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AFTER THE CRIME: REWARDING OFFENDERS' POSITIVE POST-OFFENSE CONDUCT

Paul H. Robinson and Muhammad Sarahne*

Although an offender's conduct before and during the crime is the traditional focus of criminal law and sentencing rules, an examination of post-offense conduct can also be important in promoting criminal justice goals. After the crime, different offenders make different choices and have different experiences, and those differences can suggest appropriately different treatment by judges, correctional officials, probation and parole supervisors, and other decision makers in the criminal justice system.

Positive post-offense conduct ought to be acknowledged and rewarded, not only to encourage it but also as a matter of fair and just treatment. This essay describes four kinds of positive post-offense conduct that merit special recognition and preferential treatment: the responsible offender, who avoids further deceit and damage to others during the process leading to conviction; the debt-paid offender, who suffers the full punishment deserved (according to true principles of justice rather than the sentence actually imposed); the reformed offender, who takes affirmative steps to leave criminality behind; and the redeemed offender, who out of genuine remorse tries to atone for the offense.

The essay considers how one might operationalize a system for giving special accommodation to such offenders. Positive post-offense conduct might be rewarded, for example, through the selection and shaping of sanctioning methods, through giving preference in access to education, training, treatment, and

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other programs, and through elimination or restriction of collateral consequences of conviction that continue after the sentence is completed.

Keywords: *post-offense conduct, punishment theory, reformed offender, re-deemed offender, criminal sanctions, collateral consequences of conviction*

INTRODUCTION

An elaborate set of criminal law and sentencing rules scrutinize an offender's conduct leading up to and during an offense. Often overlooked is the importance of what offenders do after the offense. They might behave very badly, perhaps fabricating evidence to destroy the credibility of a rape victim, for example. Or they might behave almost admirably, by turning themselves in to police and with sincere remorse trying to atone for their offense. And there are many shades of propriety and impropriety along this continuum of post-offense behavior. A rational criminal justice system ought to encourage positive post-offense behavior, and acknowledge and reward it when it occurs.

This essay examines five kinds of positive post-offense behavior and suggests that four of them should trigger an offender's special treatment within the criminal justice system. It concludes that recognition and reward of some categories of positive post-offense conduct would serve not only to encourage such conduct but also to advance broader criminal justice goals, such as reinforcing societal norms and enhancing the justness of criminal liability and sentencing rules.

I. POST-OFFENSE CONDUCT IN THE LITERATURE

The role of post-offense conduct in sentencing has been subject to substantial scholarly writing, in which different punishment theories and distributive principles view the relevance of this role differently. Strict desert retributivists maintain that punishment ought to be proportionate to the gravity of the committed offense, for which the actual or potential harm and the offender's culpability are the primary factors to assess.¹ Retributive

1. See MARGARET DEGUZMAN, SHOCKING THE CONSCIENCE OF HUMANITY: GRAVITY AND THE LEGITIMACY OF INTERNATIONAL CRIMINAL LAW 186 (2020); GUYORA BINDER, CRIMINAL LAW 90 (2016).

desert is backward-looking, in that judgments about the seriousness of the offense focuses on past events and wrongdoings, and thus it has been argued that “the gravity of the wrong is not influenced by anything that takes place subsequent to the wrong-doing, such as the offender’s profound repentance.”² Therefore, pure retribution considers post-offense behavior as irrelevant to the deserved punishment, since the offender cannot change his past level of culpability, during the commission of the offense, or undo the harm he has already inflicted.³

The objection to taking account of post-offense conduct within the sentencing process stems from several grounds. First and foremost, it might seem inconsistent with principles of fairness and equality, as it leads to sentencing disparities and the imposition of different sanctions on those who commit the same offense under the same circumstances.⁴ Others oppose considering post-offense conduct because such conduct could be triggered by many reasons, not necessarily indicating any moral development or lesser culpability.⁵ Moreover, some may argue that post-offense considerations undercut the gravity of the offense as the crux of assessing the deserved punishment, and may increase the punishment based on, for example, the failure to acknowledge guilt or cooperate with the authorities.⁶

However, contemporary retributive approaches ascribe an importance to post-offense conduct so long as it has an effect on the severity of the offense. For instance, John Tasioulas argues that the main exception to the exclusion of actions and events taking place after the crime from the evaluation of the offense’s gravity is when repentance occurs immediately following the commission of the wrongdoing. According to him, in such case, where the offender is immediately appalled by his act, apologizes, tries to amend the harm done to the victim, and voluntarily surrenders to the authorities, repentance would

2. John Tasioulas, *Repentance and Punishment*, 81(2) *PHILOSOPHY* 279, 308 (2006).

3. Hadar Dancing-Rosenberg & Netanel Dagan, *Retributarianism: A New Individualization of Punishment*, 13 *CRIM. L. & PHIL.* 129, 130 (2019) [hereinafter Dancing-Rosenberg & Dagan, *Retributarianism*]; Julian Roberts & Hannah Maslen, *After the Crime, Post-Offense Conduct and Penal Censure*, in *LIBERAL CRIMINAL THEORY: ESSAYS FOR ANDREAS VON HIRSCH* 87, 89 (A.P. Simester, Antje du Bois-Pedain, & Ulfrid Neumann eds., 2015).

4. Dancing-Rosenberg & Dagan, *Retributarianism*, *supra* note 3, at 132.

5. Roberts & Maslen, *supra* note 3, at 107.

6. *Id.* at 107–08.

be a factor mitigating culpability.⁷ Similarly, Roberts and Malsen have contended that in a desert framework, certain commendable post-offense actions—namely ones affecting harm, culpability, or deserved censure—should have a mitigating role and be legitimately considered by the sentencing court.⁸ This approach is even broader than the one presented by Tasioulas, since it does not confine the time frame for the relevant post-offense behaviors.

