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COMMENTARY

WEIGHTING PUNISHMENTS: A COMMENTARY ON NEVARES-MUNIZ

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In "The Eighth Amendment Revisited: A Model of Weighted Punishments," Nevares-Muniz presents a model of punishment designed to satisfy the proportionality and disparity requirements of the eighth amendment.[1] This commentary focuses upon the nature of the proposed model and suggests several difficulties with the main arguments of the article.

The author begins by discussing the concept of "cruel and unusual punishment." She traces its roots from the English Bill of Rights of 1689 through its original appearance in American judicial opinion in *O'Neil v. Vermont*,[2] through the important case of *Weems v. United States*,[3] and to the recent cases of *Coker v. Georgia*[4] and *Rummel v. Estelle*.[5] The discussion narrows to a treatment of the proportionality requirement associated with the currently conceived notion of cruel and unusual punishment. The author points to the importance of the proportionality requirement by referring to the work of Beccaria,[6] Hart[7], and the Criminal Code Revision Act of 1979.[8]

Nevares-Muniz then establishes the importance of the propor-

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1 Nevares-Muniz, *The Eighth Amendment Revisited: A Model of Weighted Punishments*, 75 J. CRIM. L. & CRIMINOLOGY 272 (1984).

2 144 U.S. 323, 337 (1892) (Field, J., dissenting).

3 217 U.S. 349 (1910).

4 433 U.S. 584 (1977).

5 445 U.S. 263 (1980).

6 C. BECCARIA, ON CRIMES AND PUNISHMENTS (New York, 1963) (lst ed. Milan, 1764).

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

8 Criminal Code Revision Act of 1979, S. 1723, 96th Cong., lst Sess., §§ 3103, 3702 (1979).

tionality requirement for the legitimate operationalization of the standards regarding cruel and unusual punishment, and proceeds to point out that "[t]he 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."[9] The author proposes the use of a scaling system such as the one devised by Sellin and Wolfgang[10] to assure penal code compliance with eighth amendment requirements. The remainder of the article briefly describes the scaling system of Sellin and Wolfgang and applies the data of the 1978 National Survey of Crime Severity[11] to the Puerto Rico Penal Code. The author concludes "that the eighth amendment's requirement of proportionality in sentencing is not satisfied by the Puerto Rico Code's sentencing structure. In terms of perceived seriousness of harm to society, the statutory penalties do not share a rational proportion with their corresponding offenses."[12] To remedy this situation, the author suggests use of a Sellin-Wolfgang-type scaling system.[13]

The author assumes that operationalization of the just deserts model ought to entail use of citizen judgments to determine the just penalty for law violation.[14] She further suggests that her proposed strategy conforms to the requirements of the model. This model stipulates that offenders should receive punishment because of what they deserve, not because of the incapacitative or rehabilitative value of punishment.[15] Punishment should "fit" the crime and not be tailored to the characteristics of the offender. Van den Haag and others have argued, however, that justice is not necessarily what public opinion thinks it is. Indeed, justice and the public view of justice may have little in common.[16] Nevares-Muniz does not demonstrate how the use of public judgments facilitates the production of justice.

The second major problem involves the author's underlying assumptions concerning crime seriousness data. She writes that

> In order to weigh the seriousness of offenses to determine appro-

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9 Nevares-Muniz, *supra* note 1, at 277.

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

11 *See* National Survey of Crime Severity: Final National Level Geometric Means and Severity Scores by Offense Stimuli Items (1978) (manuscript on file at the Center for Studies in Criminology and Criminal Law, University of Pennsylvania).

12 Nevares-Muniz, *supra* note 1, at 285.

13 *Id.*

14 *Id.* at 280.

15 *See* A. VON HIRSCH, DOING JUSTICE (1976).

16 *See* van den Haag, *The Criminal Law as a Threat System*, 73 J. CRIM. L. & CRIMINOLOGY 783 (1982).

> priate sanctions, courts need a 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 produced by crime severity scales.[17]

Nevares-Muniz also notes that "[t]he 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."[18]

Both of these remarks seem to reflect the author's belief that crime seriousness data are objective data. This belief is of pivotal importance and requires substantiation. Although numbers do emerge from the attitudinal surveys conducted to assess public judgments on the seriousness of crime, such judgments do not necessarily represent "objective" measures of the social harm associated with various forms of criminal activity. Even if citizens agree on the seriousness of various forms of crime, and it is unclear whether they do given the methods used in such surveys,[19] such agreement may have little relationship to the *actual* social harm produced by crime. Previous work has shown that public perceptions on a variety of issues reflect serious misunderstanding. For instance, the results of a 1978 public opinion survey revealed that more than half of those surveyed believed that most recipients of welfare support could manage without such assistance. Yet, two-thirds of welfare recipients are children, the elderly, or the ill and disabled.[20] Of the remaining recipients, only about 12% do not work, and almost all of these non-workers are females at home with small children.[21] An example more closely related to punishment is Thomas and Howard's finding that public willingness to punish is related to mistaken expectations regarding the ability of punishment to act as a deterrent.[22]

It seems especially inappropriate for Nevares-Muniz to argue for the use of public judgments of crime seriousness given that objective assessments of *actual* harm are available.[23] Although there

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17 Nevares-Muniz, *supra* note 1, at 277-78.

