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"THE SHAME OF IT ALL": STIGMA AND THE POLITICAL DISENFRANCHISEMENT OF FORMERLY CONVICTED AND INCARCERATED PERSONS

Regina Austin*

I. INTRODUCTION

The usual justifications for criminal sanctions seem ill-suited to support post-conviction penalties like the political disenfranchisement of ex-offenders. If the punishment is supposed to fit the crime, then where a defendant has not been guilty of election fraud or a violation of the public trust, denial of the right to vote seems unwarranted. Since most violators of the criminal law are hardly aware before the fact that a criminal conviction may result in the loss of voting rights, the deterrence value of such a penalty is diminished by its relative obscurity. Moreover, retribution, another justification for punishing violators of criminal laws, requires that the offender be given the opportunity to repay her/his debt to society; blanket prohibitions on political participation violate that sentiment.

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Thus, of all the justifications for political disenfranchisement, stigma may be the most coherent.

This paper deals with the impact of the stigma of conviction and incarceration as experienced not only by minority offenders, but also by their families and communities, and the relationship of that stigma to political disenfranchisement. The first part of the paper argues that voting rights should be extended to ex-offenders so as to allow them to rehabilitate themselves and to get beyond the shame that conviction and incarceration generate. Moreover, extending the vote to ex-offenders and allowing them to participate fully in political debates about the criminal justice system, especially the penal system, would permit their families to end the silence caused by the stigma they also bear, and to address the full consequences of the mass incarceration of blacks as they experience it first-hand. In addition, extending the franchise to ex-offenders, who are thought to be selfishly indifferent toward others, will allow them to have an impact on policies that affect the well-being of their families and communities. Finally, ending felon disenfranchisement would invigorate the politics and decision-making of the communities from which the ex-offenders come. The second part of the paper briefly deals with strategies for overcoming stigma, particularly individual lawsuits based on the tort of invasion of privacy, and political activity, which I argue is the one truly viable option available to the formerly convicted and incarcerated. Ironically, the political disenfranchisement of ex-offenders makes it less likely that they will be able to surmount the stigma of conviction and incarceration through political activism. In this regard, self-disclosure or “coming out” by highly successful formerly convicted and incarcerated persons would greatly advance their cause.

II. INCARCERATION AND STIGMA

Roughly speaking, a stigma is a mark or characteristic that designates a person as “flawed, compromised, and somehow less than fully human.”2 Stigmatization erects boundaries or barriers between persons who would otherwise belong to the same community.3 The

3. See generally Erving Goffman, Stigma: Notes on the Management of
stigmatized are outcasts who are to be avoided and isolated. They are dehumanized and considered defective or unwholesome. They are discriminated against. Like a contagious disease, stigmas may affect those who are associated with the targeted, including their families, friends, and neighbors.4

Stigmas produce significant social and psychological effects. Although anger and arrogance are not unheard of responses to stigmas, stigmas generally induce shame in those who are branded.5 Sociologist Jack Katz has defined shame as “a fearful and chaotic sense of an irresistible and eerie revelation to self, of a vulnerability in one’s nature that, by indicating one’s moral incompetence, isolates and humbles one in the face of what one regards as a sacred community.”6 Shame in turn causes silence, secrecy, and concealment. The disrespect of the community leads to self-consciousness, self-doubt, and low self-esteem in the stigmatized.

Stigmas are generally justified by one or both of two ideological positions: (1) Few social, economic, and political resources should be devoted to benefiting people whose conditions are the result of their own poor decision making; and (2) the social order ought to reflect a hierarchy of groups differentiated on the basis of moral distinction.7 As a result, the deviance of the stigmatized or their departure from the norm(ally becomes the principal determinant of their status or social location.8 Little or no effort is typically made to reconcile the stigmatized with the community; no provision is made for ceremonies or rites of contrition to offset the degradation heaped on them by the community.

