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On: 25 February 2012, At: 08:27

Publisher: Routledge

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Criminal Justice Ethics

Publication details, including instructions for authors and subscription information:

<http://www.tandfonline.com/loi/rcrc20>

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Available online: 16 Feb 2012

To cite this article: Dan Demetriou (2012): Justifying Punishment: The Educative Approach as Presumptive Favorite, *Criminal Justice Ethics*, DOI:10.1080/0731129X.2012.656189

To link to this article: <http://dx.doi.org/10.1080/0731129X.2012.656189>



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ARTICLE

Justifying Punishment: The Educative Approach as Presumptive Favorite

DAN DEMETRIOU*

In The Problem of Punishment, David Boonin offers an analysis of punishment and an account of what he sees as ethically problematic about it. In this essay I make three points. First, pace Boonin's analysis, everyday examples of punishment show that it sometimes isn't harmful, but merely "discomforting." Second, intentionally "discomforting" offenders isn't uniquely problematic, given that we have cases of non-punitive intentional discomfort—and perhaps even harmful discomfort—that seem unobjectionable. Third, a notable fact about both non-harmful punishment and non-punitive intentional discomfort is that they aim at improving the subject. This suggests that, if the prima facie wrongness of intentionally harming another person is the fundamental challenge for punishment, the "educative defense" is the royal road to justifying the practice. I conclude by outlining one version of the educative defense that exploits this advantage while avoiding some traditional objections to the approach.

Introduction

David Boonin's *The Problem of Punishment* (2008) begins by offering an analysis of punishment and a diagnosis of its "problem": punishment necessarily requires the state to harm some citizens intentionally.¹ Boonin then argues at length that every major justification for punishment and the intentional harm it

entails (about two dozen strategies are considered) is morally inadequate. His main tactic involves showing how the defense under consideration prescribes punishing some non-offenders, or fails to prescribe punishment for some offenders, or sometimes prescribes intuitively inadequate or excessive punishments (the "or" here is very much inclusive—in many instances all three types of implications are argued for). Like Randy Barnett before him, Boonin concludes by

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forwarding a model of restitution as a replacement for punishment.² Restitution often entails harming offenders, sometimes greatly, but in no case is that harm *intended*. In this essay I raise some worries about Boonin's particular critique of punishment, and suggest that its weaknesses turn out to motivate the "educative defense" (ED) of legal punishment above its rivals.

Roughly, a justification for punishment is "educative" if it says punishment is justified when it aims at improving or benefiting the offender in some way. Thus understood, ED has an ancient pedigree. Plato, in the earliest theory of punishment we have, argued that punishment is justified by its improvement of the offender, and in fact is so good for the offender that he should welcome it.³ Since then, some of the most prominent philosophers of the topic have advocated for some variety of ED as either partly or wholly justifying the practice of punishment.⁴ For example, according to some interpretations Hegel and Dewey sympathized with the approach.⁵ Most recently, neuroscientific research suggests to some that retributivism is no longer credible, and that promising new therapies (such as the "prefrontal workout") recommend an educative goal for punishment.⁶ Nonetheless, ED has always been a minority position when it comes to legal punishment. It certainly is not as immediately intuitive as some other views. When we imagine a loved one brutally raped and killed, the last thing we think about is how we could improve her murderer at the state's expense. And when we assume the dispassionate perspective

of a policymaker, retributive intuitions fade in favor of ones that advise punishment for the sake of deterrence. The allure of ED probably rests upon the fact that most good parents punish and feel justified in doing so. From there, it is natural to suppose that if private, parental punishment is justified, state punishment is, too, and for the same general reasons. One might also find it improbable that legal punishment is justified by an entirely different set of reasons from those justifying the punishment given by parents, coaches, and other authorities who punish with the offender's interests in mind.

To be sure, there are many dissimilarities between the parent and the state, the mischievous child and the brutal murderer. These dissimilarities may turn out to sink the theory, as might any number of worries about whether ED prescribes unintuitive punishments, prescribes punishing some non-offenders, or proscribes punishing some offenders. That said, what I hope to show is that *if* the fundamental problem of punishment is its intentional harmfulness, then ED should be seen as the most promising justificatory strategy for punishment. This is because, first, educative punishment alone aims at a non-harmful, albeit still "discomforting," response to the offender, since only the ED of punishment aims specifically at making the offender better off. (Let "discomforture"—which shouldn't be confused with "discomfiture," or being defeated in battle—be taken as a term of art for the negative treatment visited upon the offender

in punishment. It subsumes the varieties of negative treatment traditionally referred to as “evil,” “suffering,” “hard treatment,” “deprivation,” and the like, but without the ethical connotations these terms suggest. The key is that discomfort is a determinable for which *harmful discomfort* and *non-harmful discomfort* are determinates.⁷) Since non-harmful discomforting punishments are less problematic than truly harmful ones, ED is easier

to defend in that regard. Second, it is particularly easy to imagine cases of morally unproblematic *non-punitive* intentional discomfort not motivated by educative aims. Since reproofing offenders doesn’t add anything ethically worrisome over and above intentionally harming them, the fact that educative aims easily justify non-punitive intentional discomfort also suggests that ED is the royal road to defending punishment.

