SHAME'S REVIVAL:
AN UNCONSTITUTIONAL REGRESSION

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The [Eighth] Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.
—Chief Justice Earl Warren, Trop v. Dulles

INTRODUCTION

In September of 2000, in an Arkansas court, a mother pled guilty to a traffic violation for not having her three-year-old daughter strapped into a car-safety seat. Unsatisfied with the usual fine, the judge ordered the mother to write a mock obituary for her mentally and physically disabled child.

In 1997, a woman was convicted of drug possession. The judge ordered her to stand on a public street corner wearing a sign saying, “I got caught possessing cocaine. Ordered by Judge Whitfield.”

In 1991, Darlene Johnson, “a pregnant mother of four, was convicted of beating two of her daughters with a belt and an electrical cord.” To avoid prison, Ms. Johnson acquiesced to the judge’s convi...
dition of probation that she be implanted with a contraceptive.  
Increasingly, judges are punishing criminals in a new and seemingly effective way—through the imposition of shame and other forms of emotionally distressing sanctions. Having grown weary of "one-size-fits-all" punishments, many judges are giving "voice to a community's fury and moral disgust." For example, Judge Howard Broadman, who ordered that the abusive mother be implanted with a contraceptive, stated, "The current system is broken, no question. Is it right for a judge to sit back and do the same sentencing? I think not. That's the definition of insanity." These punishments go beyond the simple legislative guidelines for convicted criminals; rather, more so than a fine or community service, they express a moral condemnation of the offender's conduct. In fact, these sanctions are examples of a moral reform theory of punishment, which forces the wrongdoer to take time to reflect upon his indiscretion. It is not much different from a parent or teacher having a child write an essay about what he did wrong or stand in the corner for the duration of the class. Through the use of shame, these punishments serve retributivist, deterrent, and rehabilitative ends; it is a virtual panacea for criminal conduct.

At first glance, shame may seem a novel and ideal form of punishment, but it is not without its faults. Shaming punishments strip

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8 Farah, supra note 7, at A15.
9 Abramson, supra note 5, at A31.
10 Farah, supra note 7, at A15.
12 See Garvey, supra note 4, at 738-39 ("[T]his appealing but largely neglected theory . . . recommends the infliction of hardship on an offender that 'mirrors' his own wrongdoing in order to morally 'educate' him, to make him see the error of his ways, and ideally, to lead him to repentance.").
13 Retributivists believe that an offender should be punished simply because he deserves to be sanctioned. See, e.g., Michael S. Moore, The Moral Worth of Retribution, in RESPONSIBILITY, CHARACTER, AND THE EMOTIONS: NEW ESSAYS IN MORAL PSYCHOLOGY 179, 181 (Ferdinand Schoeman ed., 1987).
14 Deterrence theories of punishment hold that a state punishes in order to prevent future crimes. The idea is that people will follow the law, rather than break it and risk punishment. The threat of punishment deters the criminal act. See, e.g., Gordon Hawkins, Punishment and Deterrence: The Educative, Moralizing, and Habituating Effects, 1969 WIS. L. REV. 550, 555. ("[P]unishment is a ritualistic device designed to influence persons by intimating symbolically social disapproval and society's moral condemnation.")
15 See Garvey, supra note 4, at 754 ("[T]he possibility that shame can rehabilitate has been noted as a source of its appeal.").
16 See id. at 746-57 (discussing how shaming punishments fit into each theory of punishment). While retributivism, deterrence, and rehabilitation are not the only theories of punishment, they are the most widely studied and influential. See generally SANFORD H. KADISH & STEPHEN J. SCHULHOFER, CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS, 102-25 (6th ed. 1995).
the convicted of more than their liberty; they rob them of their dignity, which no morally decent society should do.\textsuperscript{17} The attorney for the now sterilized Ms. Johnson\textsuperscript{18} clearly reiterated this point:

We all know the kind of bad things that people do that get arrested. The court is really witness to one long continuum of man's inhumanity to man. But does that mean that our courts and our governments and our policies are to stoop to the same level of inhumanity as the worst of its citizens—the worst of its citizens who end up being defendants in criminal cases?\textsuperscript{19}

As effective as shaming punishments may seem in satisfying the public call for new and more constructive means of sanctioning criminal behavior, these punishments may exceed the simple rubric of judicial innovation. Shaming could serve an effective purpose in any penal system—it provides retribution, deterrence, and rehabilitation in a neat package\textsuperscript{20}—but the penalties do so at the cost of the convicted's dignity, which may be too high a price under the United States Constitution.\textsuperscript{21}

The Eighth Amendment specifically bans "cruel and unusual punishment."\textsuperscript{22} While the Amendment's scope has often been limited to cases involving proportionality of punishment,\textsuperscript{23} a more liberal interpretation of the Amendment and its place in the American penal system supports a broader application. Since the dawn of constitutional interpretation, the meaning of the Constitution and its provisions have never stagnated to reflect only the time at which a provision was adopted. Rather, the breadth and freedoms that the Constitution embraces is ever evolving, and thus:

The Eighth Amendment's ban on inflicting cruel and unusual punishments . . . "[proscribes] more than physically barbarous punishments." It prohibits penalties that are grossly disproportionate to the offense, as

\textsuperscript{17} See AVISHAI MARGALIT, THE DECENT SOCIETY 262 (Naomi Goldblum trans., 1996) ("[A] society is a decent one if it punishes its criminals—even the worst of them—without humiliating them.").

\textsuperscript{18} See Farah, supra note 7, at A15.

\textsuperscript{19} Id. (quoting Charles Rothbaum).

\textsuperscript{20} See Garvey, supra note 4, at 746-57.

\textsuperscript{21} See Toni M. Massaro, Shame, Culture, and American Criminal Law, 89 MICH. L. REV. 1880, 1937 (1991) ("[T]he elusiveness of shame, the unreflective way in which the new shaming sanctions have been developed, and the serious harm to human dignity that truly effective shaming can cause, all suggest that the fairness objections to official shunning and shame are particularly compelling.").

\textsuperscript{22} U.S. CONST. amend. VIII.

\textsuperscript{23} See, e.g., Solem v. Helm, 463 U.S. 277 (1983) (finding that a life sentence without possibility of parole for check fraud was a disproportionate punishment for the crime committed and was therefore unconstitutional); Weems v. United States, 217 U.S. 349 (1910) (finding a fifteen year prison sentence for false entries in a public document to be excessive).
well as those that transgress today's "broad and idealistic concepts of dignity, civilized standards, humanity, and decency." In that shaming punishments are degrading, and often inhumane, they should not survive in the face of the decency and integrity that the Eighth Amendment ban on cruel and unusual punishment demands.

