as a whole does indeed present a challenge for the electoral inclusion of prisoners. I argue, however, that there are ways to circumvent this type of problem or at least to address it to certain extent. Accepting that a full enjoyment of civil liberties is not necessary for the meaningful exercise of the right to vote, the protection of autonomous suffrage can overcome the problem of coercion by means of an adequate institutional design of electoral procedures within prisons, a design that does not necessarily compromise prison reform. Five directions that this design might assume are suggested below, though many others could be included in this list. First, the development of stricter security measures is necessary to avoid coercion in the moment of casting the vote (Easton, 2009, 451), for instance via the strong institutional guarantee of a secret ballot. This does not involve freeing prisoners of other unfair coercions they experience within prison, but it would exclude the possibility of coercions when casting the ballot. Second, the electoral act should be administered by an institution completely independent of prison services, and elections within the prison must admit impartial observers. This would combat the power of prison authorities and prevent executive influence. Third, it is highly advisable that the results of the election within the prison not be made available to prisoners themselves as this could lead to undesirable retaliations. Fourth, if the conditions of the prison make it impossible to install

ballot boxes inside (because doing so would jeopardize some of the previous objectives), then special arrangements must be made so that prisoners are taken out at random to cast their votes somewhere within the premises or in an area surrounding the prison. Finally, it is important for prisoners to be aware of the impact of the aforementioned measures (that is, they are bringing about electoral integrity) and for the prisoners to be plausibly persuaded of the integrity of elections within prison. Otherwise, it is possible that prisoners would have no stable grounds to trust the integrity of electoral process and that those who run the prison could credibly threaten sanctions if prisoners do not vote in a certain way.

These directions have the potential to limit the problems of coercion or to eliminate it altogether in certain cases. However, they do not constitute an all-things-considered case against electoral coercion, and certain extreme cases could still be problematic. In contexts in which prison conditions are severely corrupt and deteriorated, even the correct implementation of the directions is not enough to impede electoral coercion. Under such conditions, there may be a case for disenfranchisement.

### *The case of electoral manipulation*

A second problem, the fact that prisoners are under the influence of and potential manipulation by executive authorities is more complicated, yet less pressing. Disenfranchisement as a response to this problem may be considered *over-inclusive* because most prisoners spend a limited amount of their lives in prison. Prior to their imprisonment, they enjoyed all the civil liberties put forth by Ramsay as necessities for democratic citizenship. Furthermore, as the empirical work of Cormac Behan (2014, 174) suggests, offenders bring with them 'levels of education, political and civic engagement', all of which 'impact on their engagement, whether inside or outside prison'. In these terms, their preferences were formed in a context 'rather free' from the manipulation by executive authorities that can occur inside prison. This is, for example, the case of a prisoner who begins to serve his sentence immediately before Election Day. The case for disenfranchisement would be stronger when applied only to those who have already served long-term sentences and whose liberty has been limited for a considerable amount of time. Nevertheless, even if democracy must admit a process of deliberation – and civil liberties play a pivotal role in such a process–, the changeable nature of political preferences is a highly contentious issue. The affirmation that individual political preferences are immutable is not uncommon. However, if it is conceded that preferences are mutable to a certain extent, there are no grounds on which to claim that the individual preferences of those who cannot take an active part in the process of deliberation cannot be influenced by such a process.

Disenfranchisement must be also considered *under-inclusive*. The relationship between prisoners and authorities was the object of the classical theory of 'special authority relationships' in continental law, according to which 'categories of persons in an unusually close relationship to the State, such as prisoners, school students and members of the armed forces, were not protected by the full range of basic rights' (Lazarus 2016, 747). This theory has been superseded by the abovementioned idea of prisoners as rights holders. However, it warns of the fact that prisoners are not the only group under this kind of relationship with authority. Members of the police force, the