Theoretically, for violators of the criminal law, the process of stigmatization begins with their arrest and conviction, public events

Spoiled Identity (1963) (discussing the relationship between stigma and deviance).
4. Id. at 30–31. Brands vicariously inflicted on others are often referred to as “courtesy stigmas.” Id.
5. See id. at 7.
8. See id.
that are intended to produce shame. Whatever respite from disgrace and embarrassment the incarcerated may enjoy while confined in prison or jail with others similarly situated, the stigma reattaches when the convicted are released from physical custody or freed from the supervision of the criminal justice system. According to one commentator who investigated the re-entry of female prisoners:

Women exiting prison experience stigma by virtue of their conviction for crime, regardless of having done the time associated with punishment for the offense. The status of ex-offender is only one part of the person's identity, yet it can become the most prominent defining characteristic for representing self. With the label comes the baggage of distrust and lack of credibility . . . .

A panoply of economic, social, and political post-conviction penalties, including the denial of the right to vote, is intended to assure that the shame of incarceration is not forgotten or avoided. Post-conviction penalties that limit an ex-offender's ability to obtain a job, to qualify for publicly-subsidized housing, or to otherwise fully participate in economic life may be shameful and humiliating—in part because they remind the ex-offender of his or her prior moral transgressions. They also interfere with the ex-offender's obligations as a parent, for example, or impede her or his ability to possess the indicia of an autonomous adult and thereby frustrate the efforts of the ex-offender to escape or transcend her or his status as a moral defective. According to one investigator, the inability of released prisoners "to earn a decent living and support a family was far more shameful than their criminality. So, the stigma of criminality leads to the shame of being unable to support one's children, to help one's mother, and so forth."
Under the stigma theory of felon disenfranchisement, ex-offenders are denied the right to vote because they are "morally incompetent, unredeemable, and likely to recidivate."13 Allowing ex-offenders to vote, therefore, would seem to undermine the integrity of the democratic process. It might be argued, however, that stigma is not a strong justification for disenfranchisement of ex-offenders because the disability can be hidden.14 Theoretically, it is easy for an ex-offender to "pass" as an eligible voter. That is especially true in communities where a significant number of people choose not to vote. Although any argument that undermines an asserted basis for the legitimacy of felon disenfranchisement should be taken seriously, this one is particularly weak.

Getting arrested, convicted, and sent to prison has the effect of "putting one's business in the street." A community does not have to be tightly knit for the information to get around; being tightly packed or densely populated (as many urban neighborhoods are) will do. Stigma depends on the sentiments of the community that the stigmatized consider sacred, not necessarily the opinions of the public in general.15 If the circle in which an ex-offender lives, travels, and wants to be respected, albeit small, is aware of her or his political disability, that may suffice to provoke the shame of stigma.

The stigma of voter disenfranchisement becomes especially public when its impact on the black electorate is considered. The weight of the denial of the vote to ex-offenders falls heavily on blacks, especially black males. Criminal or felon disenfranchisement is a mark of inferiority that is related to blacks' historic denial of the vote. Lack of voting by reason of legal prohibitions reduces the voter turnout in some minority communities along with factors such as apathy and anger.16 Outsiders unable to tell one form of non-

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engagement with the political system from the other may stigmatize the community as a whole.

For minority offenders, the nature of the stigma they experience upon conviction, incarceration, and reentry is compounded by the additional effects of racial stigmatization and stereotyping. Racial discrimination in general is profoundly stigmatizing and shame inducing. Those bearing the mark of black or brown skin are assumed to be naturally unintelligent, lazy, and dishonest. Race is strongly associated with deviance, particularly sexual depravity, economic irresponsibility, and lawbreaking. As a result, the most innocent of minority youth bear a stigma that connects them with criminality. Because of gross statistical miscalculations regarding their criminal proclivities, black and brown young men are more likely than their white peers to be subjected to heightened scrutiny and to experience adverse encounters with the police that result in their arrest and conviction. The disparate rates of conviction and incarceration of young minority offenders reinforce the stereotype linking them with criminality. Once minority offenders are released from incarceration, the misinterpretation of crime statistics relating to recidivism and to the general propensity of minorities to commit crime exacerbates the stigma they bear. The imposition of a host of post-conviction penalties, the ready dissemination of criminal records by the state, and the media representations of minority criminals as virtually “natural born” make the stigma nearly impossible to overcome once it has attached.

Convicts in general are assumed to be “tough, mean, sneaky, dangerous, aggressive, and untrustworthy” and are labeled as such. But black and brown inmates are also considered shameless. The

Caucasian Americans, when they live in states with restrictive criminal disenfranchisement laws, even for those who have never been convicted of a crime.

