

Spring 1984

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Recommended Citation

Dora Nevares-Muniz, The Eighth Amendment Revisited: A Model of Weighted Punishments, 75 J. Crim. L. & Criminology 272 (1984)

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THE EIGHTH AMENDMENT REVISITED: A MODEL OF WEIGHTED PUNISHMENTS*

DORA NEVARES-MUNIZ**

I. INTRODUCTION

Beginning with the case of *Weems v. United States*,¹ in 1909, the United States Supreme Court has interpreted the eighth amendment of the Constitution² to impose a requirement of proportionality in criminal sentencing. The requirement of proportionality implies that the severity of a punishment must be graduated to the severity of the offense for which it is imposed. This Article proposes that current state determinate sentencing statutes are defective and violate the eighth amendment because the penalty terms contained within them have been "fixed" arbitrarily by legislatures without giving adequate and systematic consideration to the offense and punishment severity—therefore failing the test of proportionality.

To correct the disproportionality inherent in current state penal codes, we suggest that the statutes be rewritten to impose punishments based on an empirically derived offense severity scale, which assesses the weight of each offense in terms of its social harm. The Sellin-Wolfgang crime severity scale³ is a good example of this concept. The scale utilizes an empirical measure of the community's perception of various offenses to rank the offenses according to their severity. By determining the quantum of each offense's severity, a sequence of severity ratios is obtained, which in effect ranks all offenses in a severity continuum. Such a ranking can be utilized to determine a penalty scale that is commensu-

* The sections on the Puerto Rico punishment provisions and the proposed sentencing model are a revised version of pp. 223-40 of the author's Ph.D. dissertation entitled, *Penal Codification in Puerto Rico: A Sentencing Model* (Ann Arbor: University Microfilms, 1981).

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¹ 217 U.S. 349 (1909).

² "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

³ T. SELLIN & M. WOLFGANG, *THE MEASUREMENT OF DELINQUENCY* (1964).

rate with the offenses, thus satisfying the eighth amendment's prohibition against disproportionate penalties.

As an appropriate method to satisfy the constitutional mandate of proportionality, we recommend that legislators use an empirically derived offense severity scale—modelled after the Sellin-Wolfgang scale⁴—in determining statutory penalty terms.

II. CRUEL AND UNUSUAL PUNISHMENTS

The prohibition against cruel and unusual punishments originated in the English Bill of Rights of 1689.⁵ One commentator has noted that the English provision “was first, an objection to the imposition of punishments which were unauthorized by statute and outside the jurisdiction of the sentencing court, and second, a reiteration of the English policy against disproportionate penalties.”⁶ This policy was considered, furthermore, to reflect a long-established English tradition, already codified in the Magna Carta, against disproportionate punishments.⁷

As originally interpreted in the United States, the constitutional phrase “nor cruel and unusual punishments” was intended to prohibit only barbarous punishments.⁸ This “traditional” interpretation of the eighth amendment was first expressed as:

punishments of torture, such as those mentioned by the Commentator [Blackstone] [e.g., drawing or dragging of the prisoner to the place of execution, disembowelling alive, beheading, quartering, public dissection, burning alive] . . . and all others in the same line of unnecessary cruelty, are forbidden by that amendment to the Constitution.⁹

The first Supreme Court opinion to discuss the issue of proportionality between offense and punishment severity was the dissent written by

⁴ *Id.*

⁵ The Virginia Constitution of 1776 copied the “cruel and unusual punishment” provision verbatim from the English statute. Eight states followed Virginia in including a prohibition against cruel and unusual punishments in their constitutions, and by 1787, the federal government included it in the Northwest Ordinance. By 1791, the prohibition was enacted as the eighth amendment to the United States Constitution. Granucci, “*Nor Cruel and Unusual Punishment Inflicted*,” *The Original Meaning*, 57 CALIF. L. REV. 839 (1969).

⁶ *Id.* at 860.

⁷ *Id.* at 846.

⁸ *Id.* at 842.

⁹ *Wilkerson v. Utah*, 99 U.S. 130, 136 (1878) (death by firing squad sustained because it was common military punishment). The “traditional” approach was followed in *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459 (1947) (a second electrocution attempt caused by malfunctioning of the electric chair in the first attempt is not cruel and unusual punishment); *Weems v. United States*, 217 U.S. 349, 380-95 (1910) (White, C.J., dissenting); *In re Kemmler*, 136 U.S. 436, 446 (1890) (the eighth amendment held to prohibit inhuman or barbarous punishments such as “burning at the stake, crucifixion, breaking on the wheel . . .”; therefore, death by electrocution is legal).

Justice Field in *O'Neil v. Vermont*.¹⁰ Although Justice Field acknowledged the "traditional" interpretation of the eighth amendment,¹¹ he also interpreted the amendment to prohibit "all punishments which by their excessive length or severity are greatly disproportioned to the offences [sic] charged."¹²

In *Weems v. United States*, the Court stated that "it is a precept of justice that punishment for crime should be graduated and proportioned to offense."¹³ Thus, the Supreme Court adopted a requirement of proportionality as part of its eighth amendment analysis.

The Court in *Weems* utilized the following tests to weigh the severity of the punishment. First, the Court compared the challenged punishment to statutory penalties for the same offense in various other states, in terms of severity and kind. Second, the Court compared the challenged penalty to penalties for more serious offenses, both at the federal and the state levels. Third, the Court compared the penalties for different behavior which would fall under the same offense for which *Weems* was convicted.¹⁴

The *Weems* decision also introduced the notion that the meaning of the amendment could change over time because it relies on the perception of offense and punishment severity held by the community.¹⁵ This view served as a basis for the "evolving standards of decency" approach which is implicit in the modern interpretation of the eighth amendment.¹⁶

During the last decade, both the proportionality¹⁷ and the evolving

¹⁰ 144 U.S. 323, 337 (1892) (Field, J., dissenting). Although the first eighth amendment case before the Supreme Court was based on a proportionality challenge to a state sentence, the Court did not consider it, holding that the amendment did not apply to the states. *Pervear v. Massachusetts*, 72 U.S. (5 Wall.) 475 (1867). *But see* *Robinson v. California*, 370 U.S. 660 (1962) (the eighth amendment applies to the states through the fourteenth amendment).