This Comment analyzes shame punishments in light of current Eighth Amendment constitutional jurisprudence. Part I traces the history of punishment in the United States, specifically noting a trend in civilizing the treatment of criminals. By reviewing the influence of Blackstone, the Framers, and the Supreme Court, Part II seeks to determine the meaning of the Eighth Amendment's ban on cruel and unusual punishment. Finally, Part III reviews the potential unconstitutionality of shame punishments, finding that such punishments are unacceptable under the Eighth Amendment's progressive dictates.

I. THE CHANGING FACE OF PUNISHMENT

As society has moved from primitive tribal cultures to the establishment of civilized nation-states, the methodology of punishment has become increasingly humane and, to the greatest extent possible, dignified. Torture and mutilation, once a pillar of an effective penal system, have given way to the modern day prison and probation system. The evolution of punishment demands a growing civility in the way society deals with its criminals. The reintroduction of shame is antithetical to this evolution, as it turns the penal system back to a time when notions of civility and dignity were not accounted for in the sentencing of criminals.

24 Hutto v. Finney, 437 U.S. 678, 685 (1978) (citations omitted) (holding that confinement in a prison or in an isolation cell is a form of punishment subject to scrutiny under Eighth Amendment standards and placing a maximum limit of thirty days on confinement in punitive isolation).

25 See generally Toni M. Massaro, The Meanings of Shame: Implications for Legal Reform, 3 PSYCHOL. PUB. POLY & L. 645, 703 (1997) ("[P]sychological works on shame . . . analyze closely . . . how shaming may convey contempt, and result in humiliation rather than shame."); Massaro, supra note 21, at 1936 ("The humaneness of a penalty depends on a host of factors, including whether it is proportional to the crime, is administered in an even-handed manner across offenders, and is not exceptionally degrading or cruel.").


27 See generally ULLA V. BONDESON, ALTERNATIVES TO IMPRISONMENT: INTENTIONS AND REALITY 16-26 (1994) (discussing the development of modern day probation).
A. Punishment at Its Earliest and Most Shameful

An examination of the earliest forms of punishment show that humiliation and shame were critical elements of primitive penal systems. All forms of "hanging, drawing, and quartering were carried out publicly in ceremonial fashion." Thus, public humiliation further contributed to the punishment itself; "a horrifying example was not, though, the only purpose behind [such rituals] . . . It was also intended that the victim should be humiliated, for degradation figured largely in all contemporary theories of punishment."

Perhaps the most telling sign of the importance of humiliation in early penal systems was the use of branding as a means of punishing common criminals. The Romans, French, and English all engaged in this most effective method of shaming punishment. Branding involved the burning of the first letter of the crime committed onto the perpetrator's face. For example, murderers were branded with an "M," vagrants with a "V," and fighters with an "F." Branding was not restricted to the Europeans; it was also an important feature of American colonial jurisprudence. New Jersey, for example, punished burglars by branding first their hands and then their faces for subsequent offenses. The use of branding had repercussions beyond humiliation; such markings would preclude the branded from finding employment, thus "render[ing] them desperate."

The use of the pillory was also a common method of punishment whose operation was primarily psychological. The pillory was largely used to "bring about the feeling of humiliation naturally attendant

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28 BARNES, supra note 26, at 43 ("With the coward the punishment was usually a matter of gross humiliation or corporal punishment . . . [h]e might be deprived of his weapons, made to eat with dogs, or to run a gauntlet of a shower of spears or clubs.").
29 Id. at 1361 (quoting CHRISTOPHER HIBBERT, THE ROOTS OF EVIL 27 (1963)).
30 Id.
31 BARNES, supra note 26, at 62.
32 Id.
33 Id.
34 Id.
35 Id.
36 BARNES, supra note 26, at 62 ("[T]he first offense was to be punished by branding with a T on his hand, while the second offense was to be punished by branding an R on his forehead.").
37 GEORGE IVES, A HISTORY OF PENAL METHODS 53 (1914).
38 A pillory is a "device for publicly punishing offenders consisting of a frame and adjustable boards erected on a post and having holes through which the head and hands of the offender were thrust." WEBSTER'S INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 1716 (3d ed. 1993).
39 BARNES, supra note 26, at 62-63.
upon the infliction of public disgrace.\textsuperscript{40} Further humiliating those confined to the pillory was the public’s practice of construing the criminal’s public confinement as an opportunity to express their condemnation by pelting him with “decayed vegetables, rotten eggs, and even stones.”\textsuperscript{41}

Such methods of punishment had effects transcending the punishment itself. A person punished in such a manner was often shunned by the entire community; though “the spectacle was over, those punished, although released from punishment, never would return to their previous place in society.”\textsuperscript{42} The shame lasted well beyond the punishment, and the stigmatization of the criminal was assured.

B. A Move Toward Civility—the Rise of Prisons

At the beginning of the eighteenth century, imprisonment in the United States was rare. Prisons were generally reserved for political and religious offenders, as well as debtors.\textsuperscript{43} It was not until the end of the eighteenth century that a transition from the corporal forms of punishment\textsuperscript{44} to imprisonment began to take hold in penal theory.\textsuperscript{45} From 1820 to 1970, corporal punishment fell out of favor and almost completely disappeared.\textsuperscript{46}

The earliest reformers were the Quakers,\textsuperscript{47} who believed that solitude would afford the offenders time to reflect on their wrongs and rehabilitate themselves.\textsuperscript{48} In addition, the Quakers believed that it was necessary to treat the prisoners with a certain sense of kindness while also giving them direction.\textsuperscript{49} To effectuate this theory of con-
finement, reflection, and rehabilitation, the Quakers built separate cells for the miscreant, where inmates could quietly and independently study the Bible. A prisoner was released when society regarded him as "sufficiently reformed." For the Quakers, imprisonment encouraged rehabilitation. Such rehabilitative ends to confinement would quickly find favor in Western nations, particularly in the United States.