17. See generally Austin, Crime Statistics, supra note 10 (suggesting that racialized crime statistics that are not controlled for social or economic factors can reinforce racial and ethnic stratification and subordination).

18. Id.


notion that going to prison has become a rite of passage for poor young black and brown males fuels the concern that the criminal justice system is not sufficiently humiliating for minority men and that the imposition of stiffer emotional or psychological sanctions is in order.\textsuperscript{21} Accusations of shamelessness, however, must be analyzed with care. Being excluded from the law-abiding population and ensconced in a criminal subculture that judges their behavior more leniently may protect offenders from the full impact of the censure of the law-abiding population while they are incarcerated. For poor and minority offenders, collectively coming to understand both the structural obstacles (poverty, poor education, poor housing, poor health care) that played a role in promoting their criminal behavior, and the inadequacies of the criminal justice system (primarily its racial bias) that resulted in their incarceration allows them to view their crimes and status vis-à-vis the broader perspective of society.\textsuperscript{22} Rather than shame, some imprisoned minorities may experience anger and indignation as a result of "reframing" their punishment in less stigmatizing terms. None of this means that minority inmates are without shame. It just may be that whatever shame they experience is a result of their failure to conform to the values of the subgroup of the society from which they come. Such a result would be consistent with the notion that the institutions of the larger American society are unfair and unjust, and accordingly cannot be counted on to treat minorities in a way that fosters the development of a healthy self-respect.\textsuperscript{23} It is unrealistic to expect prisoners to capitulate to shaming that is wholly incompatible with their sense of psychological well-being as blacks and Latinos in America. Stigma, thus, is a source of conflict between penal institutions and the minority inmates they house, with the prize being the emotional psyche of the incarcerated.

The precise nature and extent of the shame minority offenders actually experience in the course of conviction,

\textsuperscript{21} See Braman, supra note 12, at 166; see also Dorothy E. Roberts, \textit{The Social and Moral Cost of Mass Incarceration in African American Communities}, 56 Stan. L. Rev. 1271, 1288–89 (2004) (suggesting that vicarious exposure to the violence of prison life and resistant prison culture may damage young people by encouraging criminal behavior).

\textsuperscript{22} Braman, supra note 12, at 172–73.

incarceration, and reentry are matters that need to be fully studied. Private shaming, which individuals and groups existing in communities undertake on an informal basis, is more ubiquitous than the formal shaming undertaken by the state through state agencies and state-enacted measures like post-conviction penalties. Additionally, the shaming done by the offenders' communities may be more effective because it is less concerned with stigmatization and more focused on reintegation. Reintegrative shaming "is followed by efforts to reintegrate the ex-offender back into the community of law-abiding or respectable citizens through words or gestures of forgiveness or ceremonies to decertify the ex-offender as deviant."

Private shaming may focus more on reintegration than formal shaming because the prisoners' families and communities of formerly convicted and incarcerated persons have more of a stake in their redemption and rehabilitation than the society in general. Specifically, the stigma of incarceration and the accusation of shamelessness are not reserved for offenders; as recent empirical and ethnographic research confirms, the families of convicted and incarcerated persons experience a significant stigma as well. The shame of incarceration is contagious. It produces a loss of self-worth and self-esteem in family members. Anthropologist David Braman, who conducted an ethnographic study between 1998 and 2001 of the impact of male incarceration on families residing in the District of Columbia, has concluded that the "stigma related to incarceration is visited on the families of prisoners as much as—if not more [than]—