Generally speaking, recent years have witnessed the emergence of a new individualization of punishment trend in retributive penal theory—termed “retributarianism” by Dancing-Rosenberg and Dagan—which shares with strict retributivism the reliance on retribution as the sole rationale and justification for punishment, yet seeks to expand the boundaries of retributivism by opening the door to the possibility of taking into account also post-offense conduct that is not directly related to the past offense, and not for utilitarian reasons, but in order to assess the proportionate deserved punishment and the offender’s culpability.⁹ For example, character retribution theory is a product of this broad trend. This theory states that retribution is not a function of the wrongdoing only, but also of the quality of the wrongdoer’s moral character. In determining the proportionate punishment, character retributivism suggests examining the offender’s entire moral personality and the totality of his moral being, instead of focusing solely backward on the moment of committing the wrongful act, thus extending the time frame for gauging the deserved punishment. Punishment, under character retributivism, would take into consideration the development of the offender’s character over time, including positive post-offense actions and changes in his personality—like taking responsibility, expressing remorse, apology, penance, and making amends—which may imply his transformation into a meaningfully different person who deserves less punishment.¹⁰

On the other hand, utilitarian theories of punishment are more tolerant not only with respect to taking into account post-offense conduct in the sentencing process, but also in that examining such conduct is in fact

7. Tasioulas, *supra* note 2, at 308.

8. Roberts & Maslen, *supra* note 3, at 96–107.

9. Dancing-Rosenberg & Dagan, *Retributarianism*, *supra* note 3, at 132–33.

10. Netanel Dagan & Hadar Dancig-Rosenberg, *Character Retribution as a Brake on Risk-Driven Criminal Justice*, in *CRIMINAL JUSTICE, RISK AND REVOLT AGAINST UNCERTAINTY* 69, 75–76 (John Pratt & Jordan Anderson eds., 2020).

necessary to achieve some utilitarian punishment purposes. For instance, general deterrence may accommodate cooperation with the police that promotes the goal of cost-effective crime prevention, on which general deterrence is premised.¹¹ Under general deterrence, post-offense actions reducing the harm would also have a mitigating role, since the greater the harm, the more important are deterrence and harsher punishments.¹² Moreover, post-offense conduct is obviously highly relevant to a court pursuing special deterrence, incapacitation, or rehabilitation, under which sentences are predicated mainly upon speculations about offenders' future behavior, rather than the committed offense, and may even require indeterminate sentences.¹³ Utilitarian precepts underlie the use of post-offense conduct in mixed theories as well. For example, limiting retributivism is a theory according to which principles of retribution and just desert define the outer bounds of the sentence and set a proportionate sentencing range depending on the gravity of the offense, whereas crime-control utilitarian principles such as deterrence, incapacitation, and rehabilitation may influence the precise amount and nature of the punishment within the said range.¹⁴ Limiting retributivism permits looking at post-offense conduct for imposing a punishment within the deserved sentencing range, rather than affecting its lower and upper limits, given a utilitarian justification for that.¹⁵

It is noteworthy, though, that not all utilitarians agree upon the role that post-offense conduct should play in sentencing. Some argue that the certainty of the punishment contributes to deterrence more than the severity of the punishment. Based on this premise, sentencing should avoid the consideration of unforeseeable contingencies such as post-offense behavior of the offender.¹⁶

11. Binder, *supra* note 1, at 90.

12. DeGuzman, *supra* note 1, at 186.

13. *Id.*; Binder, *supra* note 1, at 90–91.

14. See Richard Frase, *Limiting Retributivism: The Consensus Model of Criminal Punishment*, in *THE FUTURE OF IMPRISONMENT IN THE 21ST CENTURY* (Michael Tonry ed., 2003); Christopher Slobgin, *Limiting Retributivism and Individual Prevention*, in *THE ROUTLEDGE HANDBOOK ON THE PHILOSOPHY AND SCIENCE OF PUNISHMENT* (Farah Focquaert ed., 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3318321.

15. Dancing-Rosenberg & Dagan, *Retributarianism*, *supra* note 3, at 143.

16. Michael O'Hear, *Is Restorative Justice Compatible with Sentencing Uniformity?*, 89(2) *MARQUETTE L. REV.* 305, 309–10 (2005).

The relevance of post-offense conduct to punishment has been endorsed in practice by several court opinions, statutes, and sentencing guidelines across the jurisdictions. About a decade ago, the Supreme Court of the United States, in *Pepper v. United States*,¹⁷ made it clear that sentencing courts may consider a very wide range of information about the offender, more than the particular acts by which the offense was committed, including the offender's life, characteristics, and propensities. This principle was incorporated by the legislature in § 366I of the United States Federal Code.¹⁸ Additionally, the United States Federal Sentencing Guidelines expressly recognize the possibility of reduction in punishment due to positive post-offense conduct, like the acceptance of responsibility for the offense,¹⁹ the disclosure of an offense that would have otherwise remained undiscovered,²⁰ and post-offense rehabilitative efforts.²¹ The role of post-offense behavior is also recognized on the state level. For instance, statutory provisions in many states authorize courts to provide mitigation in punishment where the offender assists law enforcement authorities²² or substantially compensates the victim in a civil procedure.²³

Sadly enough, in spite of the scholarly literature, court opinions, and sentencing statutes and guidelines in many jurisdictions with regard to the role of post-offense conduct, it is not uncommon, as will be demonstrated in this essay, to see the system failing to recognize and reward offenders for their positive post-offense deeds. Therefore, this essay aims to suggest a mechanism by which certain offenders who engage in positive behaviors after the crime may be rewarded. Unlike the existing literature described above, which addresses post-offense conduct only through the prism of punishment, our goal is to propose and show many other ways to recognize such conduct.