1. Boonin’s Problem with Punishment

Boonin analyzes punishment as authorized intentional reprobative retributive harm. Let’s look at each element one by one. First, punishment can be meted out only by a proper *authority*. Even if an offender clearly deserves punishment, for an improper authority (e.g. a vigilante) to harm the offender would be assault, not punishment. Second, punishment must be *reprobative*: the state transacts with us when it levies a fee, but it scolds us when it levies a fine. Third, punishment is also *retributive* by nature. In saying so, Boonin does not mean to say that the justification for punishment or even its punishment formula (its method of punishment) must be retributivist. Rather, by “retributive” Boonin means only that, necessarily, punishment is conceived as a response to something the offender, and not someone else, has done. Fourth, punishment is supposed by Boonin always to involve some *harm*. Fifth, and finally, the authority in question *intentionally* harms the offender. Harm cannot be merely foreseen by the punishing entity; it is in fact part

of the goal of punishment to harm the offender. (Importantly, for Boonin this intended harm criterion does not mean that the harm is done for its own sake. Boonin takes pains to note that one can intend harm *and* intend it as a means. For instance, the harm involved in spanking one’s child is intentional although it, typically, is not harm done for its own sake.⁸)

Boonin raises two concerns about the intentional harmfulness of punishment. First, whatever could make it permissible for an individual to *intentionally harm* another? Second, what justifies legal punishment, or the state’s intentionally harming some of its citizens? The second question is more difficult to answer than the first. After all, even if a justification for private punishment were forthcoming, it would be as insufficient for justifying *legal* punishment as justifying an individual’s preference for blondes would be for justifying the *state’s* preferring blondes.⁹ Thus, we can summarize Boonin’s positions as follows:

The Analysis: punishment = authorized intentional reprobativ retributive harm.

The Problem: what justifies the state's intentionally harming its citizens?

In the next two sections, I raise difficulties for both Boonin's *Analysis* and his *Problem*. The objections I

raise suggest that ED is the likeliest defense of punishment for those readers moved by the morally problematic nature of intentional harm (of whom I am one). But the positive lessons I take in favor of ED are quite independent of my objections, which have merit whatever the value of ED.

2. Educative Aims and Non-Harmful Punishment

Consider these two cases:

Drill Sergeant: Bailey is a new Marine recruit in normal Marine boot camp conditions. One day he fails to line up properly for a march, and is ordered by his drill sergeant to "drop and give him fifty."

Jackass: Sally, age 12, is an American girl growing up in a healthy, loving American household. She knows she is supposed to take the garbage out on Fridays. After multiple failures to perform her chore, her mother forbids her from watching her favorite show, MTV's *Jackass*, for a month. (Her mother knows this is Sally's favorite show, but this consideration was not sufficient for her choosing this punishment—she would not have forbidden Sally from watching PBS's *NOVA* or any other edifying program, should one of those have been Sally's favorite.)

I take these two examples to be instances of punishment. What is significant about cases such as these is that the offenders are not harmed.

Of course, this claim is not beyond dispute. One might argue that *Drill Sergeant* is analogous to cases of spanking or wrist-slapping, which are supposedly harmful. Now it isn't obvious to me that wrist-slapping and even some cases of spanking are harmful. But even if I am wrong about that, it is nonetheless true that

forced pushups in the context of *Drill Sergeant* are even less plausibly harmful than these other punishments. For not all pain is harmful, most of us would agree. And even if all pain is harm-making, the analogy between spanking and *Drill Sergeant* isn't necessarily successful. Perhaps this is because spanking and wrist-slapping reach a certain threshold of harm-making pain not reached in *Drill Sergeant*. Or perhaps *Drill Sergeant* has, in ways spanking does not, various good-making features that counterbalance or outweigh its harm-making features such that the harm-making pain in *Drill Sergeant* does not result in harm all-told for Bailey. For instance, perhaps spanking has no intrinsic benefit to it (and children know this), whereas the strengthening nature of pushups does (and Bailey knows this), and for this reason pushups aren't harmful while spanking is. Moreover, it might be that spanking is harmful because, as one often hears in psychological discussions, it teaches children to "resolve difference with violence." This concern might be a moot point in basic training, but it is nonetheless true that demanding Bailey do pushups in no way counts as a violent act on the part of the drill sergeant. Or spanking might be

harmful because a child doesn't tacitly consent to the practice, as Bailey did when he chose to join the Marines. Because of these and like considerations, I suggest we eschew arguments from analogy for what is and what isn't harmful, and simply consider the cases at hand. So again I ask: Granting that Bailey's punishment is somewhat painful, is it *harmful*, even in the short term? The intuition is that it is not.

The *Jackass* case seems especially difficult to see as an instance of intending harm. Although clearly Sally dislikes missing her favorite show, only on an implausibly broad conception of harm is Sally harmed by being banned from viewing a banality such as *Jackass*, especially at her age. Perhaps it helps to recall the case's counterfactual stipulation: Sally's mother doesn't have a policy of banning Sally from her favorite show *de dicto*, since she wouldn't have banned her from watching *NOVA* if that were Sally's favorite program. Sally's mom chooses to ban her from watching *Jackass* partly because she knows that Sally really likes the show, yes, but also partly because she sees *that* show as at best a waste of Sally's time and at worst a harmful influence.

If *Drill Sergeant* and *Jackass* reveal what I think they do, we can see that although punishment is often harmful, it need not be. Boonin's analysis should therefore be tweaked into the weaker *Analysis**:

*Analysis**: punishment = authorized intentional reprobativ retributive *discomfortune*.