¹¹ 144 U.S. at 339 (Field, J., dissenting).

¹² *Id.* at 339-40. Defendant was fined \$6,638.72 for 307 charges of selling liquor illegally in Vermont. A subsidiary punishment of three days of forced labor for each one dollar fined was also set. By the Court's calculation, this would have required defendant to serve 19,914 days of imprisonment.

¹³ 217 U.S. at 367. *Weems* was convicted under the Phillipines Penal Code of falsifying an official public document. The penalty challenged was a fine, 15 years of chained imprisonment and forced labor, plus accessory penalties of civil interdiction: subjection to surveillance as well as perpetual absolute disqualifications to vote, hold elected office, acquire honors, and receive retirement pay.

¹⁴ 217 U.S. at 363-66. For a discussion of the constitutionality of the punishment imposed upon *Weems*, see *id.* at 380-82.

¹⁵ *Id.* at 373.

¹⁶ The "evolving standards of decency" approach was first adopted in *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (denationalization as punishment for wartime desertion).

¹⁷ See *Solem v. Helm*, 103 S. Ct. 3001 (1983); *Enmund v. Florida*, 458 U.S. 782 (1982); *Rummel v. Estelle*, 445 U.S. 263 (1980); *Hutto v. Finney*, 437 U.S. 678 (1978); *Coker v.*

standards of decency¹⁸ approaches have gained recognition over the "traditional" approach. An evolving standard of decency analysis requires "objective indicia that reflect the public attitude toward a given sanction."¹⁹ Valid indicators for assessing contemporary standards of decency include existing penalties either statutorily fixed by the legislature²⁰ or imposed by the jury,²¹ societal values and norms as identified by prior court opinions, history and tradition, public opinion, and universal moral precepts.²²

In assessing proportionality between offense and punishment severity, courts require consideration of the following criteria: nature and gravity of the offense, punishments for the same offense in other jurisdictions, penalties for more serious offenses in other jurisdictions, sentences imposed on other criminals in the same jurisdiction, acceptable goals of punishment, and evolving standards of decency.²³

In the recent decision of *Solem v. Helm*,²⁴ the Court indicated that application of the aforementioned criteria "assumes that courts are competent to judge the gravity of an offense, at least on a relative scale."²⁵

Georgia, 433 U.S. 584 (1977) (death penalty for rape is excessively disproportionate to the severity of the offense); *Ingraham v. Wright*, 430 U.S. 651 (1977); *Gregg v. Georgia*, 428 U.S. 153 (1976) (the plurality opinion recognized the proportionality requirement but said that the death penalty is appropriate for the most serious offenses); *cf. Furman v. Georgia*, 408 U.S. 238 (1972); *Rudolph v. Alabama*, 375 U.S. 889 (1963) (Goldberg, J., dissenting). For an excellent analysis of the evolution of the proportionality approach in both federal and state courts, see Schwartz, *Eighth Amendment Proportionality Analysis and the Compelling Case of William Rummel*, 71 J. CRIM. L. & CRIMINOLOGY 378 (1980).

¹⁸ See *Gregg*, 428 U.S. at 172-76; *Woodson v. North Carolina*, 428 U.S. 280, 288-90 (1976); *Furman*, 408 U.S. at 330-32 (Marshall, J., concurring); see generally *Rudolph v. Alabama*, 375 U.S. 889 (1963); *Trop v. Dulles*, 356 U.S. 86 (1958).

¹⁹ *Gregg*, 428 U.S. at 173; see also *Furman*, 408 U.S. at 278.

²⁰ See *Rummel v. Estelle*, 445 U.S. 263 (1980) (fixing the duration of penalties is the responsibility of the legislature, however, the court should intervene in cases of grossly disproportionate application); *cf. Solem v. Helm* 103 S. Ct. at 3015-16 (distinguishing the stringent South Dakota parole system from the one in *Rummel*); *Woodson*, 428 U.S. at 288 & n.12; *Gregg*, 428 U.S. at 174 & n.19; *Furman*, 408 U.S. at 436-37 (Powell, J., dissenting); *Weems*, 217 U.S. at 377.

²¹ *Coker*, 433 U.S. at 596-97; *Gregg*, 428 U.S. at 181; *Woodson*, 428 U.S. at 288-89; *Furman*, 408 U.S. at 439-40 (Powell, J., dissenting); *McGautha v. California*, 402 U.S. 183, 201-02 (1971); *Witherspoon v. Illinois*, 391 U.S. 510, 513 n.5, 519 (1968) (an important function of the jury is to maintain a link between contemporary values and the penal system).

²² See cases cited in *Woodson*, 428 U.S. at 288 n.11; *Furman* 408 U.S. at 274-78 (Brennan, J., concurring). See generally Goldberg & Dershowitz, *Declaring the Death Penalty Unconstitutional*, 83 HARV. L. REV. 1773 (1970).

²³ *Rummel v. Estelle*, 445 U.S. at 295 (Powell, J., dissenting); *cf. In re Lynch*, 8 Cal. 3d 410, 503 P.2d 921, 105 Cal. Rptr. 217 (1972) (setting out criteria as: degree of danger that the offender represents to society, comparison of the challenged penalty with that of more severe offenses in that jurisdiction, and with the penalty for the same offense in other jurisdictions); accord *In re Foss*, 10 Cal. 3d 910, 519 P.2d 1073, 112 Cal. Rptr. 649 (1974).