25. Id. at 100–01.
26. See Braman, supra note 12, at 165–66; Todd R. Clear et al., Incarceration and the Community: The Problem of Removing and Returning Offenders, 47 Crime & Delinq. 335, 341 (2001); Hazel May, Murders' Relatives: Managing Stigma, Negotiating Identity, 29 J. Contemp. Ethnography 198, 203–05 (2000) (noting that the relatives of convicted murderers experience stigma rooted in both "family toxicity," i.e., a perception that the relatives are somehow causally connected with the violence, and in the specific societal conceptions of murder as a rare and extreme crime). But see Denise Johnston, Effects of Parental Incarceration, in Children of Incarcerated Parents 59, 83–84 (Katherine Gabel & Denise Johnston eds., 1995) (concluding that studies show that shame or stigma is not a concern of incarcerated parents or their children, but of the children's caregivers, except for the families of first-time male offenders or of offenders convicted of "atypical" offenses like sex crimes, tax fraud and embezzlement).
27. Clear et al., supra note 26, at 342.
it is on the prisoners themselves. The stigma on family members of criminal offenders has several sources. Crime by a family member is taken as evidence of bad parenting and familial socialization. In addition, "[i]ncarcerated parents are considered to be social failures, and this pejorative characterization is exacerbated by underlying assumptions about race and socioeconomic status." For example, loss of a significant family member—especially a male breadwinner—may result in a family's becoming the stereotypical black, fractured, female-headed family. In truth, "[t]he very problems that incarceration exacerbates—from diminished income to undesired single parenting—are deeply embedded in stereotypes of black families in America." Thus, mass incarceration reinforces the stereotypes about black families.

Family members typically respond to the stigmas associated with the incarceration of a loved one with silence. Most of the participants in the study conducted by Braman "told no one outside of the immediate family about their relative's incarceration and the troubles they faced. Indeed, many were even hiding the incarceration from extended family members." Although there may be practical concerns behind the forced silence of the families of the incarcerated, i.e., "jobs, welfare payments, child custody, and even housing may be jeopardized when others become aware of the parents' whereabouts," it is fear of a negative response that makes mothers, spouses, and children reluctant to talk about their confined relatives, and the impact of their absences, with other family members, friends, schoolmates, colleagues at work, and fellow parishioners at church. Because of the silence, family members of the incarcerated tend to underestimate the incidence of incarceration among other families in their communities and this heightens their isolation and shame. Moreover, their silence leaves the rest of society ignorant of the

31. Id. at 165.
33. Id. at 73–74; Braman, supra note 12, at 174, 184–85, 215.
34. Braman, supra note 12, at 264 n.2.
extensive damage incarceration causes the family members of the imprisoned. As Braman asserts:

Stigma and incarceration interrelate in aspects of family life that are generally hidden from public view. A woman ashamed that she is giving up on her marriage [to an inmate], a son ashamed of his father's addiction, a daughter ashamed of selling her body to pay her grandmother's rent—these are things that do not make headline news, that are absent from stories of what prison and street life are "really like." Far from being unconcerned about criminality, familial integrity, and honesty, families of prisoners wrestle with each of these issues every day in settings they often perceive as hostile and unforgiving. They are not shameless; they feel the stigma that accompanies not only incarceration but all the other stereotypes that accompany it—fatherlessness, poverty, and often, despite every intent to make it otherwise, diminished love. 35

Because of the silence, democratic decision making with regard to policies adversely affecting the incarcerated and their families is ultimately impaired. 36 The votes of their neighbors and the decisions of their duly elected officials will not reflect the needs of this particularly vulnerable segment of the population.

Unlike their incarcerated relatives who are able to cope with their isolation and stigma through the support of criminal subcultures, family members who live among the civilian population of law-abiding folks are less likely to have a buffer to protect them from shame and humiliation. 37 However, evidence suggests that family members of the incarcerated who criticize and challenge their stigmatization through collective action, including overt political activism, and have a sympathetic and accepting support network fare better than those who do not. 38

Beyond the families, the communities from which the incarcerated come also experience stigma. The community loses its "reputation as a good place to live and do business." 39 Having large

35. Id. at 219.
36. Id. at 220.
37. Id. at 174–75.
38. May, supra note 26, at 215–18.
numbers of residents who are disqualified from voting because of prior convictions stigmatizes the entire community as being unfit to participate in the political process with regard to issues of criminal justice and penal policy. Some commentators maintain that such communities are quite hostile to ex-offenders and their families. The experience of victimization and the class differences that affect the likelihood of criminal involvement no doubt impact the sympathies of residents toward the offending population and their families. A desire to combat stigma may also be a factor in generating hostility toward ex-offenders; maintaining a stance of distance or distinction from lawbreakers is a mechanism for dealing with communal shame. On the other hand, there is some evidence that communities impacted by the mass incarceration of black and brown youth, though wary, may be more forgiving of offenders and identify with their plight, especially where the loss of political rights is concerned.\textsuperscript{40} The debate over the choice between a politics of distinction from and a politics of identification with lawbreakers would be deeper and more meaningful if ex-offenders and their families were allowed to participate fully.\textsuperscript{41} The exclusion of ex-offenders from full participation in political life affects the quality of the decision-making with regard to such issues by community residents themselves. Thus, both internal and external politics would be enhanced if ex-offenders were allowed to exercise the franchise.