In the early twentieth century, rehabilitation began to take a preeminent role in penal theory. By 1935, the majority of states had implemented an indeterminate sentencing structure, in which a judge was given broad discretion to individualize prison sentences. Such tailored systems took into account all the circumstances surrounding the crime, and thus the prisoner's sentence was designed to serve the needs of rehabilitation as much as retribution. In the middle of the twentieth century, the parole and probation systems were developed to "avoid the detrimental effects of imprisoning offenders . . ." The goal of probation is one of individual prevention. More specifically, probation aims "to promote [a convict's] adjustment to the community by using conditional sentence or probation instead [of incarceration]." Probation is a "treatment ideology which places greater importance on the resocialization of individuals than general obedience to the law." The penal system that began its development in the late eighteenth century and that took hold in the twentieth century demonstrated an increasing respect for the criminal's dignity despite the fact that he was removed from society and imprisoned. The prison and

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50 Kelley, supra note 48, at 763.
51 Id.
52 Two Pennsylvania prisons (the Western Penitentiary, built in 1829, and the Eastern Penitentiary, built in 1836) were the first to implement the Quaker ideals, known at that time as the "Pennsylvania System." Romano, supra note 47, at 1094. See also Braithwaite, supra note 46, at 1733 ("[T]he United States became the great laboratory of the penitentiary, attracting admirers like de Tocqueville to visit on fact-finding tours of these new instruments of civilization.").
53 The nineteenth century witnessed a proliferation of the Quaker system. Confinement was deemed an effective way of dealing with offenders. Therefore, as the Quaker system encouraged rehabilitation, by the dawn of the twentieth century, rehabilitation had become the primary goal of punishment. Kelley, supra note 48, at 763.
54 Id. at 763-64.
55 Id. at 764. For example, "a kidnapping in which a divorced parent takes a child from the other parent's custody without permission is vastly different from a kidnapping in which a child is snatched by a stranger for ransom money." Id. at 764 n.46.
56 BONDESON, supra note 27, at 187. Some critics of the prison system have noted that prisoners are not utopias of rehabilitation; rather, they are schools for crime. Prisoners are exposed to all members of the criminal world and thus are taught new crimes while becoming increasingly enmeshed in criminal subcultures. The violent and sometimes oppressive atmosphere of prisons can leave an inmate more angry at the world than when they entered prison.
57 BONDESON, supra note 27, at 187.
58 Id.
probationary system was a vast improvement over the barbaric public tortures and branding that marked the earliest forms of punishment. In progressive republics such as the United States, a respect and a belief in criminal rehabilitation seemed to be in line with the burgeoning tolerance and esteem for individuals of all genders, races, and creeds. Assuming that a modern day republic such as the United States aspires to decency, "[e]very human being, even a criminal, is entitled to the respect granted to humans because they are human. An injury to human dignity is humiliation, and so even a criminal is entitled not to be humiliated." The dignity of all members of society, including those convicted of crimes, needs to be revered and protected. Thus, a penal system that includes imprisonment and probation with an eye toward rehabilitation represents a vastly improved and progressive punishment methodology (when compared to the draconian public tortures and shaming that persisted until the close of the eighteenth century) and demonstrates a respect for criminals as individuals.

II. DEFINING THE "CRUEL AND UNUSUAL PUNISHMENT" CLAUSE OF THE EIGHTH AMENDMENT

Given the steady movement towards a more dignified penal system and the progressiveness of constitutional interpretation, the Eighth Amendment's ban on cruel and unusual punishment should be expanded to include the shaming punishments described above. Though imprisonment is not necessarily a bastion of humanity, it may in fact be a more dignifying experience than having to wear a T-shirt proclaiming, "I am a felon on probation for..." This Section aims to show that the Eighth Amendment was designed to serve progressive ends, and so what at one point in time may be considered decent and constitutional, may at another time be found cruel and unconstitutional. By tracing the origins and evolution of the Eighth Amendment, it becomes clear that the ban on cruel and unusual punishment entails injecting an element of humanity in the sanction-

59 However, an argument can be made that prisons were inherently anti-republican: "At the very moment in American history when republican freedom was acquiring its deepest meaning, America took pride in institutions of unfreedom. It became permanently attached to the myth that crime was a price of freedom, that freedom was so dangerous it had to be checked by remorseless unfreedom." Braithwaite, supra note 46, at 1733.

60 MARGALIT, supra note 17, at 262.

61 Id. at 262-70 (arguing that though imprisonment is not the ideal form of punishment, it does mark a change in the moral sensitivity of society and so it stands as progress when compared to the barbaric and humiliating punishments of the past). See also Part IIIA. ("[I]f prison means the deprivation of liberty, then it is not beyond comprehension that a 'person can endure the deprivation of... liberty with dignity.' If this is the case, then it is possible to conclude that a short imprisonment may be better than shame...") (citations omitted).
ing of law breakers, making it impossible to continue the draconian penal practice of shame.

A. Blackstone’s Influence

Perhaps no one had more of an influence on the American constitutional structure than Sir William Blackstone. Prior to the drafting of the United States Constitution, Blackstone’s treatise, Commentaries on the Laws of England, served as the source of law for American courts. Furthermore, Blackstone was a prominent influence in the debates over the Constitution: “[L]ike Montesquieu [], Blackstone] was cited frequently by all sides. A trenchant reference to Blackstone could quickly end an argument.” Blackstone’s influence crept into the Framers’ thoughts on nearly all aspects of the Constitution, including the Eighth Amendment ban on cruel and unusual punishment.

Though the punishment methods of the early eighteenth century are somewhat foreign and barbaric in the eyes of modern society, Blackstone’s words served as a reminder that punishment did need to be censored. In a day of public torture and shaming, Blackstone wrote:

[T]he humanity of the English nation has authorized, by a tacit consent, an almost general mitigation of such part of these judgments as savours of torture or cruelty: a sledge or hurdle being usually allowed to such traitors as are condemned to be drawn; and there being very few instances... of any persons being embowelled or burned, till previously deprived of sensation by strangling...

Embodied in Blackstone’s text was a notion that punishment may not be excessively cruel and respect must be given to the person who is undergoing such extreme forms of official state sanction.

Blackstone also demanded that nations be governed by the rule of law. As a result, he was advocating for a criminal code that provided a general uniformity of punishment:

[I]t is moreover one of the glories of our English law, that the species, though not always the quantity or degree of punishment, is ascertained for every offence; and that it is not left in the breast of any judge, nor even of

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64 See infra Part H.B.

65 4 WILLIAM BLACKSTONE, COMMENTARIES *376-77.
a jury, to alter that judgment, which the law has beforehand ordained, for every subject alike, without respect of persons.\textsuperscript{66}

Without uniformity, men would be subject to the whims of judges, creating a sense of arbitrary justice not acceptable in a republic: "For, if judgments were to be the private opinions of the judge, men would then be slaves to their magistrates; and would live in society, without knowing exactly the conditions and obligations which it lays them under."\textsuperscript{67} The certainty and even-handedness of criminal penalties allow an offender to fully understand the consequence of his actions, and nullifies arbitrary and unequal condemnation of one criminal over another by a presiding judge.\textsuperscript{68}

Blackstone’s influence extended into the actual wording of the Eighth Amendment: "For the bill of rights has particularly declared, that excessive fines ought not to be imposed, nor cruel and unusual punishments inflicted . . . ."\textsuperscript{69} This very phrase was misread by the colonial states and the Framers of the Constitution as a prohibition of the tortures catalogued in the earlier portions of Blackstone’s chapter:

It seems to be generally accepted that such provisions [prohibiting cruel and unusual punishments] in early Constitutions, particularly in those of the original Thirteen States, were intended to prohibit the punishments prohibited in England by 1 Wm. And Mary, Ch. 2, the so-called Bill of Rights of England . . . . These were the cruel and barbarous punishments on occasion formerly imposed in England by the Crown. They were punishments considered at the time to be unnecessarily cruel and bordering on outright torture such as breaking on the wheel, public dissection, and the like.\textsuperscript{70}

The Framers had misconstrued Blackstone,\textsuperscript{71} but as such the misinterpretation became a foundation of American constitutional thought, and so “such a reading explains the American framer’s interpretation of the cruel and unusual punishments clause; an inter-

\textsuperscript{66} Id. at *377.
\textsuperscript{67} Id.
\textsuperscript{68} Id. at *378 ("[W]here an established penalty is annexed to crimes, the criminal may read their certain consequence in that law, which ought to be the unvaried rule, as it is the inflexible judge, of his actions."). See also Massaro, supra note 21, at 1940 ("To the extent that shame sanctions are ‘custom designed’ to the offender, and not part of any sentencing guidelines, they thus are subject to the abuse of unequal application.").
\textsuperscript{69} 4 WILLIAM BLACKSTONE, COMMENTARIES *378.
\textsuperscript{70} Anthony F. Granucci, "Nor Cruel and Unusual Punishments Inflicted": The Original Meaning, 57 CAL. L. REV. 839, 865 (1969) (quoting State v. Cannon, 55 Del. 587, 591 (1963)).
\textsuperscript{71} Blackstone had not intended the prohibition of torturous punishment. Rather, he was interested in proscribing excess and preserving individual respect. For example, a man could be “embowedled or burned” so long as he were “previously deprived of sensation by strangling.” BLACKSTONE, supra note 65, at *377.
pretation which spawned the American doctrine that the words 'cruel and unusual' proscribed not excessive but torturous punishments."

B. The Framers’ Perceptions

Throughout the Constitutional Convention of 1789, many of the Framers recognized a need to include enumerated liberties upon which the newly created federal government could not infringe. Therefore, after the ratification of the revolutionary Federal Constitution, the new Congress immediately began work on a set of amendments guaranteeing liberties—the Bill of Rights—including the ban on cruel and unusual punishment. It was during these debates that the Framers revealed their liberal intentions behind the adoption of the Eighth Amendment.

The Framers had a strong conception that a proper and civil penal system should not include the barbarities that marked many of the punishments in other societies; such a prohibition was a necessary element of the American experiment in republicanism. During the ratification debates of the Federal Constitution, Patrick Henry warned his fellow Virginians of adopting a supreme government that did not secure its civilians against oppressive punishment:

In this business of legislation, your members of Congress will loose the restriction of not imposing excessive fines, demanding excessive bail, and inflicting cruel and unusual punishments. These are prohibited by your [Virginia] declaration of rights. What has distinguished our ancestors? That they would not admit of tortures, or cruel and barbarous punishments.

George Mason, author of the Virginia Declaration of Rights, which served as the model for the Bill of Rights, outlined the reach of the Eighth Amendment: “[One] clause of the bill of rights provided that no cruel and unusual punishments shall be inflicted; therefore, torture was included in the prohibition.” The words of Mason and Henry lend support to the idea that the Cruel and Unusual Punishment Clause of the Eighth Amendment was not an empty phrase.

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72 Granucci, supra note 70, at 865.
74 COLONIES TO NATION, 1763-1789: A DOCUMENTARY HISTORY OF THE AMERICAN REVOLUTION 581 (Jack P. Greene ed., 1975) (“The first Congress under the new Constitution met in March, 1789, and James Madison, one of the representatives from Virginia, quickly moved to fulfill Federalist promises to add a bill of rights.”).
75 See Granucci, supra note 70, at 839-42 (discussing the views of several important figures in the drafting of the Eighth Amendment, including those of George Mason, the author of the Virginia Declaration of Rights, the model for the federal Bill of Rights).
76 Id. at 841 n.10 (quoting 3 J. ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 447-48 (2d ed. 1881)).
77 Id. at 842.
At the time of its adoption, the Eighth Amendment was considered an important safeguard against state infliction of inhumane punishment. The goal was to limit the manner by which punishment was to be inflicted. Examining the commentary surrounding the drafting and ratification of the Eight Amendment reveals that "the practices intended to be forbidden were punishments such as pillorying, disemboweling, decapitation, and drawing and quartering; it was unusual cruelty in the method of punishment that was condemned."\(^{78}\) The aim of the Framers was to eliminate torture\(^{29}\) as a tool of the potentially oppressive hand of the newly created central government.

However, when examining Blackstone's influence and the words of the Eighth Amendment's Framers, it becomes increasingly apparent that the foundation upon which the prohibition of cruel and unusual punishment sits is in fact nothing less than decency.\(^{80}\) Therefore, as society progresses and what was once considered decent becomes an abomination in the eyes of many, the prohibitions covered by the Eighth Amendment should naturally be extended to include those modern conceptions of what is acceptable and, more importantly, humane.

This was not the immediate impact of the Eighth Amendment. Following the adoption of the Bill of Rights, "state and federal jurists accepted the view that the clause prohibited certain methods of punishments. Since the 'barbarities' of Stuart England were not used often in America, the clause was rarely invoked in the courts."\(^{81}\) By the end of the nineteenth century, the Cruel and Unusual Punishment Clause had been so rarely invoked\(^{82}\) that many considered it obsolete, "aimed only at primitive practices that had long since passed away.\(^{83}\) Furthermore, a new understanding of the clause had emerged—"[t]he aim of the provision was said to be the prohibition of


\(^{79}\) "[I]t is safe to affirm that punishments of torture...are forbidden by [the eighth] amendment to the Constitution." Wilkerson v. Utah, 99 U.S. 130, 136 (1878).

\(^{80}\) Note, The Cruel and Unusual Punishment Clause, supra note 78, at 635 ("Fundamentally, the provision rests upon considerations of human decency... . Not only is the offender's own human dignity at stake, but the standards of humanity embodied in any notion of society limit the methods of punishment that society can conscionably impose.").

\(^{81}\) Granucci, supra note 70, at 842. The popular conception at the time was that the Framers intended the Amendment to proscribe "not excessive but torturous punishments." Id. at 865.

\(^{82}\) It was not until the end of the nineteenth century that the Supreme Court first heard a non-capital case dealing with the Cruel and Unusual Punishment Clause. In O'Neil v. Vermont, the question of whether imprisonment for the illegal distribution of liquor fell under those punishments proscribed by the Eighth Amendment's ban on cruel and unusual punishment was raised. The Court made no ruling, however, because it was not properly submitted as a federal question. 144 U.S. 323 (1892).