17. *Pepper v. United States*, 562 U.S. 476 (2011).

18. 18 U.S.C. § 366I.

19. U.S. Sentencing Commission Guidelines Manual § 3E1.1 (2010).

20. U.S. Sentencing Commission Guidelines Manual § 5k2.16 (2004).

21. U.S. Sentencing Commission Guidelines Manual § 3E1.1 (2010).

22. Paul H. Robinson, Sean E. Jackowitz, & Daniel M. Bartels, *Extralegal Punishment Factors: A Study of Forgiveness, Hardship, Good Deeds, Apology, Remorse, and Other Such Discretionary Factors in Assessing Criminal Punishment*, 65 VAND. L. REV. 737, 744 (2012) [hereinafter Robinson et al., *Extralegal Punishment Factors*].

23. *Id.* at 765.

II. DOING A GOOD DEED

One kind of positive post-offense conduct is doing a good deed for someone else. Pierre Johnson is awaiting his day in court for drug charges of which he is ultimately convicted when a serious fire starts in a neighbor's home. Johnson climbs through a window and rescues the wheelchair-bound woman.²⁴ Michael Rogers has been in and out of prison for his entire adult life but at the moment is living on the streets. There is little reason to think his past prison cycling will change. He is at a busy shopping center when a knife-wielding man begins attacking people. Three people are wounded, one is killed. When police arrive they too are attacked. Roger uses a grocery cart to ram the attacker and knock him down, saving lives.²⁵ Lamont Cunningham, who spent three years in jail, is currently awaiting trial on a domestic battery charge when he comes across a woman being abducted by a man disguised as a postal worker. Cunningham hits the man over the head with a 75-pound flower pot. When the man flees, Cunningham chases him down and holds him until police arrive.²⁶

Such good deeds ought to be praised and perhaps rewarded, but there is little reason to do so through the criminal justice system. The offender ought to be acknowledged and rewarded as any other citizen would be for doing the same thing. But the deed does not alter the wrongdoing of the

24. *Minnesota Felon Rewarded for Heroic Act*, Post Bulletin (Oct. 4, 2013), https://www.postbulletin.com/archives/minnesota-felon-rewarded-for-heroic-act/article_9a6241b5-dd03-57f6-a306-4559571ed6cf.html. For another example, in a burglary case, the offender stole from an apartment goods that included video tapes. Upon viewing the movies, he found they were videos made by a local soccer coach who was sexually abusing young athletes. The offender contacted authorities and turned over the evidence even though doing so exposed him to prosecution as a serial thief. Al Goodman, *Burglar Finds Child Sex Abuse on Tapes He Took, So He Points Out Suspect, Police Say*, CNN (Dec. 19, 2013), <https://www.cnn.com/2013/12/19/world/europe/spain-burglar-child-pornography/index.html>.

25. *Melbourne's 'Trolley man' Michael Rodgers in Trouble Again*, THE WEST AUSTRALIAN (Nov. 30, 2018), <https://thewest.com.au/news/australia/melbournes-trolley-man-michael-rodgers-in-trouble-again-ng-b881037380z>.

26. Brian Brueggemann, *Ex-Con Saved Woman from Fake Carrier—Man Served Time for Felonies*, BELLEVILLE NEWS-DEMOCRAT (Sep. 27, 2002), <https://infoweb-newsbank-com.proxy.library.upenn.edu/apps/news/document-view?p=AWNB&docref=news/of6552BD4A449852>.

offender's crime.²⁷ Empirical research about ordinary people's judgments of justice support the conclusion that good deeds unrelated to an offense ought to have little effect on punishment for the offense.²⁸

Where a good deed is related to the offense, the standard liability and punishment rules will take it into account; no special accommodation is required. In some cases, for example, the good deed may cause us to alter our interpretation of the case facts, concluding, for example, that perhaps the defendant didn't intend the harm that occurred, and thus ought to be liable for only a lesser offense. Or the good deed may actually change the harmfulness of the offense conduct. For example, Motti Ashkenazi steals a backpack at the beach, his standard way of getting money for his drug habit. On this occasion, however, it turns out that the backpack is a terrorist bomb intended to kill and maim the beachgoers, and his thievery saves many lives. He notifies police, who disarm the bomb.²⁹

While good deeds by offenders require no special rules, the cases do have an important lesson to teach that is highly relevant to criminal justice and our proposals to reward offenders who engage in positive post-offense conduct: it is simplistic and misleading to think in terms of "good people" and "bad people," or in terms of "criminals" versus the rest of us. Human nature is more complex than that. Everyone's life is filled with a series of moral decisions, and different people's patterns of decision-making are different. Both "criminals" and "noncriminals" alike have probably made bad choices that would be judged criminal if the criminal justice system

27. A good deed in furtherance of one of the statuses described below—as an expression of reform or atonement, for example—obviously would need to be taken into account under our proposal.

28. Robinson et al., *Extralegal Punishment Factors*, *supra* note 22, at 820.

29. *Beach Terror Attack Averted After Thief Finds Bomb in Bag*, JEWISH TELEGRAPHIC AGENCY (Jun. 23, 1997), <https://www.jta.org/1997/06/23/default/beach-terror-attack-averted-after-thief-finds-bomb-in-bag>. In the bomb thief case, the fact that lives are saved makes the conduct objectively justified, so the offender ought to be liable only for attempt liability—as would any unknowingly justified actor. Paul H. Robinson, *The Bomb Thief and the Theory of Justification Defenses*, 8(3) CRIM. L.F. 387 (1998). In another similar case, a repeat offender stole a van in a crowded Brooklyn neighborhood, only to realize that the van contained a bomb. Knowing that the bomb could go off at anytime, the thief continued to drive the vehicle until he arrived at an uninhabited waterfront area and then called the police. Robert Evans, *7 Ruthless Criminals Who Turned Good When Nobody Was Looking*, CRACKED (Sep. 4, 2011), http://www.cracked.com/article_19393_7-ruthless-criminals-who-turned-good-when-nobody-was-looking.html.

were all-knowing and ever-present. What the good-deed cases help reveal is that there is the possibility for doing good in all people (and the possibility for doing bad). Criminal law must be in the business of punishing bad choices, not writing off bad people. This is relevant to our present discussion because we will propose that there is societal value in giving recognition and reward even to “criminals”; as we punish their bad conduct, so too should we reward their good conduct.