Of course, civic endeavors by ex-offenders are particularly suspect with regard to laws pertaining to crime and punishment. Their first-hand knowledge of the criminal justice and penal systems calls their objectivity and impartiality into question. Yet, as Professor George Fletcher has argued, "bias does not disqualify [other] people from voting. Indeed voting is precisely about expressing biases, loyalties, commitments, and personal values. Excluding from the electorate those who have felt the sting of the criminal law obviously skews the politics of criminal justice toward one side of the debate."\textsuperscript{42} Furthermore, criminal justice is not the

\begin{itemize}
  \item \textsuperscript{40} See Brian Penaire et al., \textit{Barred from the Vote: Public Attitudes Toward the Disenfranchisement of Felons}, 30 Fordham Urb. L.J. 1519, 1543 (2003) (noting that views on disenfranchisement are linked to minorities' perceptions of the unfairness of the criminal justice system and the belief that rehabilitation should be its goal).
  \item \textsuperscript{42} Fletcher, \textit{supra} note 1, at 1906.
\end{itemize}
only item on the agenda of most political communities; broader prohibitions on voting thus seem unjustified. The political interests of ex-offenders likely extend beyond promoting changes in the criminal justice system, since the impact of their own involvement with the system extends beyond themselves.

To focus particularly on the impact of the ex-offender vote on the criminal justice system exacerbates the stigma by portraying ex-offenders as totally self-interested. Indeed, "[t]he stereotype of the offender is that of an individual isolated from all [normal] social relations." Yet, when the full effect of the stigma of conviction and incarceration on families and communities is considered, it is clear that ex-offenders have an interest in the policies of the plethora of public agencies that deal with housing, education, public health, mental health (particularly drug addiction and domestic violence), child welfare, public assistance, and social benefits.

Social scientists are beginning to delve more deeply into the impact of incarceration on the lives of the offspring of inmates. They and those affected by parental incarceration are starting to ask what, "as a matter of principle," the criminal justice system owes to such children given that they are "inadvertently punished when their parents are incarcerated." The glib response to such a query is likely to be that their parents should have thought of that before they committed a crime. Some of their offspring share that view. As one commentator noted: "Older children recognize that their parents voluntarily engaged in the activities that resulted in parent-child separation. This leads them to reasonably question their parents' love and concern, the basis upon which [the children] agreed to accept limits on their [own] behavior." Thus, the children's adjustment to separation from their parents may depend on the resources and support available to them and their remaining family members, as well as the children's understanding of the consequences of their parents' incarceration for them.

43. Braman, supra note 12, at 64.
44. Roundtable on Re-Entry, supra note 29, at 14 (comment of Imani Davis, the child of an incarcerated father).
45. Johnston, supra note 26, at 77.
Unfortunately, the lack of coordination between the criminal justice system and the child welfare system limits the contact that many incarcerated parents have with their children and the opportunities the parents have to assure that their children’s needs are being satisfied.\footnote{See generally Philip M. Genty, \textit{Damage to Family Relationships as a Collateral Consequence of Parental Incarceration}, 30 Fordham Urb. L.J. 1671 (2003) (noting that the missions of the criminal justice system and the child welfare system are distinct, and that the two systems often make decisions that are in conflict with regard to family relationships).} Ex-offenders’ lack of voting power, then, disables them from having any impact on the policies that affect the lives of those who care about the incarcerated and those about whom the incarcerated might care. The children of parents in the throes of the criminal justice system cannot vote and must rely on others to advance their interests. The denial of the franchise to ex-offenders is stigmatizing because it is infantilizing of people who sorely need the chance to display adult civic responsibility.