²⁴ 103 S. Ct. 3001 (1983).

²⁵ *Id.* at 3011.

The Court stated further that, "[c]omparisons can be made in light of the harm caused or threatened to the victim or society, and the culpability of the offender".²⁶ These statements invite the use of offense severity scales in future proportionality analyses under the eighth amendment.²⁷

One of the clearest interpretations of the eighth amendment's prohibition was given by Justice Brennan, concurring in *Furman v. Georgia*.²⁸ Justice Brennan enunciated various principles of punishment that include: (1) that punishment is "unnecessary," and hence "excessive," and prohibited as cruel and unusual "[i]f there is a significantly less severe punishment adequate to achieve the purposes for which the punishment is inflicted";²⁹ (2) that the State must not inflict severe punishment arbitrarily;³⁰ (3) that the "judicial determination is as objective as possible";³¹ and (4) that punishment must comport with human dignity.³² Current discussions on sentencing revolve around these principles.

The first principle, referred to in the literature as parsimony or subsidiarity,³³ recommends that the least restrictive sanction necessary to achieve defined social purposes be chosen. This principle was first enunciated in the Model Penal Code, along with the recognition that imprisonment should be a punishment of last resort.³⁴ In response to this principle, the proposed Federal Criminal Code is heavily weighted toward probation or conditional discharge rather than imprisonment.³⁵ This principle also explains the trend in current codes to add a probationary component to sentences of imprisonment.³⁶ Furthermore, non-

²⁶ *Id.*

²⁷ Interestingly, the Court in *Solem*, asserting that "there are widely shared views as to the relative seriousness of crimes," *id.* at 3011, took judicial notice of the empirical research done by Rossi, Waite, Bose & Berk, *The Seriousness of Crimes: Normative Structure and Individual Differences*, 39 AM. SOC. REV. 224, 237 (1974). This study, performed in Baltimore, developed an offense seriousness scale akin to the Sellin-Wolfgang severity scale.

²⁸ 408 U.S. at 257, (Brennan, J., concurring).

²⁹ *Id.* at 279.

³⁰ *Id.* at 274.

³¹ *Id.* at 277.

³² *Id.* at 270, 273.

³³ See N. MORRIS, *THE FUTURE OF IMPRISONMENT* 58 (1974) (parsimony); A. VON HIRSCH, *DOING JUSTICE: THE CHOICE OF PUNISHMENTS; REPORT OF THE COMMITTEE FOR THE STUDY OF INCARCERATION* (1976). For several Supreme Court decisions that incorporate the parsimony requirement either implicitly or explicitly, see *Robinson v. California*, 370 U.S. 660 (1962); *Trop v. Dulles*, 356 U.S. 86 (1958); *Weems v. United States*, 217 U.S. 349 (1909).

³⁴ MODEL PENAL CODE §§ 7.01(1), 7.03 (Proposed Official Draft 1962).

³⁵ CRIMINAL CODE REVISION ACT OF 1979, S. 1723, 96th Cong., 1st Sess., §§ 3103, 3702 (1979).

³⁶ In addition to this constitutional rationale, statutory preference for probation is currently explained in terms of the following rationales: 1) probation has proved to be more effective in dealing with social re-adaptation of the offender since it does not involve complete dislocation from the community; 2) it is less costly than imprisonment; and 3) it gives a margin to the sentencing judge to deal with contingencies not considered by the Legislature in

incarcerative sanctions such as warning and release, intermittent confinement, supervision, free labor, restitution, and civil disabilities, are prescribed for most non-violent offenses.³⁷

The second principle stated by Justice Brennan in *Furman*,³⁸ as well as by Justice Powell in *Solem*,³⁹ is non-arbitrariness, which requires an objective judicial determination of the sanction. Objectivity in sentencing requires both parity—the imposition of equal sanctions to similarly situated offenders—and proportionality—sanctions proportional to the seriousness of the offense.⁴⁰

Despite the criteria established by the Supreme Court to evaluate whether a punishment comports with the eighth amendment, the American legal system has paid scant attention to the perceived severity of penalties or to the scaling of offenses and punishments.⁴¹ Current state sentencing statutes, therefore, are constitutionally challengeable because they confer unstructured discretion to sentencing judges. Furthermore, the statutes arbitrarily impose penalty terms, regardless of proportion to social harm, to other offenses and to sentencing alternatives, thus violating the proportionality requirement.

The Supreme Court has mandated, moreover, that the socially perceived severity of a crime be considered in assessing the degree of offense seriousness for penal statutes.⁴² The sanction for a criminal offense should reflect its severity in terms of social harm. In order to weigh the seriousness of offenses to determine appropriate sanctions, courts need a

defining and classifying offenses. See NATIONAL COMMISSION ON REFORM OF THE FEDERAL CRIMINAL LAWS, 2 WORKING PAPERS, 1268-69; AMERICAN BAR ASSOCIATION, STANDARDS FOR CRIMINAL JUSTICE, *Sentencing Alternatives and Procedures*, Standard 2.3 commentary at 63-73 (1968).

³⁷ CRIMINAL CODE REVISION ACT OF 1979, *supra* note 35; MODEL SENTENCING AND CORRECTIONS ACT (1979).

³⁸ 408 U.S. at 276 (Brennan, J., concurring).

³⁹ 103 S. Ct. at 3010.

⁴⁰ See also CRIMINAL CODE REVISION ACT OF 1979, S. 1723, 96th Cong., 1st. Sess., § 3102(b), which states: "The term 'punishment commensurate with the seriousness of the offense' means that the severity of the sentence is proportionate and directly related to the severity of the offense and the harm done and that similar crimes committed under similar circumstances receive similar sentences." Note that § 3102(b) includes the requirement of parity as part of the principle of proportionality.