Boonin might reject *Analysis**, even if he grants that *Drill Sergeant* and *Jackass* fail to instantiate harm. Boonin might ask us to imagine a

case wherein the state punishes offenders by making them drink a debilitating drug cocktail. A convict, Manson, has a rather unique constitution, however, and actually benefits from the cocktail physically. Or consider our skepticism about the punitive value of so-called "country-club" prisons used for white-collar and celebrity criminals. In cases like these, we might want to say that punishment has been instantiated as a *practice*, yet that nonetheless these offenders haven't been punished because they haven't been harmed. Thus Boonin might conclude that my putative counterexamples are instances of *attempted*, but unsuccessful, punishments.¹⁰

I believe this response would fail to save the harm criterion in Boonin's *Analysis*. First, it strikes me that Sally and Bailey are successfully punished. Second, to some degree our intuitions about the drug cocktail and country-club prison cases are confused by the fact that, in the nearest worlds in which they obtain, these cases portray the state as failing to achieve its goal of causing harm. This alone is sufficient for showing that the state failed at some level, since it failed to punish in the *way* it sought to. More importantly, however, the state fails to achieve its goal of punishment *tout court* in these cases not because the offenders are left unharmed, but because they are not shown to be discomfoted at all. This result is an artifact, however, of the way I have under-described the cases. We can remedy this: for instance, embellish the first case such that the cocktail has, even for Manson, a horrible taste that lasts for some time. (If you think distaste can be harmful, imagine the horrible taste lasts only up to the moment

the distaste would become actually harmful.) Do our intuitions about what counts as punishment tell us that Manson was successfully punished? My intuition is that he *is* punished if made to drink a disgusting concoction, although quite possibly the punishment isn't severe enough. The same sort of under-description is at play in the country-club prison case. If the offender is Martha Stewart, then it seems obvious that being sentenced to a country-club prison would be successful punishment. (Again, perhaps she is not being punished enough, but that is a different question.) Martha Stewart would be discomfited by *my* living conditions at their humble best, let alone the ones forced upon her in a country-club prison.

If harm-infliction is unnecessary to punishment, we must replace Boonin's *Problem* with *Problem**:

*Problem**: what justifies the state's intentionally discomfiting its citizens?

It appears that the new problem of punishment is still a problem. The interesting point for those especially worried about *Problem** is that any defense of punishment that aims only at *non-harmful* discomfiture will obviously have a lower hurdle to cross, and ED is the only such theory.

Recall that ED says punishment is justified when the proper authorities intend (and perhaps reasonably expect) the punishment to improve or benefit the offender. Thus understood, ED subsumes what Boonin calls the "moral education solution" and much more.¹¹ Perhaps the most historically significant spectrum along which these views fall con-

cerns the nature of the recommended improving measures. At one extreme, we have those views that treat the offender as a rational, autonomous, sane adult, and see punishment as meant to educate the offender of his wrongs. At the other extreme we have those ED views that see the criminal as sick, and justify punishment as a sort of bitter medicine that heals the offender. Somewhere in the middle of this spectrum are more paternalistic¹² sorts, which see offenders as childish and thus in need of a punishment that trains them to be good in some respect. (An ED view could embrace all three perspectives, of course, and hold that "education" might involve some instruction, some training, and some therapy, depending on the case.) Despite occurring across a fairly broad spectrum, ED views are united by their claim that punishment is properly motivated by the authority's concern about something the offender has revealed about himself by offending, and that the intentional discomfiture the authority imposes upon him is justified by its improving function—or at least this intent.

No other justification for punishment necessarily aims at non-harmful discomfiture. Consider the justifications of punishment that see punishment as something consented to by the offender,¹³ or fair,¹⁴ or justified by the expressive purpose of punishment.¹⁵ Suppose two possible punishments are equally consensual (fair, expressive), but one is harmful while the other non-harmfully discomfiting. These sorts of justifications give us no reason to choose the non-harmful option. Indeed, ED's

particular concern for the offender is downright repugnant to those non-consequentialist theories that begin by emphasizing how horrible crimes deserve harsh punishment.¹⁶ Turning from non-consequentialist theories, ED is teleological insofar as it provides a forward-looking purpose for punishment. And yet it is not a utilitarian defense, nor is it any brand of justification based on agent-neutral considerations, since it aims at the good of the offender and not the overall good. Theories attentive to

the overall good might well prefer punishments that non-harmfully discomfort offenders, when doing so is optimistic. But such theories do not aim specifically at non-harmful discomfort of the offenders. Thus, if just a little more good could be done by harmfully punishing the offender, an agent-neutral consequentialist or utilitarian would favor doing so. But ED, like the typical punishing parent, does not consider promoting the overall good to be a sufficient justification for making punishments harmful.

3. Educative Aims and Non-Punitive Intentional Discomforture

Boonin's *Problem* can be criticized from a second direction that, interestingly, also recommends ED. To see how, consider these cases of non-punishment:

Grasshopper: Grasshopper asks Master to teach him the Way, and after many warnings about the pains involved, Master agrees to take Grasshopper on as a disciple. Master, knowing that Grasshopper's soul can be refined only through subjecting him to painful challenges, regularly beats his student with bamboo sticks, forces him to lift boiling cauldrons with his naked forearms, and so on.