Politically challenging the stigma of conviction and incarceration has salutary effects for minority ex-offenders, their families, and their communities. The political disenfranchisement of minority ex-offenders may make that difficult, however, by thwarting total political engagement on a host of issues of interest to these constituencies. Although the political disenfranchisement of minority ex-offenders is barely justified by stigma, disenfranchisement makes the perpetuation of stigma more likely.

III. PRIVACY LAW, POLITICS, AND THE STRUGGLE AGAINST THE STIGMA OF INCARCERATION

There are at least four strategies for dealing with or managing stigmas: (1) “prevent the occurrence of the stigmatizing events;” (2) reduce the impact of the stigma on the stigmatized; (3) “reduce the perceived risk” associated with integrating the stigmatized into the population of the normal; or (4) “reduce the number of stigmatizing messages and their social amplification.”\footnote{Howard Kunreuther & Paul Slovic, \textit{Coping with Stigma: Challenges and Opportunities}, in \textit{Risk, Media, and Stigma: Understanding Public Challenges to Modern Science and Technology} 331, 340 (James Flynn et al. eds., 2001) [hereinafter \textit{Risk, Media, and Stigma}].} Each of these alternatives might conceivably be employed to cleanse ex-offenders and their families of the stigma of conviction and
incarceration. (1) Curbing racism in the criminal justice process would reduce the incidence of conviction and incarceration (particularly of young minority males), the stigmatizing events. (2) The impact of the stigma would be reduced by programs aimed at ending the wall of silence families of the incarcerated erect around themselves. (3) Stigmatization based on stereotyping is problematic because it is not based on facts. The avoidance that the stigma generates is uncalled for because it is premised on “a misconception” or “misperception of risk” and is therefore an “overreaction.” Stigmas should accordingly be tested with data and rejected if they are found to be matters of superstition and factual inaccuracies. As I have argued elsewhere, much of the perceived risk posed by minority ex-offenders is based on a misinterpretation of data relating to the incidence of offending and recidivism. Proper understanding of the data would reduce the misperception.

The law may be useful with regard to (4) “reduc[ing] the number of stigmatizing messages and their social amplification.” Because stigmatization is a manifestation of power, combating stigma requires a marshaling of power by groups that tend to have limited social, economic, and political capital. The law is a tool that relatively weak minorities have employed to alter or improve their relative standing in the society. Anti-discrimination law, for example, ought to be used to protect minority ex-offenders seeking employment or loans from financial institutions from unsubstantiated presumptions about the risk of recidivism and dishonesty they supposedly pose. Here, I want to consider briefly the possibility of relying on tort law, particularly the dignitary tort of invasion of privacy, as a way of managing the stigma of conviction and incarceration.

Once upon a time, privacy law recognized that stigma and shame without end work against the rehabilitation and reintegration of the formerly incarcerated into the community of the law-abiding. At present, however, rehabilitation and reintegration are not prized

50. See Falk, supra note 20, at 339-40.
51. See Austin, Crime Statistics, supra note 10, at 78-80.
52. See id.
by a society with a seemingly insatiable appetite for real crime stories packaged as entertainment. The real crime genre of reporting and storytelling emphasizes individual accountability for criminal behavior over structural solutions, and punitive responses that heighten the stigma of conviction and incarceration over other possible purposes of criminal sanctions. The change in orientation that has occurred toward the stigmatization of offenders is reflected in tort law. Before the tort of invasion of privacy was constitutionalized, an ex-offender's old arrests and convictions were in some cases deemed private matters where the ex-offender had stayed out of the limelight and assumed the role of an upstanding private citizen. Disclosure was actionable if it destroyed the ex-offender's attempt at anonymity or subjected her/him to public scrutiny or ridicule. As the cases discussed below suggest, the courts struggled to analyze the stigma that attaches to the formerly incarcerated and worked toward identifying the point at which it becomes offensive to publicize a person's criminal past. In reasoning their way to a decision, judges considered the passage of time, the purpose and social value of the disclosure, the relevancy of the disclosure to that purpose, the voluntary action of the ex-offender in opening the door to disclosure, and the necessity of identifying the ex-offender or interfering with her or his effort literally to achieve a "good name."