⁴¹ The research done is limited to the following references: Hamilton & Rotkin, *Interpreting the Eighth Amendment: Perceived Seriousness of Crime and Severity of Punishment*, in CAPITAL PUNISHMENT IN THE UNITED STATES (H. Bedau & C. Pierce eds. 1976); Wolfgang, *Seriousness of Crime and a Policy of Juvenile Justice*, in DELINQUENCY, CRIME AND SOCIETY (J. Short ed. 1976); Buchner, *Scale of Sentence Severity*, 70 J. CRIM. L. & CRIMINOLOGY 182 (1979); Erickson & Gibbs, *On the Perceived Severity of Legal Penalties*, 70 J. CRIM. L. & CRIMINOLOGY 102 (1979); Sebba, *Some Explorations in the Scaling of Penalties*, 15 J. RESEARCH CRIME & DELINQUENCY 247 (1978); Wolfgang, *Real and Perceived Changes in Crime and Punishment*, 107 J. AM. ACAD. ARTS & SCI 143 (1978).

⁴² *Solem v. Helm*, 103 S. Ct. at 3010-12.

system of reference against which to evaluate the proportionality of the sanction relative to other crimes and to the social harm inflicted by the crime along a single dimension. Such a system of reference may be provided by crime severity scales.

III. SCALING OFFENSES

The concept of scaling offense and sanction severity was an issue as early as 1764, when Cesare Beccaria proposed that legislators should develop a scale of offense severity, ranging from the slightest misbehavior to the most serious crime, with a corresponding scale for the severity of sanctions.⁴³

During the late 1950's, Professor Hart wrote that "the grading of offenses was not only proper but essential."⁴⁴ He asserted further that "the grading should be done with primary regard for the relative blameworthiness of offenses," in other words, by taking into account the relative extent of the harm and the community's view of the gravity of the misconduct.⁴⁵ Such grading, consequently, should be determinative of the relative severity of the punishment authorized for each offense by the community.

The pioneering work of Professors Thorsten Sellin and Marvin Wolfgang⁴⁶ during the early 1960's first produced a valid⁴⁷ and reliable⁴⁸ unidimensional seriousness scale that grades and ranks offenses ac-

⁴³ C. BECCARIA, *DE LOS DELITOS Y LAS PENAS* [OF CRIMES AND PUNISHMENTS] 184-87 (Juridica Hispano-America ed. 1958).

⁴⁴ Hart, *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROB. 401, 426 (1958).

⁴⁵ *Id.* Note that Justice Powell made a similar statement in *Solem*, 103 S. Ct. at 3011.

⁴⁶ T. SELLIN & M. WOLFGANG, *supra* note 3.

⁴⁷ *Id.* at 227-38. For other research that validates the Sellin-Wolfgang severity scale, see Riedel, *Perceived Circumstances, Inferences of Intent and Judgments of Offense Seriousness*, 66 J. CRIM. L. & CRIMINOLOGY 201 (1975); Bridges & Lisagor, *Scaling Seriousness: An Evaluation of Magnitude and Category Scaling Techniques*, 66 J. CRIM. L. & CRIMINOLOGY 215 (1975); Wellford & Wiattowski, *On the Measurement of Delinquency*, 66 J. CRIM. L. & CRIMINOLOGY 175 (1975).

⁴⁸ T. SELLIN & M. WOLFGANG, *supra* note 3, at 320-21. Reliability refers to the extent to which a measurement procedure yields similar results on repeated trials. The Sellin-Wolfgang severity scale has been derived successfully in a variety of different cultural milieus through a number of replication studies that yield crime severity ratios consistent with their study. See, e.g., Akman, Normandeau & Turner, *The Measurement of Delinquency in Canada*, 58 J. CRIM. L. & CRIMINOLOGY 330 (1967); De Boeck & Houchon, *Prolegomenes a Une Statistique Criminelle Congolaise*, 6 CAHIERS ECONOMIQUES ET SOCIAUX no. 3-4 (1968); Hsu, *Cultural and Sexual Differences on the Judgment of Criminal Offenses*, 64 J. CRIM. L. & CRIMINOLOGY 348 (1973); Normandeau, *The Measurement of Delinquency in Montreal*, 57 J. CRIM. L. & CRIMINOLOGY 172 (1966); Velez-Diaz & Megargee, *An Investigation of Differences in Value Judgments between Youthful Offenders and Non-Offenders in Puerto Rico*, 61 J. CRIM. L. & CRIMINOLOGY 549 (1971); M. Hsu, *The Measurement of Crime and Delinquency in Taipei* (1968) (unpublished doctoral thesis for the University of Pennsylvania); Normandeau & A. Sa'danoer, *Towards Measurement of Crime and Delinquency in Indonesia*, (1968) (unpublished manuscript for the University of Padang; copy on file at Center for Studies in Criminology and Criminal Law,

cording to the relative harm inflicted upon the community. Although their study was originally intended to develop a delinquency index, it can also be used to rank code offenses.

In order to assess the community judgment concerning crime severity, a survey was carried out utilizing sampling techniques and statistical analyses. The researchers constructed a questionnaire with various offense descriptions. The basic components of the descriptions or "index" elements,⁴⁹ were injury, theft, damage, and combinations of them. A sample of the population was selected and asked to rate the severity of the offense descriptions in comparison to a modulus. The results were statistically analyzed.⁵⁰ By utilizing this procedure, Sellin and Wolfgang obtained weighted scores for various crimes that were scaled on a crime severity ratio scale.