III. OFFENDERS BEHAVING BADLY

While some offenders may do good deeds, other offenders take the opportunity after the offense to add to the societal harm of their offense by deceiving and injuring others when dealing with authorities, witnesses, victims, and others in an effort to avoid the conviction that they know they deserve: falsely accusing innocent persons of committing the offense, lying to investigators and the court, unfairly humiliating or falsely accusing victims or witnesses in order to undermine their credibility, or a variety of other bad behaviors calculated to avoid their deserved liability.

Seventeen-year-old Lindsey Armstrong is in court testifying about being raped in a public park. To undermine her testimony, the defense produces the girl's underwear. Her mother recounts: “They said she had to hold up her thong to prove that her underwear wasn't ripped, to make out she was a liar.” The underwear had “Little Devil” written on it, and the victim is instructed to read the words aloud in court. The victim becomes so upset that she is uncertain she can continue to testify. Two weeks after the trial ends, Armstrong kills herself. Her parents say she felt the trial had “humiliated and degraded” her and that she had been “raped all over again.”³⁰

30. Auslan Cramb, *Mother of Teenager Who Took Her Own Life after Rape Trial 'Appalled' by Girl's Thong Being Used Against Her in Irish Case*, THE TELEGRAPH (Nov. 19, 2018), <https://www.telegraph.co.uk/news/2018/11/19/mother-teenager-took-life-rape-trial-appalled-girls-thong-used/>. In a similar case, Darryl Rosen was a Sacramento police officer who used his privileged position to sexually assault women he encountered. At trial the defense aggressively cross-examined the victims in pursuit of his technical defense that he didn't touch them but instead compelled them to touch him. As one of his many victims told the court: “I never wanted to testify at trial and have to relive the acts of the assault, questions about my character and be made to feel that I had somehow done something wrong or that it was my fault.” *Case of Darryl Rosen*, THE AWARENESS CENTER / JEWISH

Daniel Maoz is convicted of two murder charges based on what the judge describes as “a set of facts that wouldn’t disgrace a horror film at the cinema.” A gambling addict, Maoz murdered his parents by stabbing each of them dozens of times in order to use their inheritance to pay off gambling debts. During his trial, in an attempt to explain the DNA evidence implicating him, Maoz falsely accuses his identical twin brother, whom it is determined was not at the crime scene.³¹ In a similar blaming-others case, James Wagner kills a teen, then blames it on three younger boys whom he says united in lying against him.³²

Jefferson Sumpter finds a woman stranded by a winter storm and offers her a ride to safety. When she accepts, Sumpter rapes and beats her. At his rape trial, he testifies falsely, claiming it was not rape, and blaming the victim: “she should have known better than going with a stranger. And we all know that women and the media make up rape allegations. . . . She isn’t dead and she should appreciate that.”³³ Ultimately, physical evidence and his own statements conclusively prove the rape.

Sometimes the bad behavior is motivated less by a desire to escape deserved punishment and more by greed or a desire to simply inflict more pain and suffering. Karen Cotton is seen on security camera footage stealing the backpack of a store clerk. The police quickly apprehend her and return the backpack, but Cotton has already removed the employee’s engagement ring from the bag. Even after her conviction and despite repeated pleas, she refuses to return the ring to the clerk.³⁴

Fred Hammer owes his nephew \$1,605 in back wages. When the young man threatens to sue, Hammer kills him. Before he can be convicted for the offense, he is convicted and imprisoned for three other shootings. The

COALITION AGAINST SEXUAL ABUSE/ASSAULT (Oct. 22, 2004), <http://theawarenesscenter.blogspot.com/2004/10/case-of-darryl-rosen.html>.

31. Stuart Winer, *Man who Murdered Parents Given Two Life Terms*, TIMES OF ISRAEL (Jul. 1 2013), <https://www.timesofisrael.com/man-who-murdered-parents-given-two-life-terms/>.

32. *Hail Mary, Defendant Called Victim, Liar*, AP, PRESS OF ATLANTIC CITY (Oct. 5, 1993).

33. Daniel Tepfer, *Rapist Blames Victim, Women and Media for his Crime*, CT POST (Sep. 21, 2018), <https://www.ctpost.com/local/article/Rapist-blames-victim-women-and-media-for-his-13247642.php>.

34. Vince Cestone, *Cops: Women Who Stole Engagement Ring from Jack in the Box Won’t Give It Back*, KRON4 (Oct. 26, 2018), <https://www.kron4.com/news/cops-women-who-stole-engagement-ring-from-jack-in-the-box-wont-give-it-back/>.

nephew's body is never found, and Hammer refuses to divulge its location. While in prison, however, he agrees to reveal the location for \$15,000, which the family pays.³⁵

Milton Brown is in court for a series of sexual assaults for which he is ultimately convicted. He elects to act as his own attorney, thus limiting the judge's ability to interfere when he leads two of his victims through questioning that forces them to relive their ordeals for no apparent legal benefit to the defense but instead apparently for his own pleasure and amusement.³⁶

Clearly, all defendants have the right to vigorously defend themselves, but the innocent defendant and the guilty defendant—and the defendant knows which he is—stand in importantly different situations. The innocent defendant may well have to do things in speaking the truth that will injure others. That is the price that we necessarily must pay for a criminal justice system dedicated to avoiding injustice. But the guilty offender knows when he is fabricating and lying, and knows when he is falsely implicating or humiliating others in order to mislead authorities or the court. Being investigated for a crime does not create a right in the guilty offender to affirmatively deceive authorities or needlessly injure innocent others.