Hard-Knock High: Two parents must send their gawky son, Eugene, to Hard-Knock High, in part because they are poor and in part because Eugene culpably didn't earn a scholarship to a better school by getting better grades. Knowing that Eugene will have to fight to survive at Hard-Knock High, his father forces Eugene to take boxing classes. The boxing instructor must ensure that, in training, Eugene suffers a significant amount of pain (after all, Eugene has to learn how to take a punch and keep fighting).

Resident: Sam, a resident at General Hospital, is regularly forced to work 90–100 hours a week. The administration at General Hospital is not forced by financial or other exigencies to demand so much from their interns. They merely think the demandingness of residency is a necessary rite of passage in training good doctors.

Grasshopper, *Hard-Knock High*, and *Resident* each lack only one and the same element of punishment: reprobation. In each case the authority condition is met. If anyone can morally do what is being done to Grasshopper, Eugene, and Sam, it would seem that Master, Eugene's parents, and the hospital administration are those people. That they would be the proper authorities for doing these things to Grasshopper, Eugene, and Sam does not entail that their actions or policies are morally permissible. All I am pointing out is that *if* these sorts of actions and policies are morally permissible, Master, Eugene's parents, and the hospital administration would be

the proper entities for ordering them or carrying them out. Second, Grasshopper, Eugene, and Sam go through their ordeals because of something they have done—viz., asking to be a disciple, failing to earn the scholarship, and enrolling in medical school. Again, whether they *deserve* such treatments is a different question. What matters is that they are “connected” to their treatments in ways parallel to how those we punish are supposed to be connected to some offense. So the retribution criterion is satisfied. Third, it seems that they are being discomfited in some way. If a \$10 parking ticket is a punishment and thus discomfiting, then surely having to raise boiling cauldrons with bare forearms, getting punched in the face at the gym, and working 100 hours/week are discomfiting, too—possibly harmfully discomfiting. Finally, the discomfiture is intentionally imposed upon Grasshopper, Eugene, and Sam. The authorities do not merely foresee the pain involved, but rather use it as a necessary means to their ends: respectively, they believe that one simply cannot learn the Way except through pain, that one cannot be inured to punches without experiencing the pain of being punched, and that one cannot be a good doctor without undergoing the ordeal of 100-hour work weeks. (Note that in *Resident*, if General Hospital is state-run, then we have an instance of state-administered authorized retributive intentional discomfiture.)

Most people would say that, in at least some of these cases, nothing immoral is being done. This raises a question about the problem of punishment: if (at least some of) these

situations are morally unproblematic, how can punishment be necessarily worrisome if the only element we add is *reprobation*? Of course, it would be wrong for Grasshopper, Eugene, or the residents to be scolded by their respective authorities since they didn’t break any rules. But punishment involves reproof of offenders, and it seems obvious that the mere *reproof* of offenders—at least in cases where they acted without justification or excuse—doesn’t add anything morally problematic to authorized retributive intentional discomfiture.¹⁷ It would thus appear that the problematic aspect of punishment cannot simply be the infliction of intentional discomfiture, since we have a variety of unproblematic cases of intentional discomfiture outside of punishment.

We can leave these difficulties for the critics of punishment to worry about. It is enough to draw attention to the fact that these cases of intentional discomfiture are, once again, apparently legitimized by improving aims. Perhaps there are other justifying reasons for non-punitive, intentionally discomfiting actions. For instance, take reasons based upon consent, autonomy, or some variety of freedom. Two masochists might wish to be hurt, and agree to harm each other to satisfy this desire. Suppose they make this agreement freely and knowledgeably, and have no responsibilities to others to remain healthy. Furthermore, suppose the level of suffering and physical damage they sustain is exactly equal to that of Grasshopper. Those with classical liberal or libertarian leanings will be sympathetic to the permissibility of their intending to harm

each other. But it is worth noting that this is still a highly controversial case of intentional harm, even though it perfectly satisfies the concerns of liberal or libertarian ethicists. What the ED cases described above have that cases of reciprocal masochism lack is a further *concern for the discomforted parties* that motivate the authorities to harm them intentionally. Perhaps this is why ED-type

justifications for intentional discom-
forture are much more widely em-
braced: Sally's mom would be
extolled in any popular magazine;
crusty drill sergeants are beloved
characters in too many stories to
mention; *Kung Fu's* Master was a
pop-culture hero in the otherwise
free-spirited 1970s; and so forth. Par-
allel remarks cannot be made of
reciprocating masochists.

4. Outlining the "Civic Education" Account

I have shown why ED is a uniquely promising route to answering philosophers who, like Boonin and Barnett, are particularly concerned about punishment's intentional harm. Nonetheless, no independent motivation for ED has been offered. In this section I will sketch an account that enjoys the theoretical benefits just discussed, but also steers clear of some common objections to the strategy. It should be stressed that the goal here isn't to articulate a full-fledged theory of punishment, but rather to fix ideas and show how ED has fewer problematic commitments than commonly supposed.

Obviously not all punishment is justified: the laws themselves may be excessively unjust or may have been made in excessively unjust ways; the state may be illegitimate or the rule of law excessively weak; the offender may lack sufficient *mens rea* or may have acted involuntarily. Unless otherwise noted, in what follows I will assume these factors are not at play. Given this, it seems to me that the practice of legal punishment of legal offenders is justified (when it is justified) because:

- it is designed to better offenders by shaping them into law-regarding subjects,
- and this function is intended by the state,
- and being a regarnder of the law is a good for the offender that isn't outweighed by the badness of his punishment.