The scale was designed on the assumption that it is possible to decompose a criminal event into its basic components,⁵¹ e.g., injury, theft, damage, and combinations of these.⁵² Similarly, the scale distinguishes

University of Pennsylvania); Normandeau & G. Reiss, *Measuring Criminality in Brazil* (1968) (unpublished manuscript in the University of Mexico; copy on file at Center for Studies in Criminology and Criminal Law, University of Pennsylvania); R. Figlio, *The National Survey of Crime Severity: Some General Findings* (1978) (manuscript in the Center of Studies in Criminology and Criminal Law, University of Pennsylvania); cf. Figlio, *The Seriousness of Offenses: An Evaluation by Offenders and Non-Offenders*, 66 J. CRIM. L. & CRIMINOLOGY 189 (1975) (agreement as to relative offense ordering along the severity scale); Rossi, Waite, Bose & Berk, *The Seriousness of Crimes: Normative Structure and Individual Differences*, 39 AM. SOC. REV. 224 (1974) (although using different offense descriptions from those of Sellin & Wolfgang's, the study found overall agreement of offense seriousness between races and sexes of a Baltimore household sample); Sechrest, *Comparisons of Inmate's and Staff's Judgments in the Severity of Offenses*, 6 J. RESEARCH CRIME & DELINQUENCY 41 (1969) (obtained overall offense seriousness agreement among inmates, staff members, correctional and parole agents; yet when the offenses were drugs or false pretenses, actual offenders saw their offense as less serious than other inmates did).

⁴⁹ "Index" elements refers to the components of a criminal event as defined for use in the Sellin-Wolfgang severity scale. T. SELLIN & M. WOLFGANG, *supra* note 3, at chap. 10.

⁵⁰ The procedure used is described as follows. The mean magnitude score for each larceny—which was derived by asking respondents to weigh how many times more serious than a modulus was the offense description presented to them—was computed by using a regression equation for money values, since the only metrically defined variable is that of the dollar value of theft. The regressed money values were then plotted on arithmetic coordinates and further on log-log paper. This gave a power function of the form $Y = aX^b$, which related the subjective perception of seriousness of the offense to the amount of money stolen. Then, Sellin and Wolfgang converted the offense score values to weights, by dividing each mean magnitude scale value by the scale score for a theft of one dollar. The emerging scores generated a crime severity ratio scale that covers a wide range of socially harmful behavior ranging from very insignificant to serious crimes.

⁵¹ This assumption refers to additivity and is based on research in the field of psychophysics. In 1978, Wolfgang and his associates successfully tested this assumption. See *National Survey of Crime Severity, Progress Reports (1978-81)* (manuscript on file at the Center for Studies in Criminology and Criminal Law, University of Pennsylvania).

⁵² See *supra* note 49.

between attempts and completed offenses, and assesses the degree and kind of participation in the criminal event. Thus, for example, a burglary followed by a forcible rape, an attempt to kill, and the stealing of \$100, can be weighted in terms of the value of the property damaged and stolen, number of premises forcibly entered, type and amount of intimidation, number of victims of forcible sexual intercourse, and degree and amount of personal injury. When each corresponding score of the above offense elements or components is added, a weighted score that measures the social harm resulting from the criminal event is obtained.

The weighted scores reflect community judgments of the relative seriousness of a variety of offenses.⁵³ Thus, they constitute an appropriate arrangement of offenses according to their seriousness. This in turn provides a basis on which to select punishments proportionate to the seriousness of the criminal conduct. The result is a scale of severity into which all crimes and penalties should fit—indeed, the very same system proposed by both Beccaria⁵⁴ and Hart.⁵⁵

IV. THE PUERTO RICO PUNISHMENT PROVISIONS

The Puerto Rico Penal Code's sentencing provisions are based on the various arguably irreconcilable aims of prevention, rehabilitation, parity, retribution, and deterrence.⁵⁶ A presumptive determinate sentence, which can be increased or decreased with evidence of aggravating or mitigating factors, is statutorily prescribed for each felony.⁵⁷

The presumptive term for each felony is set at three-fifths of the maximum penalty under the previous indeterminate sentencing provisions.⁵⁸ The fixed term may be either reduced or increased by the presence of mitigating and aggravating circumstances at fixed proportions of the previous law.⁵⁹ Because the previous penalty range had not been determined objectively according to the seriousness of each criminal act against society, the resulting determinate sentencing provisions suffer

⁵³ Note that in *Solem*, Justice Powell stated that comparisons of offenses in terms of "harm caused or threatened to the victim or society" and culpability of offender were relevant in the consideration of criterion of severity of the offense in a proportionality analysis. 103 S. Ct. at 3011.

⁵⁴ See C. BECCARIA, *supra* note 43.

⁵⁵ See H. HART, *supra* note 44.

⁵⁶ P.R. LAWS ANN. tit. 33, § 3284 (1982).

⁵⁷ *Id.* at tit. 34, § 1044; tit. 33 § 3005.

⁵⁸ Puerto Rico, 34 LEG. REC. no. 37 740-41.

⁵⁹ The fixed term may vary two-fifths of the maximum penalty under the previous statute, in the case of mitigating circumstances, or to the stated maximum in case of aggravating conditions. *Id.*

from the same ailments described above—they do not satisfy the proportionality requirement of the eighth amendment.

The sentencing provisions of the Puerto Rican statute, from which the determinate terms for the present law were chosen, have been described by Professor Helen Silving as showing a “lack . . . of an overall conception of the function of punishment scales in a system of criminal justice”⁶⁰ She also noted that, “[o]ne gains the impression that the number of years suggested for any given crime is pulled out of a magician’s hat.”⁶¹ This observation may have sprung from the fact that the penalty terms were inserted subsequently into spaces left blank in the proposal submitted to the Puerto Rico Legislature.⁶²

As argued above, the Sellin-Wolfgang severity scale constitutes a valid empirical frame of reference to compare offense provisions in terms of severity. We will use the data of the national replication of the Sellin-Wolfgang severity scale, performed by Professor Wolfgang and his associates in 1978,⁶³ to demonstrate that the penalty terms of the Puerto Rico Penal Code violate the eighth amendment requirements of proportionality and parity.