The opinions contain passages that speak to values of a bygone era. Melvin v. Reid, for example, involved a former prostitute who had been acquitted of murder and had thereafter "abandoned her life of shame," married, and become "entirely rehabilitated." She was living "an exemplary, virtuous, honorable, and righteous life" when a movie called "The Red Kimono" was made about her case. Her true name was used, and the film was advertised as based on real events as well. The plaintiff prevailed in her invasion of privacy action not merely because the defendants gave publicity to private facts, but because there was also an appropriation of her identity. In the course of supporting its ruling, the court characterized the disclosure as "unnecessary and indelicate, and a

54. Id.
willful and wanton disregard of that charity which should actuate us in our social intercourse." Furthermore,

One of the major objectives of society as it is now constituted, and of the administration of our penal system, is the rehabilitation of the fallen and the reformation of the criminal. Under these theories of sociology, it is our object to lift up and sustain the unfortunate rather than tear him down. Where a person has by his own efforts rehabilitated himself, we, as right-thinking members of society, should permit him to continue in the path of rectitude rather than throw him back into a life of shame and crime. Even the thief on the cross was permitted to repent during the hours of his final agony.

Briscoe v. Reader’s Digest Association involved a similar situation. The defendant did a story on truck hijacking in which it recounted the crime in which plaintiff had been involved and included the plaintiff’s name. The events had occurred eleven years earlier, but the story did not disclose that detail. The plaintiff’s eleven-year-old daughter learned of his past from the story, as did his friends, and “[t]hey thereafter scorned and abandoned him.” The court found that a jury might conclude that the disclosure of his identity was not newsworthy given its social value, its offensiveness, the lack of consent, and the interference with the state’s interest in the rehabilitation of ex-offenders. In regard to rehabilitation, the court reasoned: “One of the premises of the rehabilitative process is that the rehabilitated offender can rejoin that great bulk of the community from which he has been ostracized for his anti-social acts. In return for becoming a ‘new man,’ he is allowed to melt into the shadows of obscurity.” It also said:

55. Id. at 93.
56. Id.
57. 483 P.2d 34 (Cal. 1971).
58. Id. at 36.
59. Id.
60. Id.
61. Id. at 43.
62. Id. at 41.
We are realistic enough to recognize that men are curious about the inner sanctums of their neighbors—that the public will create its heroes and villains. We must also be realistic enough to realize that full disclosure of one's inner thoughts, intimate personal characteristics, and past life is neither the rule nor the norm in these United States.  

The primacy of First Amendment concerns has largely brought to a halt this effort to inculcate a rehabilitative/reintegrative ethic into tort law. Melvin and Briscoe are no longer good law. Now, the newsworthiness of much that is a matter of public record, including very old crimes, trumps the ex-offender's attempts to hide or get beyond his past. The greater accessibility of the records of criminal proceedings to the media and writers in general is fueling the interest in the true crime genres and thereby increasing the weight of First Amendment concerns. Whether this is a progressive change or a conservative reaction is hard to determine. It does suggest, though, that the effort to reduce the impact of the stigma borne by ex-offenders will meet with formidable opposition that has been strengthened by a media whose social and economic interests are not aligned with the promotion of ex-offenders' rights of privacy.

Political involvement remains the most effective mechanism for combating the stigma of incarceration. Politics provides a way for ex-offenders to generate responses to the stigmatizing messages that pervade the culture. Positive contact and cooperation between ex-offenders and ordinary citizens in the context of political activity dispel some of the myths and stereotypes that support ex-offenders' stigmatization. The circularity of the relationship between stigma and disenfranchisement makes it imperative that the politically excluded not wait for formal inclusion to begin the political assault on both.