\(^{83}\) Note, The Cruel and Unusual Punishment Clause, supra note 78, at 637.
e aim of the provision was said to be the prohibition of ‘unnecessary’ cruelty and pain.\textsuperscript{84}

But as the twentieth century dawned, the Eighth Amendment’s place in constitutional jurisprudence would be revived. The Supreme Court began to recognize that the Eighth Amendment was adopted as a result of American perceptions that there was something inherently wrong with inhumane punishment. As will be made evident in the next Section, the Court, in its revival of the Eighth Amendment, has consistently emphasized the Amendment’s commitment to dignity and decency, leaving the door open to extending the ban on cruel and unusual punishment to the inhumane and mentally torturous shame sanctions.

C. The Twentieth Century Breathes New Life into the Eighth Amendment

Having laid largely dormant for the entire nineteenth century, the Eighth Amendment’s Cruel and Unusual Punishment Clause experienced a rebirth in constitutional jurisprudence during the twentieth century. The courts began to look at various sentencing structures and punishments and evaluated their permissibility on constitutional grounds. Finally, the Supreme Court began to adopt the view of the Framers that the Eighth Amendment was in fact meant to bar inhumane methods of punishment. Since the seminal decision in *Weems v. United States*,\textsuperscript{85} “the Supreme Court has consistently held that the concept of cruel and unusual punishment is constantly changing.”\textsuperscript{86}

In 1910, the Supreme Court handed down its decision in *Weems v. United States*, which would prove to be a watershed decision in Eighth Amendment jurisprudence. The facts of the case are remarkable. The defendant was sentenced in the Philippines\textsuperscript{87} to fifteen years in prison along with accessory penalties for false entries in a public document.\textsuperscript{88} The Court did not sit idly on this grossly disproportionate punishment for what amounted to little else than a clerical error on the defendant’s part.\textsuperscript{89} Rather, in finding the punishment to be in

\textsuperscript{84} Id.
\textsuperscript{85} 217 U.S. 349 (1910).
\textsuperscript{86} LARRY CHARLES BERKSON, THE CONCEPT OF CRUEL AND UNUSUAL PUNISHMENT 15 (1975).
\textsuperscript{87} The Philippines were under U.S. constitutional jurisdiction. See *Weems*, 217 U.S. at 357.
\textsuperscript{88} Id. at 357-58. Furthermore, those sentenced were forced into “hard and painful labor” for the state. They were to be chained at the wrists and ankles at all times. Id. at 364.
\textsuperscript{89} Paul Weems was essentially convicted of a strict liability crime. The trial court had held that “whether an offender against the statute injures any one by his act or intends to injure any one is not material . . . .” Id. at 363.
violation of the Cruel and Unusual Punishment Clause, the Court took its first firm stand on the meaning of the Eighth Amendment.\textsuperscript{90}

In its decision, the Court announced that the Eighth Amendment was to be a conduit for change in perceptions as to what is and is not acceptable in society. Justice McKenna wrote in no uncertain terms:

> Legislation, both statutory and constitutional, is enacted, it is true, from an experience of evils, but its general language should not, therefore, be necessarily confined to the form that evil had theretofore taken. Time works changes, brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave it birth. This is peculiarly true of constitutions. They are not ephemeral enactments, designed to meet passing occasions. They are... “designed to approach immortality as nearly as human institutions can approach it.” The future is their care and provision for events of good and bad tendencies of which no prophecy can be made. In the application of a constitution, therefore, our contemplation cannot be only of what has been but of what may be.

\textit{Weems} expresses the crucial principle that the Constitution is a living, breathing document, designed to grow as society grows—its adaptability is the very essence of its continued viability. The \textit{Weems} court recognized that the often narrow language of the Constitution was not meant to be read as an absolute; instead, “[t]he meaning and vitality of the Constitution have developed against narrow and restrictive construction.”\textsuperscript{93}

The \textit{Weems} decision was crucial in allowing for a more liberal interpretation of the Eighth Amendment to evolve. The Court explicitly made clear that the Eighth Amendment was designed to enforce changes in social belief and not simply to reflect the predominant at-

\textsuperscript{90} “It is cruel in its excess of imprisonment and that which accompanies and follows imprisonment. It is unusual in its character. Its punishments come under the condemnation of the bill of rights, both on account of their degree and kind.” \textit{Id.} at 377.

\textsuperscript{91} \textit{Id.} at 373. In coming to its decision, the \textit{Weems} Court predominantly rested on what it believed was the Framers’ intent in adopting the Eighth Amendment. As defined by the Court, the “intent of the adopters of the eighth amendment [was to grant] a constitutional mandate to the judiciary to give ‘efficacy and power’ to the provision by deciding for itself what is cruel and unusual.” Pressly Millen, Note, \textit{Interpretation of the Eighth Amendment—Rummel, Solem, and the Venerable Case of Weems v. United States}, 1984 DUKEL.J. 789, 802 (1984).

\textsuperscript{92} In analyzing the Framers’ intentions in adopting the Eighth Amendment, the Court recognized that the Framers offered little by way of a definition of “cruel and unusual.” However, Justice McKenna in his majority opinion noted:

> [The Framers’] predominant political impulse was distrust of power, and they insisted on constitutional limitations against its abuse. But surely they intended more than to register a fear of the forms of abuse that went out of practice with the Stuarts... They were men of action, practical and sagacious, not beset with vain imagining, and it must have come to them that there could be exercises of cruelty by laws other than those which inflicted bodily pain or mutilation.

\textit{Weems}, 217 U.S. at 372.

\textsuperscript{93} \textit{Id.} at 373.
titude at the time of its adoption: \"The [cruel and unusual punishment] clause of the Constitution . . . may be therefore progressive, and is not fastened to the obsolete, but may acquire meaning as public opinion becomes enlightened by a humane justice.\" This is the linchpin of the Eighth Amendment—it truly is a malleable constitutional provision that bends with societal conceptions of humanity. Having revived the Eighth Amendment as a vibrant part of the Constitution, \"Weems would allow courts freely to decide what is \'cruel and unusual,' as the eighth amendment's adopters intended, without the scope of review being bound by narrow historical constraints.\"95

The Court continued to lend weight to the Eighth Amendment in \textit{Trop v. Dulles.}96 It was in this case that the Supreme Court emphasized the Eighth Amendment's concern with decency: \"The basic concept underlying the Eighth Amendment is nothing less than the dignity of man. While the State has the power to punish, the Amendment stands to assure that this power be exercised within the limits of civilized standards.\"97 Most importantly, the Court recognized that the Eighth Amendment was in fact progressive and \"that \textquoteleft evolving standards of decency\textquoteright is the litmus test for determining whether a law violates the principles embodied in the Eighth Amendment . . . .\"98