Unfortunately, there is sometimes confusion on this important point. For example, it has been argued that although self-protective perjury may be wrong, “the choice seems to be one for which excuse is classically appropriate.”³⁷ But this view reflects a misunderstanding of excuse law and theory, the coercion or duress excuse in particular. Not every temptation or feeling of internal pressure provides the basis for excuse. We don't give a duress defense to the convenience store robber because he was feeling the pressure of needing his next drug fix. One may gain a duress excuse

35. Monte Mitchell, *Hammer Pleads Guilty in Nephew's Death*, WINSTON-SALEM JOURNAL (NC) (Dec. 8, 2010), <https://infoweb-newsbank-com.proxy.library.upenn.edu/apps/news/document-view?p=AWNB&docref=news/13402E2BAD1C2438>.

36. Brian Flynn, *Free: Vile Rapist Who Grilled His Victims in Court—Early Release Shocker Exclusive*, THE SUN (London, England) (Jan. 17, 2012), <https://infoweb-newsbank-com.proxy.library.upenn.edu/apps/news/document-view?p=AWNB&docref=news/13C56CAEAAAEE1238>.

37. William J. Stuntz, *Self-Incrimination and Excuse*, 88 COLUM. L. REV. 1227, 1254 (1988). See also Lisa Kern Griffin, *Criminal Lying, Prosecutorial Power, and Social Meaning*, 97 CAL. L. REV. 1515, 1551–53 (2009).

only if the offender is coerced by a threat that “a person of reasonable firmness in his situation would have been unable to resist.”³⁸ Responsible offenders prove every day that it is possible to resist the temptation to lie to investigators and the court.

Further, this peculiar excuse argument fails to take account of the fact that it is the offender himself or herself who created the threat of punishment by committing the offense. We might provide a defense for the use of force against an attacker, but not if the defendant brought about the attack by breaking into the person’s home. Indeed, the duress excuse is by statute commonly “unavailable if the actor recklessly placed himself in a situation in which it was probable that he would be subjected to duress.”³⁹ A person who commits an offense is aware of a risk that he may be prosecuted.

This peculiar claim of an excuse defense for a guilty offender lying to avoid conviction apparently rests in part on the view that such lying is a “victimless crime.”⁴⁰ But the victim here is society generally rather than a particular individual. It is hard to see how society being the victim supports such a defense. Under this misguided view, is the offender who files a false tax return to hide his offenses—a victimless crime—also to have a defense? Also, a defense for the offender who bribes government officials to avoid conviction—another victimless crime? Lying to avoid deserved liability is neither justified nor excused, but only a continuation of the offender’s wrongdoing.

Another writer argues: “[T]here is something potentially unfair about making it a crime for one suspected of criminal activity to shield himself from government scrutiny. Indeed, it is ironic that the more serious the crime being covered up, and the more severe the penal consequences, the stronger is the defendant’s claim of self-preservation and, arguably, the less wrongful is his act of covering up.”⁴¹ It is one thing to remain silent and to refuse to do anything that might help the government convict you, but it is quite another to affirmatively commit additional offenses in order to escape deserved punishment. The more serious the original offense, the greater the

38. Model Penal Code § 2.09(1).

39. Model Penal Code § 2.09(2).

40. Stuntz, *supra* note 37, at 1254.

41. Stuart P. Green, *Uncovering the Cover-Up Crimes*, 42 AM. CRIM. L. REV. 9, 33 (2005).

societal interest in sanctioning it, and the greater the societal injury in the use of criminal means to affirmatively hide it.

IV. THE RESPONSIBLE OFFENDER—AVOIDING FURTHER DECEIT AND DAMAGE TO OTHERS

The temptation is clear for a guilty offender to deceive and to injure others in an attempt to save himself. The offender who avoids this kind of misbehavior ought to be acknowledged and rewarded for that responsible choice. Yet, it is not uncommon for the current system to simply ignore such positive post-offense conduct by such a *responsible offender*.

Indeed, the system's indifference to an offender acting responsibly after the offense can sometimes be seen even in cases where the offender goes beyond avoiding the bad behavior described above to hide his wrongdoing and takes affirmative steps to reveal his or her crime. Having become remorseful about what she has done, Deborah Sena goes to police and reports the sexual abuse of eight children by a man, another woman, and herself. She does not want the children to have to testify in court, so she pleads guilty. She ends up getting the same sentence and the same conditions as the other woman who did not go to police and who was a more active and longer-standing participant.⁴² We do not propose that the responsible offender get less punishment than he or she deserves for the offense,⁴³ but there are many other ways in which responsible offenders can be rewarded for their positive post-offense conduct, as discussed in Part VIII.

As a matter of timing, it will be common that we would know whether an offender has earned membership in the responsible offender group by the time he or she reaches sentencing, but this ought not be an absolute limit. An offender could gain membership several years later, for example,

42. David Ferrara, *Woman Accused in Videotaped Sex Attacks Agrees to Plead Guilty*, LAS VEGAS REVIEW-JOURNAL (Jan. 28, 2015), <https://www.reviewjournal.com/local/local-las-vegas/woman-accused-in-videotaped-sex-attacks-agrees-to-plead-guilty/>.

