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JUST AND PAINFUL: A CASE FOR THE CORPORAL PUNISHMENT OF CRIMINALS. By *Graeme Newman*. London: Harrow & Heston/Macmillan Book. 1983. Pp. 163. \$13.50.

The longer and more frequent prison terms that accompanied the retributivist reforms of the 1980's have resulted in overcrowded prisons¹ and an increasingly large fiscal burden for society (p. 5). In response, communities are opening their prison doors through early release programs² and are turning to community service and probation as an alternative to incarceration. Graeme Newman,³ in his provocative book, *Just and Painful: A Case For The Corporal Punishment of Criminals*, presents a reactionary alternative to the high-cost "schools of crime" we call prisons. He advocates punishment that "fits the crime" (p. 21), stating that "all crimes — whether violent or property crimes — could best be served retributively by various kinds of violent punishments" (p. 25). Although much has been written regarding corporal punishment in schools,⁴ this work is unique in its support for corporal punishment in the criminal law setting.⁵ Newman concludes that corporal punishment "can meet with the philosophical challenge of just punishment and . . . can also go much of the way to solving the fiscal problem of criminal punishment" (p. 5).⁶

This thought-provoking proposal for reform begins with an analysis of pain. Newman, seeking to give offenders the punishment they deserve, views pain not as an evil in itself, but rather as "the prime ingredient of punishment [and] a necessary condition of justice" (p. 7). Crucial to his analysis are the assumptions that physical pain can be measured quite precisely, and that it can be controlled by technological and scientific administration (p. 12). True to its title, the book's focus is on justice, the satisfaction of which is twofold: society must feel that the criminal has been punished (pp. 37-38) and the punish-

1. For an excellent discussion, see *The Prison Overcrowding Crisis*, 12 N.Y.U. REV. L. & SOC. CHANGE 1 (1983-84).

2. See Gottfredson, *Institutional Responses to Prison Crowding*, 12 N.Y.U. REV. L. & SOC. CHANGE 259, 267-68 (1983-84).

3. Professor, School of Criminal Justice of the State University of New York, Albany. Newman received his Ph.D. from the University of Pennsylvania in 1972. He is also author of a comprehensive history of punishment, *THE PUNISHMENT RESPONSE* (1978).

4. See, e.g., R. PAQUET, *JUDICIAL RULINGS, STATE STATUTES AND STATE ADMINISTRATIVE REGULATIONS DEALING WITH THE USE OF CORPORAL PUNISHMENT IN PUBLIC SCHOOLS* (1982).

5. Cf. Midgley, *Corporal Punishment and Penal Policy: Notes on the Continued Use of Corporal Punishment with Reference to South Africa*, 73 J. CRIM. L. & CRIMINOLOGY 388 (1982) (article seeking to provide insights into corporal punishment's persistent use in other countries, in the hope that more research will be undertaken).

6. For a negative view of the use of corporal punishment in this context, see A. VON HIRSCH, *DOING JUSTICE: THE CHOICE OF PUNISHMENTS* 111 (1976).

ment must be painful to the criminal.⁷

To meet the standard of just punishment, the punishment must (within limits) fit the crime both in quantity and quality (pp. 14-15). However, modern punishment no longer matches the crime because pain has been cast aside. To recapture that element of fairness, the quality of the crime must be reflected in the quality of the punishment.⁸ There can be no such link in the present system, as Newman perceives it, since the only real choice the sentencing judge has is to send the criminal to prison or not. Newman, on the other hand, feels "the mugger should be beaten, the thief should receive a particular number of lashes in proportion to the amount of theft" (p. 25).

The author begins his analysis of pain by dividing it into what he believes are two distinct concepts. Chronic pain is characterized as physical pain which endures for long periods and encompasses social and economic pain as well (pp. 13-14). Within this realm fall imprisonment and unduly harsh forms of corporal punishment.⁹ Acute pain, on the other hand, is a less severe, nonlasting physical pain (p. 14). Instruments of acute corporal punishment include the whip, electric shock and other devices that provide an immediate but nonlasting pain (p. 18). Newman concludes that the punishment of all crimes, violent and property, can best be accomplished retributively by acute, violent punishment (p. 25). A recurring theme of Newman's reasoning is society's acceptance of the plethora of uncontrolled violence that accompanies prison life. The author seeks to harness this implicit approval by holding society directly responsible for the controlled and sanctioned violence against criminals.

While many methods of acute corporal punishment exist, Newman concludes that the electric shock is the fairest of all. This mode offers many advantages over incarceration. For example, "[p]rison readily offers the pain of humiliation for those offenders that a community wants locked up" (p. 40). Corporal punishment, on the other hand, can be administered with, or without, humiliating the criminal, as the facts of the crime dictate (p. 40). And, because of its brevity, corporal punishment does not punish the family of the offender by removing their source of support (p. 43). Furthermore, the electric shock can be scientifically controlled both in terms of duration and intensity so that each offender receives, in theory, the same punishment for the same crime. Thus, the use of the electric shock has the attributes of "a just, equitable, effective, and cheap punishment" (p. 40).

7. "[P]ain is not only the prime ingredient of punishment but it is also a necessary condition of justice. For without it there can be no punishment. And there can be no justice without punishment. . . ." P. 7.