The \textit{Trop} ruling shed light on exactly what the Eighth Amendment’s ban on cruel and unusual punishment actually entailed. Chief Justice Warren noted that the Amendment was to apply to more than merely death penalty cases: \"the existence of the death penalty is not a license to the Government to devise any punishment short of death within the limit of its imagination.\"99 The scope and more importantly the cruelty of a method of punishment were in fact judicially reviewable. No longer could the legislature or even a sitting judge arbitrarily mete out punishments. In judging the constitution-

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94 Id. at 378 (emphasis added).
95 Millen, \textit{supra} note 91, at 789.
96 356 U.S. 86 (1957). Trop, a native-born American, had been stripped of his United States citizenship by reason of his conviction by court-martial for wartime desertion. The Court ruled that even if the government could legitimately divest an individual of citizenship under certain circumstances, the statute at issue violated the Eighth Amendment because it was penal in nature and prescribed a cruel and unusual punishment.
97 Id. at 100.
98 Roberta M. Harding, \textit{The Gallows to the Gurney: Analyzing the (Un)constitutionality of the Methods of Execution}, 6 B.U. PUB. INT. L.J. 153, 160 (1996) (arguing that \textit{Trop v. Dulles} represented the \"Court's vehicle for unambiguously promulgating the clause's modern interpretation\"). \textit{See also Trop}, 356 U.S. at 101 (\"The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society\").
99 \textit{Trop}, 356 U.S. at 99. Furthermore, the Court went on to define \textquoteleft unusual\textquoteright in the context of its use in the text of the Eighth Amendment: \"If the word \textquoteleft unusual\textquoteright is to have any meaning apart from the word \textquoteleft cruel,\textquoteright however, the meaning should be the ordinary one, signifying something different from that which is generally done.\" Id. at 100-01 n.32.
ality of a levied sanction, "[t]he question is whether this penalty subjects the individual to a fate forbidden by the principle of civilized treatment guaranteed by the Eighth Amendment."100

In Furman v. Georgia,101 the Supreme Court espoused a workable test in order to determine whether a punishment amounts to cruel and unusual punishment in violation of the Eighth Amendment. The test, outlined in Justice Brennan's concurring opinion to the per curiam opinion stated:

If a punishment is unusually severe, if there is a strong probability that it is inflicted arbitrarily, if it is substantially rejected by contemporary society, and if there is no reason to believe that it serves any penal purpose more effectively than some less severe punishment, then the continued infliction of that punishment violates the command of the Clause that the State may not inflict inhuman and uncivilized punishments upon those convicted of crimes.102

Justice Brennan's test raises two main questions: First, "[i]s the punishment unacceptable to contemporary society or so degrading to human dignity as to cause the offender mental anguish?"103 and second, "[i]s the punishment arbitrarily inflicted or excessive in relation to the offense committed?"104

The Supreme Court has transformed the Eighth Amendment into secular gospel espousing humanity to all. Though the case law largely focuses on the death penalty and the length of imprisonment, there is little reason why the grounded conceptions of morality and dignity that guided the thoughts of the Supreme Court Justices could not be applied to the seemingly less severe punishments meted out under the title of shame. After all, the Eighth Amendment was put in place to protect human dignity.105 In looking at the types of shame and mentally distressing punishments, where the convicted are com-

100 Id. at 99.
101 408 U.S. 238 (1972) (per curiam). In Furman, three African-Americans were convicted of rape and murder and sentenced to death. The court held that the imposition and carrying out of the death penalty constituted cruel and unusual punishment, in violation of the Eighth and Fourteenth Amendments, at least where a person convicted in a state court for murder or rape was African-American and was sentenced to death after a trial by a jury that, under state law, had discretion to determine whether or not to impose the death penalty. The death penalty violated the Eighth and Fourteenth Amendments, because the application was discretionary, haphazard, and discriminatory.
102 Id. at 282 (Brennan, J., concurring).
103 Kelley, supra note 48, at 773-74.
104 Id. at 774.
105 See Trop, 356 U.S. at 100 ("The basic concept underlying the Eighth Amendment is nothing less than the dignity of man."). See also Coker v. Georgia, 433 U.S. 584, 592 (1977) (holding that punishment is unconstitutional if it is "nothing more than the purposeless and needless imposition of pain and suffering"); Weems v. United States, 217 U.S. 349, 378 (1910) ("The clause of the Constitution . . . may be therefore progressive, and is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice.").
pelled to advertise their prior misdeeds, to undergo chemical castra-
tion, or to write mock obituaries for their children, it appears that
these punishments may go to the heart of what a modern society
would deem inhumane and undignifying. If these punishments do in
fact strip offenders of their dignity, then these innovative sanctions—
though possibly effective—should be deemed unconstitutional un-
der the Eighth Amendment’s protections against cruel and unusual
punishment.

III. INNOVATION GONE TOO FAR

By analyzing shame and other innovative punishment schemes in
light of Justice Brennan’s concerns with dignity, mental anguish, and
arbitrariness, this Section will demonstrate that these type of sanc-
tions run afoul of the Eighth Amendment’s ban on cruel and unusual
punishment.

A. Dignity

The reinvigoration of shame as part of the penal system is not
without its proponents. From its retributive force to its educational
impact, shame certainly satisfies many of the goals of punishment.
However, despite its merits as an effective sanctioning system, the
human costs of a penal system that relies on shame remain too high.
Shame fails in that so degrades human dignity that it is unaccept-
able in contemporary society and does in fact cause mental anguish
to those who must bear the burden of fulfilling the draconian pun-
ishments.