The presumptive penalty range for various offenses and their corresponding range of weighted severity scores in the Sellin-Wolfgang scale are displayed below in the following tables. Table 1 below includes various violent crimes that were selected arbitrarily to illustrate our point.

The Puerto Rico Penal Code typifies murder as “the killing of a human being with malice aforethought.”⁶⁴ First degree murders are those murders “perpetrated by means of poison, lying in wait or torture or any wilful, deliberate, and premeditated killing”⁶⁵ Felony murders are those in which the death occurs during the commission, perpetration or attempt to perpetrate, “arson, rape, sodomy, robbery,

⁶⁰ Silving, *Testimony of Dr. Helen Silving on a Symposium at the Puerto Rico Bar Association on the Projects of a New Penal Code for Puerto Rico*, 41 REV. JUR. U.P.R. 885, 892 (1972).

⁶¹ *Id.* at 886.

⁶² See Silving, *id.* at 892; Lopez Rey, *La Reforma Penal*, 26 REV. COL. AB. PR. 1, 108 (1967).

⁶³ See National Survey of Crime Severity, Final National Level Geometric Means and Ratio Scores by Offense Stimuli Items (1978) (Manuscript on file at the Center for Studies in Criminology and Criminal Law, University of Pennsylvania). The severity score data provided by the national replication of the original Sellin-Wolfgang research study yield weighted scores for multiple offenses. Such data is not available yet for the Puerto Rican sample. Since a Pearson correlation of 0.9942 between the core items of the Puerto Rican sample and the national sample was obtained, however, the whole set of severity scores for the latter sample will be used in our study.

⁶⁴ P.R. LAWS ANN. tit. 33, § 4001 (Supp. 1982).

⁶⁵ *Id.* at § 4002.

burglary, kidnapping, destruction, mayhem or escape"⁶⁶ First degree and felony murders carry a penalty of ninety-nine years.⁶⁷ Second degree murders carry a presumptive penalty of eighteen years, which can be reduced to twelve years or increased to thirty years, provided that there are mitigating or aggravating circumstances.⁶⁸

An analysis of Table 1 shows that there is no rational connection between the vast difference in penalties for first degree and second degree murders and the narrow spread on the weighted severity range.

Table 1 further demonstrates the lack of consistency or guiding rationale in the selection of penalty terms for offenses within the 33-to-24 severity score range. For example, aggravated kidnapping falls within this category with a base penalty of sixty years, within a statutory range of forty to ninety-nine years,⁶⁹ forcible rape, however, carries a presump-

TABLE 1
WEIGHTED SEVERITY SCORE RANGE AND PENALTIES FOR
SELECTED OFFENSES*

Weighted Severity Score Range ^a	Statutory Offenses ^b	Statutory Penalty ^c
72—43	Felony Murder	99
47—36	Murder: First Degree	99
28—27	Second Degree	12—18—30
33—24	Aggravated Kidnapping	40—60—99
	Forcible Rape	20—30—50
	Causing or Risking Catastrophe	6—10—15
24—13	Arson	4—6—10
25—22	Attempt to Murder: First Degree	10
18—16	Second Degree	6—9—10
17—9	Aggravated Bribery	8—12—20

* The sources for Table 1 are the PUERTO RICO PENAL CODE, *infra* notes 64-74 and the National Survey of Crime Severity, *supra* note 63.

^a The scale range goes from 1 to ∞.

The severity scores are rounded to the nearest whole number.

^b This refers to PUERTO RICO PENAL CODE, as amended in 1983.

^c In years of confinement.

⁶⁶ *Id.*

⁶⁷ *Id.* at § 4003.

⁶⁸ *Id.*

⁶⁹ *Id.* at § 4178(a).

tive penalty of thirty years, with variations between twenty and fifty years for mitigating and aggravating factors.⁷⁰ The offense of causing or risking catastrophe carries a lower penalty of ten years, which varies within a range of six to fifteen years.⁷¹ In sum, penalties for offenses within a 33-to-24 severity range fall within ninety-nine and six years. No offense-punishment proportionality can be inferred from such disparate penalties.

A similar lack of proportionality is observed among the prescribed statutory penalties for arson and attempt to murder, which fall within the 24-to-13 weighted severity score range. Arson, for example, carries a penalty of six years, which can fluctuate between four and ten years depending on mitigating or aggravating circumstances.⁷² The penalty for attempt to commit first degree murder is ten years, and nine years for attempt to commit second degree murder, varying within a range of six and ten years.⁷³

Table 1 also ranks the offense of aggravated bribery. This crime is weighted at 17-to-9 on the severity score range and it carries a statutory presumptive base penalty of twelve years, which may vary between eight and twenty years.⁷⁴ When the crime severity and statutory penalty range of aggravated bribery are compared with those of arson and attempt to commit second degree murder, we see a clear lack of proportionality between perceived severity and prescribed level of punishment. Aggravated bribery, with a lower severity range, carries a higher statutory penalty range than the more serious offenses of causing catastrophe, arson, and attempts to commit first and second degree murder.

Thus, *in toto*, Table 1 exemplifies the lack of proportionality between the statutory penalty terms of the Puerto Rico Penal Code and the seriousness of their corresponding criminal activities as assessed under the Sellin-Wolfgang offense severity scale. The table also demonstrates a lack of rational proportion among the offenses in terms of seriousness relative to other offenses. The result is that equally situated offenders receive different punishments. Disparity is statutorily built into the Puerto Rico Penal Code sentencing structure.