43. As we have discussed elsewhere, one can argue that in some cases genuine remorse does reduce an offender's blameworthiness and therefore the amount of his deserved punishment. Paul H. Robinson & Muhammad Sarahne, *The Opposite of Punishment: Imagining a Path to Public Redemption: Imagining a Path to Public Redemption*, 73 RUTGERS U. L. REV. 1 (2020) [hereinafter Robinson & Sarahne, *The Opposite of Punishment*].

after deciding to do the right thing and reveal the location of bodies to murder victim's families.

Before considering how one might recognize and reward responsible offenders, consider three other kinds of offenders whose positive post-offense behavior should also be acknowledged and rewarded.

V. THE DEBT-PAID OFFENDER—SUFFERING THE FULL PUNISHMENT DESERVED

Some offenders successfully avoid receiving the punishment they deserve. Perhaps they have access to elite defense counsel who can cut a particularly good deal with prosecutors.⁴⁴ Alternatively, tens of thousands of prisoners have been released because of prison overcrowding or to reduce the state's increasing costs of corrections or for some other reason unrelated to the

44. The case of Robert Braxton is an example of how having the right attorney can help avoid the deserved punishment. Braxton abused his ex-girlfriend and her young children, which included choking, punching, and throwing objects, in addition to verbal assault. Even the sentencing judge noted that during her testimony, the ex-girlfriend, Tondalo Hall, seemed to fear her ex-boyfriend. Yet, in a deal with prosecutors, he pleaded guilty only to injuring their three-month-old daughter and received two years in prison—a ten-year sentence of which eight years were suspended. That the facts of the case were well-established seems to be supported by the fact that the ex-girlfriend, herself a victim of Braxton's violence, was prosecuted for failing to protect the children from Braxton's abuse, although there was no evidence indicating that she had harmed her children in a way. Represented by a different attorney, she pled guilty without a negotiated prosecutor promise of leniency, resulting in a thirty-year sentence. As of July 2019, fifteen years after the sentence, she was still in prison. Her attempts to modify her sentence through appeal, post-conviction relief, or clemency were so far in vain. Megan Lambert, *A Father Abuses His Children but Somehow Their Mother Goes to Prison for 30 Years*, ACLU (Jan. 31, 2018), <https://www.aclu.org/blog/smart-justice/sentencing-reform/father-abuses-his-children-somehow-their-mother-goes-prison-30>; *Group Fights to Free Abused Mother Who Failed to Report Child Abuse*, OKLAHOMA'S NEWS 4 (Mar. 30, 2015), <https://kfor.com/2015/03/30/group-spotlights-unequal-sentence-in-oklahoma-child-abuse-case/>; Alex Campbell, *This Battered Woman Wants to Get Out of Prison*, BUZZFEED NEWS (Nov. 11, 2014), <https://www.buzzfeednews.com/article/alexcampbell/this-battered-woman-wants-to-get-out-of-prison>; *The Heartbreaking Case of Tondalao Hall*, ACLU OKLAHOMA (Nov. 25, 2015), <https://www.acluok.org/en/news/heartbreaking-case-tondalo-hall>; Archibald Browne and Tres Savage, *After 15 Years Tondalo Hall Clears Commutation Hurdle*, NONDOC (Jul. 16, 2019) <https://nondoc.com/2019/07/16/tondalo-hall-clears-commutation-hurdle/>.

punishment deserved by the released offender.⁴⁵ There could be any number of reasons an offender receives less punishment than deserved, and the reasons for this may have nothing to do with the offender's good or bad behavior. Many other offenders, however, receive the full punishment they deserve (or even much more than they deserve).

Whatever the reason an offender may have escaped the punishment he or she deserves, those offenders who have not escaped, the *debt-paid offenders*, ought to receive recognition for that and preferential treatment over debt-unpaid offenders. All other things being equal, they ought to have a prior claim to opportunities and resources in acknowledgment of their debt-paid status. For example, if there are limited resources to support education, training, therapy, reintegration, and the like, as there commonly are, then it would seem right that the debt-paid offender ought to have a greater claim to that support than the debt-unpaid offender. Unfortunately, the system routinely ignores the importance of this distinction.

It is not uncommon, for example, for prisoners (more likely to be debt-paid) to have more limited educational opportunities than probationers (less likely to be debt-paid). For example, one federal survey of state facilities found that only 27 percent of state and private prisons and 3 percent of jails had college courses available to prisoners. Only 56 percent of state prisons, 44 percent of private prisons, and 7 percent of jails had vocational training programs available.⁴⁶ In contrast, in addition to education grants available from educational institutions themselves and from state governments, the federal government's Pell Grant program provides educational grants to almost any state probationer, but not to state prisoners.⁴⁷

45. See, e.g., Don Thompson, *Supreme Court Dismisses State's Prison Overcrowding Appeal*, KQED NEWS (Oct. 15, 2013), <https://www.kqed.org/news/115011/supreme-court-dismisses-states-prison-overcrowding-appeal> (California was ordered in 2013 to reduce prison population by 9,600); John Moritz, *19,500 Inmates Get Early Release—1987 Law Blamed for Record-Breaking Total*, FORT WORTH STAR-TELEGRAM (Oct. 7, 1998), <https://infoweb-newsbank-com.proxy.library.upenn.edu/apps/news/document-view?p=AWNB&doref=news/oEB042DCA97D4D4C>.

46. Caroline Wolf Harlow, *Education and Correctional Populations*, Special Report—Bureau of Justice Statistics, US Department of Justice (Jan. 2003/rev. Apr. 15, 2003), Table 3, <https://www.bjs.gov/content/pub/pdf/ecp.pdf>.