The first and probably most important attack on shame sanctions
are that they do in fact impose an extremely undignifying penalty on
the offender. For all its espoused virtue, shame “menaces certain
ideals that any morally respectable mode of punishment should
honor, not the least of which is human dignity.” Given such an at-
tack on the dignity of man, such penalties may fail to survive any scru-

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106 See Kahan, supra note 11, at 630-55 (defending the use of shame punishments).
107 See supra notes 102-04 and accompanying text.
108 See, e.g., Kahan, supra note 11 (establishing and justifying the shaming model of punish-
ment).
109 See generally id. at 638-41 (describing shame as the optimal means of deterrence); Massaro,
supra note 21, at 1890-1900 (arguing that shame sanctions are justifiable on all standard theo-
ries of punishment—retribution, rehabilitation, deterrence, and incapacitation—but still not
supporting shame as a viable mode of state sanction); James Q. Whitman, What Is Wrong with
fully retributive.”).
110 Garvey, supra note 4, at 757-61 (examining arguments that shame is undignified).
111 Id. at 739.
tiny. In his 1998 article *Can Shaming Punishments Educate?*, Stephen Garvey summarizes the arguments of those opposed to shaming punishments:

According to Toni M. Massaro, a powerful critic of shaming penalties, "[s]tate-enforced shaming authorizes public officials to search for and destroy or damage an offender's dignity." According to Andrew Von Hirsch, the stocks and pillory... may be the classic examples of illegitimate demeaning rituals, forcing offenders to "attach self-accusing bumper-stickers to their vehicles" and other forms of "compulsory attitudinalizing" should also be ruled out on grounds of dignity.\(^\text{112}\)

Contemporary shaming penalties often cross the line from effective punishment to the infliction of little else than public embarrassment of the offender. For example, Garvey cites a town in Arkansas that, in hopes of curbing juvenile delinquency, imposed a city ordinance requiring parents of delinquents be "placed within stockaded public display six hours a day."\(^\text{113}\) An even more extreme example is the case in which an offender was forced to wear a diaper over his clothing because he was "acting like a baby."\(^\text{114}\)

Many proponents of shame respond to the indignity arguments made by the detractors by pointing to two persuasive realities: First, they argue that prison itself is an indignity and that the indignity of shame is simply a substitute for that of prison; and second, because shaming penalties are usually a condition of probation, there is an element of consent involved.\(^\text{115}\)

With respect to the first argument, Stephen Garvey has argued that the social meaning of prison is ambiguous and thus "[c]omparing the indignity of prison with that of shaming penalties is complicated."\(^\text{116}\) However, if prison means the deprivation of liberty, then it is not beyond comprehension that a "person can endure the deprivation of... liberties with dignity."\(^\text{117}\) If this is the case, then it is possible to conclude that a short imprisonment\(^\text{118}\) may be better than shame, because it does in fact preserve the offender's dignity.

The other defense of shame is that those upon whom the penalties are imposed often consent to the punishment as a condition of probation, in order to avoid imprisonment. Often from the offender's perspective, shame is a better choice than confinement.\(^\text{119}\) However, as has been well established, consent is only valid if it is not

\(^{112}\) Id. at 758.
\(^{113}\) Id. at 759.
\(^{114}\) Id.
\(^{115}\) Id. at 761.
\(^{116}\) Id.
\(^{117}\) Id. (citing ANDREW VON HIRSCH, CENSURE AND SANCTIONS 82 (1993)).
\(^{118}\) Most shame sanctions are in lieu of a fine or short stay in prison.
\(^{119}\) Garvey, *supra* note 4, at 761-62.
Stephen Garvey has argued that "in order to know whether or not consent is coerced, we need to know the relevant baseline. That is, what's the alternative to the 'chosen' option?" Those who choose shame generally do so to avoid prison, but why is prison the baseline? Thus, "in order for consent to constitute a full defense of shame, what's needed is an argument that imprisonment is the morally appropriate default option."

It is clear then that shame robs an offender of his dignity. However voluntary or perhaps more desirable a choice than confinement, shame has no place in a contemporary society that proclaims the utmost respect for the individual. The effectiveness of shame rests in the importance of personal dignity to each violator. However, that is exactly what the Eighth Amendment specifically aims to protect. Thus, because personal dignity and humanity are highly valued in our society, then punishments that violate these values would have to be deemed problematic and in contrast to the idealism embodied in the ban on cruel and unusual punishment.

B. Mental Anguish

Shaming penalties are taxing not only on a person's dignity, but also on his mental health. Unlike imprisonment, where whatever undignifying experiences that may exist take place behind guarded concrete fortresses, shaming penalties place the offender in the public eye. A person is left to suffer great humiliation before the public at large. Though this is one of the goals of shame it does not necessarily make it appropriate. As Brennan noted, one of the characteris-

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102 See, e.g., Schneckloth v. Bustamonte, 412 U.S. 218, 222 (1973) (holding that a consent that is in any way coerced is not a valid consent); Bumper v. North Carolina, 391 U.S. 543, 548 (1968) ("When a prosecutor seeks to rely upon consent to justify the lawfulness of a search, he has the burden of proving that the consent was, in fact, freely and voluntarily given."); United States v. Pena, 143 F.3d 1363, 1366 (10th Cir. 1998) ("Valid consent is that which is freely and voluntarily given.").

121 Garvey, supra note 4, at 761.

122 Id. at 762. Defenders of shaming sanctions have yet to make the argument that imprisonment is the appropriate baseline. A lesser sanction may in fact be the more appropriate baseline. For example, "if the punishment for an offender who 'consents' to shame should be straight probation and not imprisonment then what looks like an offer is in fact a threat, and the offender's consent to shame is coerced and thus invalid." Id.

123 Trop v. Dulles, 356 U.S. 86, 100 (1958) ("The basic concept underlying the Eighth Amendment is nothing less than the dignity of man.").

124 See generally MARGALIT, supra note 17, at 262; JOHN RAWLS, A THEORY OF JUSTICE 440-46 (1971) (discussing the importance of preserving self-respect and eliminating shame in liberal society).

125 See, e.g., GABRIELE TAYLOR, PRIDE, SHAME, AND GUILT: EMOTIONS OF SELF-ASSESSMENT 53 (1985) ("[S]hame... introduces... the notion of an audience, for feeling shame is connected with the thought that eyes are upon one.").
tics that makes a punishment reprehensible in the eyes of the Constitution is that it causes the offender extreme mental anguish.126

Shame works largely because it is such a powerful emotion. By affecting a person's entire conception of self, shame often works too well.127 There have even been instances in which offenders subjected to shaming punishments ultimately committed suicide.128 However, the less extreme responses to shame are just as intolerable. Because “[t]he anxiety that shaming exploits is a fear of abandonment or isolation, usually from a social group or other community that is necessary or valuable to the individual,” many victims of shame penalties feel it necessary to hide or even exit the community.129 Rather than simply providing the offender with intense feelings of shame, the sanction may cause the offender to become “socially alienated and disaffected.”130

Thus, the crippling effects of shame may last well beyond the imposition and completion of the penalty. A person who has committed a relatively minor crime may feel the lasting effects not of his crime, but of his punishment for years to come.131 Therefore, “the stigma of shaming may be irreversible.”132 Shaming penalties place the offender in a position where he may suffer extreme emotional anguish, and that anguish may be disproportionate to the crime

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126 See Furman v. Georgia, 408 U.S. 238, 282 (1972) (Brennan, J., concurring) (placing the imposition of mental anguish as potentially constitutionally impermissible under the Eighth Amendment). See also Kelley, supra note 48, at 773-74 (characterizing the Furman test as asking whether the punishment is “so degrading to human dignity as to cause the offender mental anguish”).