One "regards" the law when one knows about its requirements, recognizes the importance the state gives its requirements, and sufficiently grasps why the requirements are just or at least justly derived. When there is good rule of law, the state should assume that non-offenders regard the law—not because they actually do, but rather because there is no way of knowing who does and doesn't until they break or attempt to break the law.¹⁸ On the other hand, when one disregards the law in circumstances of good rule of law, one reveals one's disregard for the particular law one breaks or for the law's just authority more generally. According to the version of ED I favor, the state is permitted to educate on both points—parallel to how a parent wants to reinforce the just

imperative of a flouted requirement in particular and the parent's just authority in general. Of course, often the laws are not just. Often the lesson takes a long period of time to sink in. Often the offender won't take the lesson to heart. For these reasons and others, "shape" should not be interpreted as a success verb: educationists need not say that the law must successfully transform the offender into a regarder of the laws through punishment, although punishment practices excessively inefficient at achieving this good would be unjust (in parallel to how forced schooling would be unjust if students didn't learn anything at school). The claim is not that the *actual improvement* of the offender justifies intentional discomforture, but rather that the improving aim, and the reasonable efficiency of the state's methods at achieving that goal, does.

Why is discomforture necessary to shaping the (culpable) offender into a regarder of the laws he broke? In circumstances of good rule of law, offenders must have been adequately informed of the laws, the laws' status as requirements as opposed to mere recommendations, and the laws' justification. That means the offender was negligent in attending to the laws, or knew about the laws but saw them as unjust, or recognized them and their justice but saw some extra-legal advantage (for himself or others) in breaking them. Assuming that the (just) state can and should try to make subjects regarders of its law, since non-forceful methods of getting subjects to regard the law were insufficient, the state must next turn to forceful measures. Force itself might count as discomforture, as when a firm forces a harassing employee to listen to a lecture on

sexual harassment or when a parent grabs a child's head and speaks clearly into her face.¹⁹ If this discomforture is intended, it is punishment. And indeed, sometimes forceful measures are enough to drive a lesson home—it seems permissible for state troopers, lights ablaze and taking their time, to let some speeders off with a warning, and the regularity of this practice speaks for ED's influence in the actual world. But sometimes forceful lessons won't direct the offender's attention or aren't reasonably expected to, and the only measure left at the state's disposal is discomforture, since discomforture is the surest method of getting someone's attention. Of course, certain forms of discomforture can easily distract the offender from the lesson being taught, and some forms of it might be at odds with the lesson. ED would naturally proscribe such methods.

Why should we think that an offender would be *improved* by becoming a regarder of (just) legal requirements? Being a regarder of legal requirements is the basic competence of legal subjects. Admittedly, in many cases one is not improved by being a sufficiently good member of some kind. One isn't improved by being a competent Congolese child-soldier or Nazi. On the other hand, sometimes being a competent member of some kind is clearly a great benefit, or at least a benefit good enough to justify some intentional discomforture (as the cases above help to show). For a sufficiently legitimate state with sufficiently just laws, an offender clearly would be improved by becoming someone who *regards* the law. That is to say, an offender is improved by discovering his (just) state's laws, by learning

that the state takes them seriously, and by understanding that they are just or at least justly derived. That does not seem controversial; in fact, one can accept this and still concede that in some cases a person is all-told better off by not regarding just laws (say, by being an expert art thief),²⁰ although I think this would be a mistake.

Even if offenders are improved by being shaped into regarders of the laws they violated and discomforture is necessary to this improving process, it still needs to be explained why this good *justifies* punishment. The first part of the justification involves saying what is appropriate about the punishment response to offenders. After all, offenders might be improved by massages, but we don't think that massages are an appropriate response to offending. Second, we have to say why the appropriate good in question is good enough to justify the discomforture of punishment.

In reply to the first concern, the good of being shaped into a competent subject seems to be a perfectly appropriate one to visit upon offenders, for they are defined precisely by their civic incompetence. As for the latter question, it seems reasonable to say that the good of being a competent subject (in a sufficiently just state) is good enough to warrant some intentional discomforture for offenders. Incompetent subjects are mistrusted by their fellow subjects and state authorities: they may be banned from certain careers or passed over for certain jobs, lose their right to vote, be kept from taking out student loans, lose custody of their children, have a tougher time finding spouses, and so forth. Moreover, incompetent subjects are liable

for tremendous amounts of state-imposed restitutive harm—Boonin's own restitution model, for example, allows that even a minor criminal negligence may cause a great amount of harm that the offender would be liable for.²¹ On the other hand, non-harmful discomforture is not a great evil, if it is an evil at all.²²