military and civil servants are also affected by this kind of relationship, in which rights have a legitimate source of restriction in other values such as security or discipline. This list can be extended to include all those people under the massive disciplinary influence of private powers that, as already admitted by Franz Neumann in (1953), ‘can be even more dangerous to liberty than public power’ (919). In a society with high indexes of inequality, the incapacity to exercise fundamental political rights is common amongst the unprivileged, and the social and economic power of non-state actors frequently renders this group irrelevant. More broadly, the influence of the state, and in particular of the administrative power, as a product of social welfare and the consequential consumerization of certain sectors of the population stands as a major threat to the independence of citizens in general (Habermas, 1993, 406–10). It is not clear under which conditions prisoners’ subjection to executive powers and the subjection of the underprivileged to political, economic and cultural powers must be codified differently in relation to enfranchisement. To be coherent with a demand for an electorate free of influence and manipulation, all those classes of persons should be disenfranchised.

### Concluding remarks

The cases for prisoner disenfranchisement argued by Ramsay and López-Guerra are probably the strongest democratic arguments available to normatively justify this practice. These cases, however, are not without great fault. Their arguments are based on a diagnostic of the conditions of imprisonment being the element that causes prisoners’ electoral participation to be problematic for democracy as their participation endangers electoral integrity. This article argued against their position and suggested that for prisoners to be treated as democratic citizens they must be enfranchised and given the opportunity to vote.

Firstly, I argued that prisoners cannot be made responsible for the conditions of their imprisonment and that, instead of an argument for disenfranchisement, undemocratic prisons must be interpreted as the need to protect the democratic premises of prisoner participation. It was also affirmed that the conditions of those imprisoned are not sufficiently different, in relevant aspects, from the conditions of other enfranchised people. Some objections to my case against democratic disenfranchisement were considered and discarded. Secondly, I also claimed that Ramsay’s and López-Guerra’s arguments underestimate the possibilities of prison reform and electoral regulation to overcome the democratic problems of electoral coercion and electoral manipulation.

There are several issues that must be discussed concerning prison reform advocating a more democratic model of imprisonment, with the recognition of prisoners as citizens constituting an urgent affair. In contrast with other rights of participation, the right to vote is particularly propitious to expressing democratic recognition for those imprisoned. This is mainly because the right to vote does not depend on a demanding notion of participation. Even prisoners in conditions of serious deprivations of liberty can be included as members of the democratic community via enfranchisement. If a compensatory relation between the mechanisms of participation and forms of recognizing citizenship can be imagined, then granting prisoners the right to vote is certainly an essential formula for such a relation. Subjecting prisoners to a legal regime in which other rights of participation are massively affected puts in danger the continuation of their recognition as citizens. Their right to vote might constitute an adequate response



to this serious problem and perhaps the starting point of a constructive solution. This diagnosis could lead to a conclusion in opposition with Ramsay's: the less liberty prisoners enjoy, the more important their enfranchisement becomes.<sup>3</sup> It is interesting to note that this seems to be the logic of the German model of disenfranchisement. In Germany, disenfranchisement does not affect prisoners, but only ex-prisoners. According to section 45a of the Criminal Code (1975) '[t]he duration of the loss of ability or of a right shall be calculated from the day the term of imprisonment has been served' (see Demleitner, 2000).

To conclude, we have seen that democratic disenfranchisement is not such a promising alternative to justify the electoral exclusion of prisoners. In actuality, commitment with democratic participation, respect for political equality and the democratic dignity of our fellow citizens speak in favour of the inclusion, rather than exclusion, of those who are imprisoned into the electoral franchise. To justify general disenfranchisement in a way that is consistent with democracy requires more robust arguments. While waiting for those arguments, the transition towards a more democratic prison system should be the main concern. The enfranchisement of all prisoners is a question that cannot be ignored in bringing about the advancement of the fundamental aim of more democratic prisons.

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<sup>3</sup>This reasoning might lead to conclude that the disenfranchisement of prisoners is more problematic than the disenfranchisement of people who are not in prison because the latter group can in fact exercise other rights of participation. However, in such a case, the aim of disenfranchisement would be evidently punitive and not regulative.

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