127 See, e.g., Taylor, supra note 125, at 89 (“[F]eelings of guilt are localized in a way in which feelings of shame are not localized; they concern themselves with the wrong done, not with the kind of person one thinks one is.”).

128 See, e.g., Courtney Guyton Persons, Note, Sex in the Sunlight: The Effectiveness, Efficiency, Constitutionality, and Advisability of Publishing Names and Pictures of Prostitutes’ Patrons, 49 VAND. L. REV. 1525, 1527 (1996) (“In 1994, a paper in New Jersey listed a young engineer among other prostitution arrestees. The recent widower and father of three killed himself when he saw his name in the paper.”). This is not to say that shame sanctions are the only form of punishment that may lead to suicide. But it is a potential result that perhaps should be considered in the debate.

129 Massaro, supra note 21, at 1902.

130 Garvey, supra note 4, at 748.

131 Of course much of the social impact and effectiveness of shame depends on the size of the community. For example, a person subject to shaming sanctions in a major city may perform his punishment in anonymity, while someone in a small community where all residents are connected would feel intense feelings of public humiliation as he carries out his punishment in front of an entire community of people with whom he has ready and recurrent contact. See Garvey, supra note 4, at 753 (“All else being equal . . . shaming penalties are likely to be more effective in Kenosha than they are in Manhattan.”).

132 Massaro, supra note 21, at 1937.
committed,\textsuperscript{133} thus rendering the punishment cruel and unusual.

C. Arbitrariness

The revival of shame sanctions has not been, for the most part, a product of any concerted judicial effort; rather, shame sanctions seem to be more the result of "whimsical bursts of judicial, legislative, or prosecutorial inspiration."	extsuperscript{134} In general, shame sanctions seem to be custom designed to the offender; thus, the penalties are likely to be applied unequally. Judges, who have discretion to impose creative sentences, may be inclined to deliver shame sanctions to some, while simply fining others.\textsuperscript{135} According to the \textit{Furman} test,\textsuperscript{136} the unequal application of a sanction leaves it open to a determination that the sanction itself is a violation of the Eighth Amendment.

The risk of unequal application could be managed by mandatory sentencing guidelines.\textsuperscript{137} However, as Toni Massaro has argued, no realistic sentencing guidelines could accurately cover all the factors that may determine the effect of a sanction.\textsuperscript{138} With respect to shame, this problem is especially profound, because shame is "elusive and intensely offender-specific."\textsuperscript{139} More importantly, if judges do take the individualized meaning of shame into account, the end result could be that "prominent, white collar or upper-class offenders, who have more social status to lose, would receive milder sentences than less prominent lower-class offenders."\textsuperscript{140} And yet ignoring the individual nature of shame may lead to judges handing out overly punitive sentences to some offenders.\textsuperscript{141}

At this time, modern shaming sanctions violate notions and principles of even-handed punishments. Judges who mete out shame sanctions often do so for one offender and not for other similarly

\textsuperscript{133} "Once an offense becomes notorious, the public will do as it chooses with the information, regardless of official admonitions. This would be especially true in work and social relationships, where shunning might be acute for some offenders." Massaro, supra note 21, at 1938.
\textsuperscript{134} Id. at 1940.
\textsuperscript{135} \textit{See} Edwin Powers, Crime and Punishment in Early Massachusetts 195-96 (1966) (noting that it was the poorer and less reputable class of citizens who were sentenced to the stocks, while respected citizens were likely to be fined).
\textsuperscript{136} \textit{See} supra notes 101-02 and accompanying text.
\textsuperscript{137} Massaro, supra note 21, at 1940 ("The risk of unequal application of shame sanctions might be controlled by requiring that all legislatures adopt mandatory sentencing guidelines, applied evenly to all offenders.").
\textsuperscript{138} Id. at 1941. Factors that exist may include how many times an offender has committed a crime, and why the crime was committed.
\textsuperscript{139} Id.
\textsuperscript{140} Id.
\textsuperscript{141} Id.
situated offenders.\textsuperscript{142} By doing so, the judge is arbitrarily picking an actor and subjecting him to punishments that others are not at risk of receiving. In order to satisfy conceptions of equality, all like offenders must face the same modes of condemnation, and with shame this becomes impossible to achieve.

Shame sanctions fail Brennan's test at every level.\textsuperscript{143} They rob the offender of his dignity, which is something that no liberal democracy can accept.\textsuperscript{144} The imposition of shame is also likely to cause extreme mental anguish, the effects of which last well beyond the completion of the sentence. Finally, because the effects of shame are offender-specific, the result is that such sanctions are applied unequally, and can never truly attain any sense of uniform applicability. The result is that, in light of the \textit{Furman} test, shame sanctions should be construed as unconstitutional.

\textbf{CONCLUSION}

At its core, shame is an undignifying experience. Its imposition is in many instances mentally torturous, and even worse, is incompatible with just conceptions that like offenders be subject to like sentences. It is an innovation in punishment that many hail as a great step forward in penology.\textsuperscript{145} However, as Toni Massaro has noted, "[T]he elusiveness of shame, the unreflective way in which the new shaming sanctions have been developed, and the serious harm to human dignity that truly effective shaming can cause, all suggest that the fairness objections to official shunning and shame are particularly compelling."\textsuperscript{146} Shame is nothing more than a revival of the very modes of punishment that came to be considered barbaric and intolerable during the late eighteenth and early nineteenth centuries.

As the Constitution has evolved and the meaning of "cruel and unusual punishment" has come to embrace the ideal of liberal progressiveness, shame has slipped from a pedestal of innovative pun-

\textsuperscript{142} \textit{Id.} at 1942 (discussing a case where a judge singled out one sex offender from many to receive a shaming punishment, because the judge "simply wanted to set an example").

\textsuperscript{143} Justice Brennan, in his concurring opinion in \textit{Furman v. Georgia}, 408 U.S. 238, 282 (1972), stated:

If a punishment is unusually severe, if there is a strong probability that it is inflicted arbitrarily, if it is substantially rejected by contemporary society, and if there is no reason to believe that it serves any penal purpose more effectively than some less severe punishment, then the continued infliction of that punishment violates the command of the Clause that the State may not inflict inhuman and uncivilized punishments upon those convicted of crimes.

\textsuperscript{144} See \textit{MARGAULT}, supra note 17, at 262.

\textsuperscript{145} See Kahan, supra note 11, at 630-52 (extolling the virtue of shame as an alternative sanction of wrongdoers).

\textsuperscript{146} Massaro, supra note 21, at 1937.
ishment to an abyss of unconstitutionality. Shame has no place in a society constructed to respect individual dignity, and thus has no place under the constitutional regime established by the Eighth Amendment.