47. See *Can a Felon Qualify for a Pell Grant?*, JOBS FOR FELONS HUB, <https://www.jobsforfelonshub.com/can-felon-qualify-pell-grant/#ixzz5ty2GKXjA>. Offenders are expressly excluded from receiving Pell grants while incarcerated; *id.*

Yet, as noted, it is more likely that offenders sent to prison have gotten at least the punishment they deserve (if not more) than the similarly situated offenders put on probation. We would argue that the debt-paid offender has a greater claim to help with educational opportunities than the debt-unpaid offender, but at very least, whatever level of educational opportunities is made available to probationers, such as through federal Pell Grants, ought to also be made available to prisoners.

Ideally, sentencing judges, correctional officials, probation and parole supervisors, and other decision makers in the criminal justice process ought to regularly give special credit to debt-paid offenders. Part VIII explores how this might be done. By giving this special credit, the offender who did not pay the debt due for reasons unrelated to him (like prison overcrowding) is not being punished; rather, the debt-paid offender is given a reward that his or her status has earned. The debt-unpaid offender has already gotten a reward that he does not deserve: escaping the punishment that he rightfully should have borne.

A critical caveat applies here: The calculation of whether an offender has received the full punishment he or she deserves cannot depend on whether he or she has fully served the sentence imposed. Unfortunately, current criminal liability and punishment rules and practices commonly violate the principle of just punishment, which requires proportionality between the amount of punishment imposed and the offender's overall blameworthiness, taking into account all mitigations and excuses. It is common for current American criminal justice to deviate from the principle of blameworthiness proportionality in order to promote one crime-control strategy or another,⁴⁸ or sometimes simply out of ignorance or miscalculation.

Typical crime-control-inspired doctrines that regularly overpunish include such things as mandatory minimum sentences, three-strike statutes, the felony-murder rule, use of strict liability, narrowing or abolishing the insanity defense, holding minor accomplices to the same liability as the perpetrator, and a host of others. The practical effect of this for our purposes is that a large number of offenders who have not completed their sentence (or have been released early because of prison overcrowding or some other reason apparently unrelated to their blameworthiness) *can nonetheless rightfully claim to be debt-paid offenders.*

48. PAUL H. ROBINSON & MICHAEL T. CAHILL, LAW WITHOUT JUSTICE: WHY CRIMINAL LAW DOESN'T GIVE PEOPLE WHAT THEY DESERVE 117–36 (2005).

Even offenders who receive probation may claim debt-paid status if their offense is not serious. Any intrusion on liberty—whether house arrest, ankle-bracelet monitoring, curfew, community service, required drug counseling, or any other non-incarcerative sanction—must be given some punishment credit in proportion to its punitive bite. Thus, if the total punishment deserved is modest, it can be fully satisfied through minor sanctions.

The logical corollary to this, of course, is that some legal doctrines, like the exclusionary rule or various non-exculpatory defenses, can have the effect of reducing liability and punishment even though the offender does not deserve such mitigation. For example, the exclusionary rule might bar the introduction of compelling and reliable evidence of intent to kill required for murder, leaving the offender liable for only manslaughter or negligent homicide. For example, Edward Coolidge was convicted of first-degree murder for killing fourteen-year-old Pamela Mason, and sentenced to life in prison. The United States Supreme Court overturned his conviction based on the exclusionary rule because the search warrant, through which key evidence had been obtained, was invalid. As a result, the prosecutors in New Hampshire negotiated a plea bargain with him, under which he agreed to plead guilty for second-degree murder, thus serving twenty years rather than life.⁴⁹

In such cases, the principle described above suggests that the offender in such a case cannot qualify as deserving debt-paid status by serving a sentence appropriate for manslaughter. If we are to look beyond the legal rules to the offender's actual blameworthiness, then we must do so not only when his deserved punishment is less than his sentence—a fairly common situation—but also when his deserved punishment is more than his sentence—a somewhat unusual situation.

One might properly observe that people can disagree about the amount of punishment deserved in any particular case, rendering membership in the group of debt-paid offenders subject to disagreement. But there are some basic principles that properly guide the judgment of deserved punishment.

49. *Scary Stories, The Murder of Pamela Mason*, QUOTEV, <https://www.quotev.com/story/10164249/Scary-Stories/31>; Jeff Woodburn, *The Crucial Coolidge Case*, NHMAGAZINE.COM (Jun. 19, 2014), <https://www.nhmagazine.com/the-crucial-coolidge-case/>.

Most importantly, the punishment deserved is that proportionate to the overall blameworthiness of the offender, taking into account all relevant factors including the seriousness of the offense and the culpability and capacities of the offender.⁵⁰ The empirical evidence suggests that there is a good deal of agreement on the rank ordering of the seriousness of offenses,⁵¹ but it is true that there is disagreement about the general severity of punishment within the criminal justice system. But once the system commits itself to a general severity level—even if it might change that level in the future—one can use that present severity level together with the rank-ordering principle of blameworthiness proportionality to judge the deserved punishment in any given case.

As a practical matter, these guiding principles suggest at minimum that an offender can reasonably claim debt-paid status if his or her punishment has been at least as much as similarly situated offenders in the jurisdiction. Beyond that, the offender can claim that the criminal law rule upon which his or her punishment has been based is one that violates the blameworthiness proportionality principle—such as mandatory minimum sentences, three-strike statutes, or any of the other crime-control doctrines deviating from desert discussed above. In Part VIII, we propose a grand-jury-like panel of citizens to make this judgment where the criminal justice decision maker has refused a request by an offender to be recognized as a member of the debt-paid group. And we are happy to defer to that panel's judgment on this issue.