One may think that the offender has a right against the state not to be improved, even greatly and appropriately improved, at the cost of some evil to himself (assuming non-harmful punishment is bad for him) or against his will (assuming the offender doesn't willingly accept the punishment). There are many ways to respond to this concern. Here is one very modest reply: supposing as we must that one doesn't have an absolute moral right never to be punished, we may nevertheless concede that one has a right not to be unless one is reasonably taken to have consented to be part of a polity that punishes offenders. But that is just one reply. I happen to accept a social-contract theory of the law's authority, and I see whatever justifies the law's authority over me as the same mechanism that removes my right not to be punished by it if I break the law. I realize it is an old-fashioned view. No matter; the relevant point is that what gives the state the *right* to punish offenders is a question of political theory or perhaps the theory of legal obligation. A substantive theory of punishment needn't establish the state's *right* to punish—it doesn't have to say what "opens the door" to legal punishment. Rather, a theory of punishment must say why we should want that right in the first place—why we should *want* that door, and why we should walk through it when

opened. (After all, when the payoff is high enough, we often give people, groups, and businesses the *right* to do bad or foolish things to us. A theory of punishment is meant to explain why punishment *isn't* bad or foolish.) Educationists hold we should want a right to punish, and we should use it, because punishment promotes a great, appropriate, and non-outweighed good for the offender.

Perhaps the most prominent complaint against ED is that the state isn't the proper entity for improving the offender. One version of this objection says that the state shouldn't be in the punitive education business because the *content* of the lesson—especially if that lesson is “moral”—would be inappropriate for the state to teach. Another version says that even if the content is suitable, the *methods* by which this lesson would be taught infringe upon offender autonomy.

In answer to these worries, I think we should note that although some ED theories might truly be “paternalistic”²³ or be focused on the offender's general “moral” well-being,²⁴ not all will be. For instance, my ED view is more suitably called a “civic education” view rather than a “paternalistic” or “moral education” theory, since I hold that the purpose of legal punishment should be the improvement of the offender as a civic being. Furthermore, it is important to recognize that improving motives are the standard reason for punishment not only in parenting but also in athletics, religious orders, elite clubs, professional and military organizations, and businesses. That means that critics who prefer any of these institutions as models for the state might find themselves suddenly much more amenable to ED. For

instance, libertarians—who often applaud the efficiency-mindedness and voluntariness of businesses—should attend to how and why managers punish (as opposed to fire) offending employees.²⁵ I suggest that they will find ED to be as commonplace in the business domain as in the family. So if the state should be structured and motivated more like a business or some other voluntary organization, then this fact would recommend ED, not count as a point against it.²⁶

What about the second worry, that the state would infringe upon offenders' autonomy if it were granted the power to “improve” them when it punishes? Doesn't this risk “conditioning” offenders or even brainwashing them? There surely is a grave concern here, as there is in any circumstance where superiors have great control over inferiors they wish to norm. I think we should note first that although ED as defined here subsumes rehabilitative and therapeutic theories of punishment, one obviously might subscribe *only* to a purely cognitive variety that utterly rejects rehabilitative and therapeutic motives and punishment procedures as being either intrinsically wrong or unacceptably prone to abuse.²⁷ Moreover, it should be noted that educationists are in fact much less committed to “edifying” punishments than is commonly thought. True, some educationists might applaud discomfortures with rich educative content, as when a court sentences a convicted drunk driver to watch films about the horrors of drunk driving accidents. On the other hand, some educationists might see the process of formulating and imposing “punitive curricula” to be unwieldy, expensive, inconsistently applied, and a bit preachy.

It may seem odd at first to suggest that an ED theorist may shy away from didactic discomforts, but it is nonetheless true that punishments such as spanking, getting grounded or benched, being placed in time out, or being ordered to run laps, clean latrines, or to do pushups are the warp and woof of educative punishments outside of legal punishment. And the discomforting aspects of these punishments have little educational content to them.²⁸ In principle, ED is open to punishments as perfunctory as fines, imprisonment, hard labor, caning, etc.,²⁹ as long as these are not harmful or as long as the (unlikely) harm that might result from them is not intended.³⁰ The educative aspect of the punishment could indeed be nothing more than a stern lecture from the court *if* that stern lecture is joined by the other aspects of punishment, including reproof and the discomfort necessary for getting the lesson across.

That said, I think we must also bear in mind that immaturity, bad socialization, and psychological or even biological weaknesses have a great deal to do with why people—even those who are sufficiently culpable and thus count as true offenders—do not regard just laws. This is significant, since if the offender offends for reasons that can be addressed only by training, rehabilitation, or therapy, then punishments justified by their civic-educative aims are likely to be excessively inefficient at fulfilling their purpose and thus will inflict unjustified discomfort. Suppose your child throws a tantrum, and you judge that he is somewhat culpable for it, but also that this bad behavior is somewhat attributable to his being hungry. Educationists advise punishment to help the child

learn that he mustn't throw tantrums. But the typical parent would probably balance the benefit of a swift punishment against the fact that the child needs to eat in order to grasp any point whatsoever. Immediately putting the hungry, distressed child in time out is simply too unlikely to help the child appreciate the lesson, and thus the discomfort of the time out is unjustified. Thus, I cannot get behind an ED theory that strictly prohibits any forced training, rehabilitation, or curing, even when the pathology is well-understood and the effects of treatment are predictable (e.g. removing a tumor in the prefrontal cortex of a serial child predator,³¹ as opposed to forced psychotherapy) and the offenses in question completely non-controversial (e.g. murder, as opposed to illegal drug use). In any event, we can protect offender autonomy even in these rare cases by offering them the opportunity of exile or jail instead of punishment. (Any discomfort in these instances would not at all be intended.)³²