18 *Id.* at 285.

19 *See* Cullen, Link, Travis, & Wozniak, *Consensus in Crime Seriousness: Empirical Reality or Methodological Artifact?*, 23 CRIMINOLOGY 99 (1985); Miethe, *Public Consensus on Crime Artifact?*, 20 CRIMINOLOGY 515 (1982).

20 *See* I. ROBERTSON, SOCIOLOGY, at 272 (1981).

21 *Id.*

22 *See* Thomas & Howard, *Public Attitudes toward Capital Punishment: A Comparative Analysis*, 6 J. BEHAV. ECON. 189 (1977).

23 *See* C. GRAY, THE COSTS OF CRIME (1979); R. Meiners, *Public Compensation of the Victims of Crime: How Much Would It Cost?* in ASSESSING THE CRIMINAL: RESTITUTION, RET-

are numerous difficulties with the measurement of actual harm, and the measurement technology is in its infancy, the total neglect of the approach on the basis of its current liabilities seems premature. There are a number of costs of crime that will never lend themselves easily to objective measurement, such as the effect of crime on the moral fabric of society. Nevertheless, objective measures, such as dollar amount of theft loss, for instance, might be combined with subjective judgments. The use of subjective judgments could be limited to the unmeasurable areas only. The resulting index might provide a far more accurate estimate of actual harm than would be possible solely through the use of subjective judgments.

Although crime seriousness data "look" like "objective" measures of crime seriousness, the numbers generated by the magnitude estimation or Likert tasks that confront respondents merely represent the subjective judgments of respondents. Given that public judgments are often mistaken, it can not be assumed that such judgments accurately represent *actual harm*. Judgments of the seriousness of white collar crime, for example, often have failed to adequately represent the actual impact of such offenses upon society. Clearly, public opinion seldom has been trusted for a wide variety of technical policy questions. Can it be seriously proposed that public opinion ought to be consulted to determine the proper prime rate? The public may agree that the rate needs to be low enough to stimulate investment to facilitate economic growth, yet it is left to those skilled in economic matters to determine exactly what the rate should be. Specification of penal policy may be a similar kind of problem. Using public judgments to determine the penalty for burglary of a residence may be akin to use of such opinions to determine the prime rate, the percentage of hydrocarbons that is to be tolerated in the atmosphere, or the rules for testing new drugs prior to release into the open market.[24] Matters relating to crime and punishment may seem different than these other kinds of affairs simply because citizens tend to have opinions, often strongly held opinions, about crime. Few citizens become emotional about the prime rate. However, the strength of convictions offers no assurance that public views are reasonable.

RIBUTION, AND THE LEGAL PROCESS (R. Barnett & H. Hagel eds. 1977); Rottenberg, *The Social of Crime and Crime Prevention*, in CRIME IN URBAN SOCIETY (McLennon ed. 1970); Hann, *Crime and the Cost of Crime: An Economic Approach*, 9 J. CRIME & DELINQ. 12 (1972); Rizzo, *The Cost of Crime to Victims: An Empirical Analysis*, 8 J. LEGAL STUDIES 177.

[24] *See* Cullen, Link, & Polanzi, *The Seriousness of Crime Revisited*, 20 CRIMINOLOGY 83, 88-91 (1982). For instance, seriousness rank for spouse beating changed from 91 to 67, bribery of a public official changed from 103 to 76, counterfeiting changed from 84 to 52, and marijuana use changed from 49 to 120.

A third problem involves shifts in public judgments of crime seriousness. It is apparent that public opinion does not remain constant regarding its evaluation of the seriousness of various kinds of crime. For instance, a replication of a 1974 crime seriousness study was conducted in 1979 and found that a variety of offenses were perceived as substantially more or less serious than in the original study.[25] Even assuming that public judgments were accurate reflections of actual harm, how might shifts in judgment be handled? How often would surveys need to be conducted to assure constancy in the relationship between law and public sentiment?[26]

It is one enterprise to establish a scale of crime seriousness, it is quite another to apply the scale to the development of a scale of penal proportionalities. The author notes two approaches to this task. The first approach is to develop an empirically-based method for scaling penalties. The author correctly recognizes such a method has not yet been devised.[27] Yet she fails to demonstrate that this task is likely to be accomplished in the near future. The second approach is to have a "sentencing authority" assign a punishment for one offense weight.[28] Using the seriousness ratios, it would then be possible to develop punishments for other offenses.