53. Id.
54. See, e.g., Gates v. Discovery Communications, Inc., 131 Cal. Rptr. 2d 534 (Cal. Ct. App. 2003) (holding that disclosure of plaintiff's guilty plea as an accessory after the fact in connection with a thirteen-year-old murder was not an actionable invasion of privacy); Uranga v. Federated Pub'n's, Inc., 67 P.3d 29 (Idaho 2003) (holding that reproduction of a 40-year old statement implicating plaintiff in homosexual activity, where statement was found in court records that were open to the public and pertinent to a story on a sex scandal, was not an actionable invasion of privacy).
The political campaign to humanize the face of ex-offenders might begin with an attempt to change the vocabulary by which they are discussed. Dr. Divine Pryor, a forensic psychologist who is one of the founders of the Nu Leadership Policy Group, a think tank composed of formerly convicted and incarcerated persons, has given a great deal of thought to the issue of offender destigmatization. Because, as Dr. Pryor suggests, discourse impacts perception and perception determines behavior, it is important to change the terminology by which we think and speak of those who have been arrested, convicted, imprisoned, and released. Instead of being called "prisoners," "parolees," or "ex-cons," we might instead refer to such individuals as "people in prison," "people on parole," and "formerly incarcerated persons." Similarly, "reentry," the process by which persons released from the custody of the penal system attempt to eke out an existence in the straight world with minimal social or economic support, is a misnomer. People who have spent most of their lives excluded from full participation in society's most significant, life-supporting institutions—notably schools, formal sector jobs, private housing, and the private health care system—need to be integrated, not re-integrated, into society in order to live a "normal," law-abiding existence. Furthermore, though redemption is hard and recidivism is expected, it should be emphasized that most formerly convicted and incarcerated persons make the transition. Ultimately, they are not that different from the rest of us. Many people have engaged in conduct that, in some context other than the one they were fortunately in, would have landed them in jail or have been, at the very least, a big mistake.

Finally, Dr. Pryor argues that de-stigmatization ultimately demands greater willingness on the part of formerly convicted or incarcerated persons who are highly productive, contributing members of their communities to reveal their criminal histories. The face or persona of ex-offenders in general would be enhanced or altered if those who have achieved a measure of success voluntarily

65. Interview with Dr. Divine Pryor, a founder of the Nu Leadership Policy Group, New York, N.Y. (July 21, 2004). Members of the Group must satisfy the following criteria: have a criminal conviction or "done time"; been successfully in the community for five years or more; hold a college degree or preferably an advanced degree; occupy a senior management position or head an organization of their own founding; be interested in or doing public policy work around the concerns of the formerly convicted and incarcerated; and be willing to self-disclose their status as a formerly convicted or incarcerated person.
disclosed their status and “came out” as formerly convicted or incarcerated persons. If more citizens came to understand that ex-offenders include people who have achieved university degrees, attained professional positions, and acquired all the trappings and responsibilities of a solidly middle-class life, there might be more support for the general category of people who have violated the criminal law and paid “their debt to society.” As the campaign to make racial profiling a broadly sympathetic political issue illustrates, whites tend to empathize with minorities who massively defy expectations, overcome obstacles, excel along traditional lines, and still experience unwarranted discriminatory behavior. Of course, there are drawbacks to a politics based on self-revelation by those who have prospered in the world beyond the criminal justice system. The exceptional accomplishments of such formerly convicted and incarcerated persons might trigger a politics of distinction or tokenism that is too narrow to encompass those ex-offenders who have succeeded on a less grandiose scale. Moreover, because of the power of the stigma, self-disclosure or coming out as a formerly convicted or incarcerated person can be hazardous to one’s economic and social standing. For some, though, the opportunity to advocate on behalf of others who have found themselves in trouble with the law will be a factor in their own rehabilitation.67

IV. CONCLUSION

In this article, I have explored the relationship between the stigma of conviction and incarceration and felon disenfranchisement. The stigma is a source of conflict between minority offenders and the institutions of the criminal justice system that would constrain the offenders’ psyches with shackles of disgrace. The shame the stigma imposes on the families and communities of the convicted and incarcerated tends to silence them and thereby render them less politically able to address the many problems that the mass incarceration of black and brown people causes them. There are strategies for both overcoming the stigma borne by the formerly

67. See generally Shadd Maruna, Making Good: How Ex-Convicts Reform and Rebuild Their Lives (2001) (exploring how ex-offenders find working with other ex-offenders to be the key to desistance).
convicted and incarcerated and for reducing the burden of the silence endured by their relations. Although privacy law may be an important source of moral reasoning about the limits of the stigma, politics, the very activity felon disenfranchisement seeks to stifle, may be the only effective mechanism for implementing the law's moral vision of rehabilitation and redemption and putting constraints on the stigma's reach.