So far I have tried to sell ED to those who, like Boonin, see intentional harm or even discomfort as especially worrisome. But for many, the problem with the present proposal isn't that it permits intentional non-harmful discomfort, but rather that it *avoids intentional harmful discomfort*. Why should our concern be for the offender's well-being and not the victim's? Here again we see why Boonin's framework helps ED's cause. ED is a theory of punishment, and as such it is neutral on the question of restitution and how much unintended harm might be suffered by the offender in discharging his or her restorative

obligations.³³ Consider one more hypothetical scenario:

Broken Window: Jack, a teenager, negligently hits a baseball through his neighbor's window. As it happens, the neighbor is home only on weekends. Jack has an important baseball game on Saturday morning—college scouts will be in attendance—but nothing planned on Saturday evening or Sunday. Jack's father expresses his regret to Jack, but explains to him that he cannot countenance leaving the neighbor without a window longer than necessary, since this would be adding insult to injury: Jack must hang the window on Saturday morning and miss his big game.

Now obviously Jack's father is being overly stringent: surely he should walk over to the neighbor's house (perhaps with a case of the neighbor's favorite beer in hand), explain the situation, and get the neighbor to agree—if he doesn't already—that the window can wait another few hours. But it doesn't matter for our purposes whether Jack's father is right or wrong to force Jack to miss such an important game. The harm to Jack is unintended and therefore not punitive, and so ED is necessarily silent on its permissibility. One might think countenancing a great deal of unintended but foreseen harm for minor restitutive and justice-based considerations satisfies only the letter

but not the spirit of ED, which has the best interests of offenders in mind. But this is just to misunderstand the view. ED holds that we should have the best interests of offenders in mind when it comes to our *punishment* of them. Our models—(good) parents, teachers, coaches, drill sergeants, bosses, managers, martial arts masters—hardly make idols out of their charges and ignore other moral demands. Educationists hold that the punishment is aimed at the offender's good, and deny that justice or the well-being of his victim(s) is served by intentionally harming the offender. But that leaves open the question of restitution, which aims at the victim's good and (perhaps in concert with the punishment of the offender)³⁴ plausibly satisfies the demands of justice.

Although important questions remain, some of which have been left completely unaddressed, we have put some flesh on the bones of an educative account that aims at improving the offender. For those theorists who are suspicious of paternalistic and moralistic versions of ED, the foregoing account also explored the non-paternalistic and non-moralistic limits of the educative theory of punishment.

Conclusion

I have argued that *Drill Sergeant* and *Jackass* are counterexamples to Boonin's analysis of punishment insofar as they show that some cases of punishment are not harmful, but only non-harmfully "discomforting." Since intentional non-harmful discomforture is less problematic than

intentional harm, and since good educators (parents, coaches, drill sergeants, etc.) plausibly do not wish to harm their students (children, players, trainees, etc.) if they don't have to, this observation speaks in favor of the ED of punishment. Furthermore, *Grasshopper*, *Hard-Knock*

High, and *Resident* show that there are morally unproblematic cases of non-punitive authorized retributive intentional discomfort. So intending discomfort, and possibly even harmful discomfort, isn't always wrong. These cases are distinguished from punishment only by the fact that they don't involve reproofing offenders. Since it is difficult to see why authorized retributive reprobative intentional discomfort of offenders should raise some unique concern absent in the non-punitive cases, these considerations show that punishment is not a peculiar institution: we intentionally discomfort others in non-punitive realms (such as educa-

tion, the military, athletics, and so forth) and in typical cases we do so morally. Significantly, the most plausible cases of acceptable non-punitive intentional discomfort are grounded on the authorities' aim of improving those they discomfort. All this implies that the ED is a particularly plausible strategy for answering the problem of punishment. One variety of ED that proscribes intentionally harming offenders—the "civic education" account—sees punishment as justified by the way it improves the offender as a civic being, and represents a particularly modest account of the state's punitive prerogatives and methods.

Notes

[My thanks to David Boonin, Dan Korman, Carl Ficarrotta, and an anonymous referee for helpful comments on an earlier version of this essay.]

1 David Boonin, *The Problem of Punishment* (New York: Cambridge University Press, 2008).

2 Randy Barnett, "Restitution: A New Paradigm of Criminal Justice," *Ethics* 87, no. 4 (1977): 279–301.

3 Mary Margaret Mackenzie, *Plato on Punishment* (Berkeley, CA: University of California Press, 1981).

4 R. A. Duff, *Trials and Punishments* (New York: Cambridge University Press, 1985); Jean Hampton, "The Moral Education Theory of Punishment," *Philosophy and Public Affairs* 13, no. 3 (1984): 208–238; Herbert Morris, "A Paternalistic Theory of Punishment," *American Philosophical Quarterly* 18 no. 4 (1981): 263–71; Richard Prust, "How to Treat a Criminal," *Public Affairs Quarterly* 2, no. 3 (1988): 33–50.

5 J. Ellis McTaggart, "Hegel's Theory of Punishment," *International Journal of Ethics* 6, no. 4 (1896): 479–502; John Shook,

"Dewey's Rejection of Retributivism and His Moral Education Theory of Punishment," *Journal of Social Philosophy* 35, no. 1 (2004): 66–78.