This second approach seems troubled by at least two weaknesses. The first involves the nature of the "sentencing authority." Presumably, it must be an authority that recognizes justice when it sees it. How can we be sure that the chosen authority will not prescribe unduly severe sentences? The author's argument attempts to anticipate this problem by requiring the "least restrictive sanction necessary to achieve defined social purposes. . . ."[29] However, this fails to solve the problem because both what constitutes appropriate social purposes, and what is the least restrictive sanction necessary to achieve such purposes, is left unspecified by the author. Naturally, the same general difficulty exists at the opposite end of the severity scale. The sentencing authority may select sentences of insufficient severity.

Like so many versions of the argument for punishments fitted to the character of the crime, arguments put forward by such diverse

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25 Of course, a response to these results is that citizens do determine these matters through representatives they elect to public office. However, our discussion does not concern judgment of citizens regarding the selection of representatives to develop penal policy. The issue involves the *direct* use of citizen judgments of seriousness itself as a basis of penal policy.

26 Nevares-Muniz, *supra* note 1, at 288.

27 *Id.*

28 *Id.* at 276.

29 C. BECCARIA, *supra* note 6, at 64.

advocates as the eighteenth century utilitarian Beccaria and the twentieth century retributivist von Hirsch, the crucial question of exactly what should be the punishment for particular offenses is swept aside. Beccaria writes:

> If geometry were applicable to the infinite and obscure combinations of human actions, there ought to be a corresponding scale of punishments, descending from the greatest to the least; if there were an exact and universal scale of punishments and of crimes, we would have a fairly reliable and common measure of the degrees of tyranny and liberty, of the fund of humanity or of malice, of the various nations. But it is enough for the wise legislator to mark the principle points of division without disturbing the order, not assigning to crimes of the first grade the punishments of the last.[30]

More than two hundred years later, von Hirsch, after failing to provide a principle that would make possible the derivation of *specific* penalties, states:

> Desert-based limits leave considerable choice as to the magnitude of the scale. . . .It may be possible to delineate the limits on magnitude better than we have done, but the forgoing should suffice to illustrate the basic idea: in deciding the magnitude of the scale, deterrence may be considered within whatever leeway remains after the outer bounds set by commensurate deserts have been established. Once a scale of a certain magnitude has been chosen, however, the internal composition of the scale should be determined by the principle of commensurate deserts.[31]

In his use of the principle of commensurate deserts, von Hirsch somehow derives a five year maximum sentence, but neglects to justify the choice or even describe its derivation.[32] In keeping with this tradition of outlining the general form of the system but declining to specify exactly where actual sentences are to come from, Nevares-Muniz explains that "[w]e 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 proportionality should be followed."[33] The author further proposes that "the Legislature create a sentencing commission to construct a punishment severity scale."[34] Given the lack of a specific, operable method for penalty scale construction, and the absence of any reason to believe that without such a method a sentencing commission will possess

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30 A. VON HIRSCH, *supra* note 15, at 93-94.

31 *Id.* at 136.

32 Nevares-Muniz, *supra* note 1, at 288-89.

33 *Id.* at 288.

34 *See* von Hirsch & Hanrahan, *Determinate Penalty Systems in America: An Overview*, 27 CRIME & DELINQ. 289 (1981).

the capacity to develop a "just" system of punishments which satisfies the proportionality requirement, it is difficult not to react to this proposal as simply another instance of the now aging rhetoric of the justice model. Indeed, little has appeared in the decade since the model began to acquire influence that provides optimism that the model *can* be defensibly operationalized. The determinate sentencing systems which have emerged, such as that in Minnesota, represent less of a pure translation of justice model ideas and more of a compromise between so-called practical exigencies and the requirements of justice. In Minnesota, out of deference to limited prison space, sentences were determined in part on the basis of their anticipated effect on the state prison population.[35] In a real fiscal world the intrusion of such "practical" factors is perhaps unavoidable. Nonetheless, it can be argued that the introduction of such influences dilute the final product such that what remains is a system defended as just because its announced goal is justice, but which comes no closer to its objective than penal predecessors built upon notions of deterrence, incapacitation, or rehabilitation.

Finally, it is interesting that Nevares-Muniz appears willing to use public judgments of the seriousness of crimes as the basis for the operationalization of the justice model, but seems unwilling to utilize public judgments to determine the appropriate predicates for a system of punishment. Research suggests that the public supports punishment on a number of grounds besides retribution. Thus, punishment applied *only* to achieve justice, or controlled only by justice- type considerations, appears to be inconsistent with public sentiment. Apparently, the value of public opinion extends only so far as is required to set into motion the wheels of a penalty system legitimated on some other basis.

The major issues considered in this critique have serious implications for the future of the justice model as both an ethically acceptable and a practically workable basis for punishment. Some of the problems identified appear to involve technical concerns that may ultimately be solved through the development of more sophisticated techniques for the measurement of social harm. Other difficulties, however, such as the acceptance of public sentiment as an operationalizing device and its simultaneous rejection as a legitimating predicate, may represent more serious challenges to the integrity of the model.

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35 *See, e.g.*, Warr and Stafford, *Public Goals of Punishment and Support for the Death Penalty*, 21 J. RESEARCH CRIME & DELINQ. 95 (1984).