8. Although the author does not explicitly define the term, "quality" of punishment appears to relate to the biblical principle of "an eye for an eye." P. 22.

9. "Some corporal punishments are chronic, such as those that produce permanent mutilation or injury or observable ugly scars." Pp. 16-17.

Newman acknowledges the widely advanced argument that corporal punishment cannot be fairly administered because people feel pain differently (pp. 43-46). He states, however, that tolerance, not the pain threshold, is the relevant issue (pp. 44-45). Differences among individual tolerances can be negated by administering the stimulus above every person's tolerance level (p. 45). Thus, Newman concludes that "all people feel pain as pain," and only "[t]he ways they react to this pain may vary" (p. 46).

A question arises as to which offenders, if any, continue to deserve prison as a punishment because of the quality of their crime or crimes. Newman's proposal for reform adopts a solution which simultaneously facilitates the need to punish severely the most reprehensible offenders while preventing exposure of too many criminals to chronic pain. He distinguishes "crimes" from "criminals." Acute corporal punishment should be used for punishing "crimes"; *i.e.*, the effect of the punishment should be limited to the specific and particular offense and should not presume to punish the criminal as an individual (pp. 52-53). This category encompasses the majority of persons entering the penal system. Alternatively, a "prison-intensive system" is reserved for punishing "criminals" — those committing the most heinous crimes and those repeat offenders who have committed a series of crimes such that it warrants our attaching to them the label "criminal" (p. 60). The revised system, which would entail prison sentences of fifteen years and longer with no chance of parole, should be used only for "the terrible few" (p. 60). According to Newman, this "split system solution" would ensure just and painful punishment to all, and would also necessarily reduce the budget concerns associated with today's intensive incarceration system (p. 60).

This work's greatest attribute is its author's responsiveness to the difficult questions raised in opposition to his proposal. He recognizes that bodily punishments are frequently thought of as repugnant because of their historical link to torture (p. 28). Newman thoroughly examines punishments that represent the "essence of barbarism" (p. 28), but persuasively reasons that acute corporal punishment cannot rise to such a level. In addition, Newman devotes a chapter to examining the elements and use of torture in hopes of distinguishing pain from torture.

Though the shortcomings of the book are few, they will hinder acceptance of this reform as prevailing social policy. The most obvious obstacle facing the reform is the eighth amendment prohibition against "cruel and unusual punishment." Newman observes that most Supreme Court decisions since *Weems v. United States*¹⁰ assume that the eighth amendment "expresses the revulsion of civilized man

10. 217 U.S. 349 (1910).

against barbarous acts.”¹¹ He concludes that the Court ironically accepts the infliction of harsh conditions, especially violence, upon the inmates when they are a by-product of imprisonment. However, it would be unconstitutional for a state specifically to choose to apply a violent or harsh punishment to a criminal (p. 87). While Newman’s effort at analysis of the issue is praiseworthy, his refutations are inadequate. For example, he states that various courts interpret “cruel and unusual” as meaning “[t]he punishment must not be barbaric, cruel or a torture” (p. 91). He dismisses this restraint by simply stating that corporal punishment cannot be cruel since it does not cause any lasting damage to the body and has several special advantages over prison (p. 92). Thus, while his criticism of the Supreme Court’s position is useful, Newman does not devote the time and analysis warranted.

In addition, Newman’s insistence on the absence of “mental pain” from acute corporal punishment is conjectural at best. The assumption that no humiliation ensues is unfounded and intuitively inaccurate. Furthermore, his assertion that the everyday life of the offender remains untouched is unrealistic. To portray a man who has been electrically shocked before the public as being readily accepted back at his job and as retaining his social status is simply not credible. The mode of distributing punishment may change, but human reaction to judicial reprimand will not. Once the idea that corporal punishment eliminates the “mental pain” of humiliation is shown to be untrue, one is left with the fact that acute corporal punishment creates both physical and mental pain. Hence, the implementation of corporal punishment may become *more* severe than prison.

Moreover, the author’s proposal overemphasizes the budget as a foundation for implementing corporal punishment. Use of electric shock with the majority of persons passing through the penal system would certainly have favorable impacts on the budget, yet the proposal goes one step further. Newman mandates that unless approval is obtained from the budgeting authority before eligible criminals are sentenced to incarceration, the sentence should be disallowed and corporal punishment should be imposed instead (p. 140). This obsession with fiscal responsibility raises serious doubts as to the validity and strength of the underlying penal theory. It also raises a question as to how far the intensity and duration of an electric shock can extend. For instance, suppose a repeat offender murders three people and the budgeting authority refuses to incarcerate him. To equate the quality of the crime with the substituted quality of the corporal punishment would probably prove fatal. Inevitably, serious offenders would receive less than adequate punishment, and society would forego the protection of incarceration.

11. P. 86 (quoting *Robinson v. California*, 370 U.S. 660, 676 (1962) (Douglas, J., concurring)).

Despite occasional shortcomings in the analysis, *Just and Painful* presents a refreshing and coherent alternative to the prevailing retributive ideas monopolizing the literature today. The author diligently examines the difficult issues facing his proposal and handles most of them with careful aplomb. Whether one accepts his proposal or not, the book is enjoyable and may be a forerunner to the reform of the future.