6 David Eagleman, "The Brain on Trial," *Atlantic Monthly*, June/July 2011, available at: <http://www.theatlantic.com/magazine/archive/2011/07/the-brain-on-trial/8520/>. Eagleman might not in fact advocate for punishment in the strict sense of the term.

7 The distinction between harmful and non-harmful discomfort seems to align with traditional thoughts about this criterion of punishment. Anthony Flew, for instance, understands punishment to require "an evil, an unpleasantness" to the victim. Flew, "The Justification of Punishment," *Philosophy* 29, no. 111 (1954): 293. The difference between a truly evil and a merely unpleasant experience tracks closely the difference between a genuinely harmful and a non-harmful discomfort.

8 Boonin, *Problem of Punishment*, 1–28. On intentional harm's neutrality between being done for its own sake as opposed to being

done for the sake of a further goal, see Boonin, 7–8 and 13–14, especially.

9 Boonin, *Problem of Punishment*, 28–36.

10 This line of response is modeled after Boonin's reply to the masochist objection against the harm criterion. Boonin, *Problem of Punishment*, 7–9.

11 *Ibid.*, 180–92.

12 "Paternalistic" here means "to treat offenders like children." Although punishment on ED involves doing something discomfoting to the offender for his sake, such punishment is not necessarily "paternalistic" in the usual philosophical sense because it is not necessarily coercive—an offender might well welcome his punishment.

13 For example, C. S. Nino, "A Consensual Theory of Punishment," *Philosophy and Public Affairs* 12, no. 4 (1983): 289–306.

14 For example, Herbert Morris, "Persons and Punishment," *The Monist* 52 (1968): 475–501.

15 For example, R. A. Duff, *Punishment, Communication, and Community* (Oxford: Oxford University Press, 2001). Some might see ED as a species of the expressive view of punishment. For those readers, the argument that follows obviously applies only to the non-ED versions of that view.

16 See, for example, Michael Moore, "The Moral Worth of Retribution," in *Responsibility, Character, and the Emotions: New Essays in Moral Psychology*, ed. Ferdinand Schoeman (Cambridge, UK: Cambridge University Press, 1987), 179–219; and Igor Primoratz, *Justifying Legal Punishment* (Amherst: Humanity Books, 1989).

17. This is so even if there is an independent problem raised by reprobation alone—cf. Joel Feinberg, "The Expressive Function of Punishment," *The Monist* 49 (1965): 397–423. Even Boonin doesn't seem to think that reprobation of offenders presents a problem for the practice. In one place he considers how rites of passage have all the elements of punishment but reprobation, but he doesn't condemn such practices. Boonin, *Problem of Punishment*, 22–23.

18 Even non-offending denouncers of laws can sometimes regard the laws they denounce, as when they denounce laws to get attention or to fit in with a crowd with whom they wish to be identified.

19 cf. Hampton, "The Moral Education Theory of Punishment," 224.

20 cf. Russ Shafer-Landau, "Can Punishment Morally Educate?" *Law and Philosophy* 10 (1991): 209–211.

21 Boonin, *Problem of Punishment*, 230–31.

22 I have granted that non-harmful discomferture is "problematic," but that leaves us neutral to whether it is a bad thing for the offender in fact.

23 Plato, *Crito* 50d ff.

24 Boonin sometimes characterizes the view in this way. See Boonin, *Problem of Punishment*, 190–192.

25 The firing boss typically does not intend harm on those she fires. So firing is typically not punishment.

26 Like the typical family, the assumption in businesses, armies, elite clubs, etc., is that the offender's good is promoted by being a competent member. Unlike the typical family, however, in many of these communities the offender has entered it voluntarily and is free to leave it at will. So it is often the case in these communities that if an offender facing punishment disagrees with the authorities, and sees his good as *not* being furthered by being shaped to the community's standards, he may leave. This raises an interesting possibility: a libertarian might be attracted to a variety of ED theory saying that offenders—after making restitution to the victim, if there is one—should be free to shorten or avoid punishment if they wish to by finding some other polity to live in, supposing any would welcome them. (Obviously, this means that I don't think that a good ED view must prescribe punishing every offender. Some offenders should be treated as rebels and simply exiled, or jailed if they refuse exile.)

27 As in Hampton, "The Moral Education Theory of Punishment," and Morris, "A Paternalistic Theory of Punishment."

28 Shafer-Landau, for instance, puzzles over how punishment could be educative. "Can Punishment Morally Educate?" 197–98. His puzzlement is a little puzzling itself, given that the typical non-legal punishment is defended and executed for its improving aims. The mystery is solved when we realize Shafer-Landau assumes educationists are committed to making the discomforting aspect of punishment educative.

29 I do not wish to wade into the difficult question of what particular sorts of discomfortures are harmful.

30 The ED view I favor says that one shouldn't intend to harm the offender. I also think that punishments with too high a risk of unintended harm are impermissible, since punishment is meant to improve the

offender. That doesn't mean that unintended *non*-punitive harm cannot be required by the state, as we shall see in what follows.

31 See Eagleman, "The Brain on Trial."

32 See note 26.

33 This insight is hardly novel: Plato was an educationist but also noted the importance of restitution for the sake of the victim. See e.g., *Laws* 9.862b.

34 Victims often feel that authorities are obligated by justice to inform or communicate to the offender that what he did was wrong. This intuition might be a legitimate demand of justice, and I don't see why educationists couldn't accommodate it. It is not a necessary aspect of their view, however.