The lack of proportionality inherent in the Puerto Rican penal statute's crime-punishment catalogue is further demonstrated with data concerning property offenses. Table 2 lists seven property offenses by severity score range and statutory penalty.

⁷⁰ *Id.* at § 4061.

⁷¹ *Id.* at § 4334.

⁷² *Id.* at § 4331.

⁷³ *Id.* at § 3122.

⁷⁴ *Id.* at § 4661.

TABLE 2
WEIGHTED SEVERITY SCORE RANGE AND PENALTIES FOR
PROPERTY OFFENSES*

Weighted Severity Score Range ^a	Statutory Offense	Statutory Penalty ^b
4—21	Robbery	8—12—20
3—16	Aggravated Burglary	8—15—18
2—11	Aggravated Theft	6—10—12
5—10	Receipt of Stolen Property	2— 3— 5
1— 3	Simple Burglary	6 months and/or \$500.
2— 4	Simple Theft	6 months and/or \$500.

* The sources for Table 2 are the PUERTO RICO PENAL CODE, *infra* notes 75-80, and the National Survey of Crime Severity, *supra* note 63.

^a The severity score range is from 1 to ∞. The severity scores are rounded to the nearest whole number.

^b The penalty is in years of confinement. All of these offenses also provide for restitution.

The broad overlapping of weighted seriousness among property offenses is clear. No similar overlapping is present, however, among their corresponding penalty terms. For example, the offense of receipt of stolen property prescribes a penalty of three years, varying within a range of two to five years.⁷⁵ Although its seriousness range (5-to-10) falls inside that of the offenses of robbery (4-to-21), aggravated burglary (3-to-16), and aggravated theft (2-to-11), the latter offenses carry higher penalties. The penalty for robbery ranges from eight to twenty years, with a base term of twelve years;⁷⁶ for aggravated burglary, an eight to eighteen years range, with a base term of fifteen years;⁷⁷ and for aggravated theft, six to twelve years with a base of ten years.⁷⁸ Similarly, the above penalties do not acknowledge the overlap of seriousness between robbery, aggravated burglary, and aggravated theft.

Table 2 also reveals that offenses such as simple burglary⁷⁹ and simple theft,⁸⁰ carrying a penalty of six months and/or a \$500 fine, may be

⁷⁵ *Id.* at § 4276.

⁷⁶ *Id.* at § 4271.

⁷⁷ *Id.* at § 4272.

⁷⁸ *Id.* at § 4274.

⁷⁹ *Id.* at § 4277.

⁸⁰ *Id.* at § 4279.

as serious as either aggravated theft or aggravated burglary, each of which carries a much higher penalty. Similarly, some aggravated thefts and aggravated burglaries are considered less serious than such offenses as receipt of stolen property, but the former carry much higher penalties.

In sum, Tables 1 and 2 clearly demonstrate that the eighth amendment's requirement of proportionality in sentencing is not satisfied by the Puerto Rico Penal Code's sentencing structure. In terms of perceived seriousness of harm to society, the statutory penalties do not share any rational proportion with their corresponding offenses. Likewise, prescribed punishments lack proportionality when compared to the severity of other offenses along a seriousness dimension. Disparity, therefore, is built into the statute. Moreover, the absence of weighted guidelines on which to structure judicial discretion in those cases where mitigating and aggravating circumstances must be examined violates the constitutional requirement of objectivity in sentencing. The existence of institutionalized arbitrariness is an unavoidable conclusion. Thus, we need to find an alternative proposal for remodeling the Puerto Rican sentencing process—one which incorporates the constitutional mandates of proportionality and parity.

V. THE PROPOSED SENTENCING MODEL

The sanctioning rationale underlying our proposed crime-punishment model is retribution or "just deserts"; with its orientation toward the criminal acts themselves, it is possible to assess them objectively. "Just deserts" implies gradation of sanctions depending on the degree of social harm brought about by the crime.

A given criminal event may involve one or more offenses with different legal labels. Thus, in evaluating criminal conduct, we will utilize as a unit of analysis the criminal event as a whole. We propose that a weighted seriousness score be given to the criminal event through the use of a measure such as the Sellin-Wolfgang severity scale. By using such a scale, the sentencing authority is able to isolate the components or elements of the criminal event, and give them differentiated numerical weights, previously obtained from the scale, which when added together yield the event's severity score. The total score value of an event, thus, will depend on the number of elements it contains and their relative values on the scale. Each score represents a measure of perceived severity of social harm. It is also a measure of the relative seriousness of the criminal event as compared to other crimes.

As explained above, Sellin and Wolfgang identified the following as basic components of the criminal event: injury, theft, property damage

and combinations of these. They next determined the components' ratio scores in the severity scale. They also obtained weighted severity scores for aggravating factors such as intimidation, victim's hospitalization, use of weapons, forcible entrance of premises, specific amount of loss in dollars, and death. These elements are listed with their corresponding weights in Table 3, below.

Table 3 illustrates the method for assessing the seriousness of criminal events that we propose should be incorporated into the Puerto Rico Penal Code. The severity ratios of the major components of crime result

TABLE 3
SCORING SYSTEM FOR CRIMINAL EVENTS — PUERTO
RICAN SAMPLE*

Elements of the Criminal Event	(Number) × (Weight) = Total
I- Number of victims of bodily harm receiving minor injuries treated and discharged	2
hospitalized	6
killed	10
II- Number of victims of forcible sex intercourse	23 ^a
III- Intimidation	23 ^b
physical or verbal	5
weapon	6
IV- Number of premises forcibly entered	2
V- Dollar value of property stolen, damaged, or destroyed	
under \$10	1
\$10-\$99	2
\$100-\$149	3
\$150-\$449	4
\$450-\$1199	5
\$1200-1499	6
\$1500-4999	7
\$5000-\$10000	8
Over \$10000	9
	TOTAL SCORE

* The sources for the data on the Puerto Rican Sample are the National Survey of Crime Severity, *supra* note 63; D. Nevares-Muniz, *supra* note 81.

^a The severity score is equal to 23.22.

^b The severity score is equal to 22.55.

from the statistical analysis of the responses of the Puerto Rican sample used in the replication of the Sellin-Wolfgang severity scale, performed by Wolfgang in 1978 throughout the United States population.⁸¹ We propose that these severity ratios, rounded to the nearest whole number, function as weights. In order to obtain a severity score for an entire criminal event, one first breaks the event into its separate elements. Next, one computes the number of times that a particular element was present in the criminal event, and multiplies each element's total by its corresponding weight. The sum total of these amounts, when added together, will yield the severity score for the event.

The proposed system may be illustrated by using a concrete example. Consider the following event:

A man broke into a house, intimidated its three occupants with a dangerous weapon, took property valued at \$1,000, and upon leaving, raped one of the occupants and killed the other two.

If we go to Table 3 and fill the corresponding spaces,⁸² the total weighted severity score for this event will be 82. The event can be broken down into separately valued components as follows: 46 (23 x 2) for the murders, 23 for the rape, 6 for the intimidation by weapon, 2 for the breaking and 5 for the property stolen.⁸³

By calculating a weighted total score for each criminal event, this method provides an objective measure of the relative seriousness of each crime on a severity scale developed through measuring the population's perceptions of various crimes. In other words, this system yields a measure of offense severity proportional to other criminal conduct along the seriousness dimension, and accordingly, to the public's perception of social harm resulting from the act. The proposed method thus satisfies the principles of parity among similarly situated offenders, and proportionality of crime severity, both of which are required by the eighth amendment.

A problem raised by incorporating seriousness scoring into Puerto Rico's sanctioning structure is that the scheme cannot assess the seriousness of non-index offenses—those offenses in which no personal injury, theft or property damage is involved—nor of attempts. To overcome this problem, we suggest using the scores derived through the straightforward rating procedure⁸⁴ of the national replication of the severity

⁸¹ See *supra* note 50. For the statistical procedure used in the derivation of the above weights, see D. Nevares-Muniz, *Penal Codification in Puerto Rico: A Sentencing Model* (Ph.D. dissertation, University of Pennsylvania, 1981).

⁸² The table of the scoring system, except for the weights, is a replication of one suggested by T. SELLIN & M. WOLFGANG, *supra* note 3, at 402.

⁸³ In Puerto Rico, that person will be indicted for rape, felony murder, burglary, and theft. The penalty may be 99 years, and a 30-year presumptive term for rape.

⁸⁴ Straightforward rating refers to the procedure in which the sample is required to esti-

scale.⁸⁵ An alternative possibility is to perform a replication of the Sellin-Wolfgang scale using a population sample of Puerto Rican residents.

In the event that legislators seek to include aggravating factors, such as the presence of co-participants, or additional offense elements in a seriousness scoring model, appropriate scores may be derived by using the straightforward scaling method developed by Sellin and Wolfgang for assessing severity of offense descriptions.⁸⁶ By using this method, individual weights can be attributed to the specified factors contained in the criminal event.

Once offenses are weighted and scaled according to their seriousness, the next step is to set correspondingly proportionate penalties in the Penal Code. This task may be approached from two directions.

First, we could construct an empirically developed punishment severity scale matching the crime severity scale. This would be the most appropriate method for scaling penalties, provided a valid and reliable punishment scale that satisfies all constitutional safeguards could be designed. Unfortunately, criminological researchers have not yet been able to design a valid, reliable and empirically developed punishment severity scale that can be generalized to a sentencing model either for Puerto Rico or for the States.⁸⁷

The second alternative would be to construct a punishment scale based on theoretical legal and criminological principles. Under this approach, the sentencing authority would select a punishment deemed appropriate for any one offense weight in the crime severity scale. Given this determination, punishments for other criminal events could be apportioned relative to the ratios of offense seriousness. Offenses within specified severity ranges would have a corresponding punishment in the scale as developed. Through this "tracking" method, offense punishment proportionality would be attained.

We suggest that the Legislature create a sentencing commission to construct a punishment severity scale. The commission could be instructed to satisfy the fundamental constitutional requirements for sanctioning, and also to give consideration to current empirical research in the development of punishment scales.⁸⁸ We do not suggest specific penalty ranges, but emphasize that the constitutional requirement of parsimony (i.e., the least restrictive sanction) must be acknowledged explicitly in the statute. Furthermore, the offense's relative proportional-

mate the seriousness magnitude of a crime as compared to a modulus. See *infra* text accompanying notes 85-87.

⁸⁵ See National Survey of Crime Severity, *supra* note 63.

⁸⁶ T. SELLIN, & M. WOLFGANG, *supra* note 3, at Chap. 10.

⁸⁷ See *supra* note 41.

⁸⁸ *Id.*

ity should be followed, and no aggravating factors should be added to the base penalty term, as these are accounted for in the seriousness scoring of the criminal event. Mitigating circumstances must be limited to those defenses and extenuating factors explicitly included in the Code.

VI. CONCLUSION

The use of offense-punishment scales such as the scale proposed in this study, is the sentencing alternative most readily available to counter the problems of arbitrariness, disparity and disproportionality in current state sentencing statutes. Through its incorporation of a proportionality analysis, a valid and reliable offense severity scale can be an appropriate objective measure through which to consider the gravity of both the offense and the penalty, as mandated by the Supreme Court's interpretation of the eighth amendment.⁸⁹

⁸⁹ See *Solem v. Helm*, 103 S. Ct. at 3007-12; *Enmund v. Florida*, 102 S. Ct. at 3372.