Note that the existence of this formal category provides a useful opportunity to contrast current criminal law and sentencing rules and practices with true blameworthiness proportionality. It is a mechanism by which the current system's conflict with true desert can be regularly illustrated and advertised. Perhaps the long-term effect of recognizing this formal category would be to cause legislators, judges, prosecutors, and others to focus on true blameworthiness, because under the system proposed here—under

50. American Law Institute, *Model Penal Code: Sentencing, Proposed Final Draft*, § 1.02 (Apr. 10, 2017), approved at American Law Institute's 2017 Annual Meeting, on May 24, 2017; Paul H. Robinson, *Mitigations: The Forgotten Side of the Proportionality Principle*, 57 HARV. J. ON LEGIS. 219 (2020); PAUL H. ROBINSON, DISTRIBUTIVE PRINCIPLES OF CRIMINAL LAW, WHO SHOULD BE PUNISHED AND HOW MUCH 138–40 (2008).

51. Paul H. Robinson & Robert Kurzban, *Concordance and Conflict in Intuitions of Justice*, 91(6) MINN. L. REV. 1829, 1854–65 (2007); PAUL H. ROBINSON, INTUITIONS OF JUSTICE AND THE UTILITY OF DESERT 23–28 (2013).

which an offender can gain recognition as a debt-paid offender before his sentence is complete—officials may come to appreciate that each instance of deviation from desert that they generate may come back to haunt them later during the debt-paid inquiry where their over-punishment will be exposed and advertised.

As a matter of timing, an offender's membership in the debt-paid group can be determined upon completion of the prison term, when the remaining sanctions, such as parole restrictions, are known. In practice, however, given the large number of instances of overpunishment—due to the crime-control doctrines routinely generating disproportionate punishment—it is likely to be quite common that an offender can become a member of the debt-paid group while still in prison.

VI. THE REFORMED OFFENDER—LEAVING CRIMINALITY BEHIND

An even more compelling case for special recognition and reward is the offender who has not only paid his or her debt but has gone further to do what is necessary to avoid future criminality. An offender may be debt-paid for his past offense yet just as inclined to commit another offense if the opportunity arises. In contrast, some offenders have taken steps that eliminate or dramatically reduce the likelihood of future criminality. That critical step, by the *reformed offender*, ought to be strongly supported, praised, and rewarded beyond whatever is done for the debt-paid offender.

Unfortunately, the system does not always make this critical distinction between the reformed and unreformed offender, and fails to give reformed offenders the credit they deserve. Michael Hawkins, a graduate of trade school and a skilled maintenance worker, applied for a facilities maintenance job at a community college. The school knew his work and wanted to hire him but due to prior convictions for “selling nickel bags of weed and breaking into abandoned buildings 30 years ago,” Ohio state law prevented the school from giving him the job.⁵² Statutes that control collateral

52. Olivera Perkins, *Collateral Sanctions reform law will make it easier for job seekers with felony records to get hired*, PLAIN DEALER REPORTER (Oct. 13, 2012), https://www.cleveland.com/business/2012/10/collateral_sanctions_reform_la.html.

consequences, like this Ohio law, ought to recognize the important distinctions between reformed and unreformed offenders.

In another case, popular mayor of Racine, Wisconsin, Jim Smith was running for re-election when a forty-year-old conviction for a \$48 dollar theft came to light, barring him under state law from seeking re-election.⁵³ The popular mayor had clearly reformed himself, and again, state statutes governing collateral consequences, such as eligibility for public office, ought to recognize the importance of the distinction between reformed and unreformed offenders.

To qualify as a reformed offender, it is not enough for the person to simply claim they will not commit another offense. The person must take affirmative steps to assure that he or she will avoid criminality in the future. This might include training, education, treatment, change of location, job, or acquaintances, or anything else that will avoid the situation that brought about the original criminal offense. If the most effective reform mechanisms are not available to him, he must nonetheless take whatever affirmative steps he can to avoid future criminality. That is, he must do something more than just grudgingly go along with whatever the system requires of him.

As to the matter of timing, an offender might qualify as a member of this group at any time after commission of the offense. However, as a practical matter, it seems likely that such a change of character is unlikely to be sufficiently clear so as to persuade a decision maker of true reform until some time later. The truth is that reform can take time.

To summarize, the fact that an offender has reformed him- or herself deserves acknowledgment and reward. All other things being equal, a reformed offender deserves priority over the non-reformed offender in access to resources and opportunities.

VII. THE REDEEMED OFFENDER—LIVING REMORSE AND ATONEMENT

The final category of offender who deserves recognition and reward is a special case: an offender who is not only debt-paid and reformed but

53. *Racine Mayor's Past Burglary Might Prevent Re-Election Bid*, WISCONSIN STATE JOURNAL (Oct. 17 1997), <https://www.newspapers.com/newspage/401506737/>.

also has gone further to demonstrate his or her sincere remorse and worked to atone for the offense. As we have argued elsewhere,⁵⁴ the *redeemed offender* has acted in so admirable a way as to deserve a special form of recognition and reward.

We have recommended elsewhere that the transformation in the redeemed offender be publicly acknowledged and celebrated in a ceremony as public as a trial and conviction, that the record of the conviction be updated to show the public redemption, and that, absent special circumstances, all collateral consequences of conviction be dropped.⁵⁵

Unfortunately, as with the three previous categories of offenders, it is common for such extraordinarily positive post-offense conduct to be ignored. For example, compare these two cases from the same jurisdiction. In the first, Starlesha Lewis drives into a child, killing it, and leaves the scene. She has been arrested on several other occasions for dangerous driving. She brags on social media about how many accidents she has been in. Before she is finally caught and convicted for killing the child, she is charged three additional times for driving dangerously. She receives a sentence of 18 months.

In the second case, arising in the same jurisdiction, Matthew Cordle kills a man while driving drunk. He checks himself into a rehabilitation facility, stops all consumption of alcohol, and then makes a video in which he admits his guilt and turns himself into authorities. After sentencing, Cordle tells the court, "It should have been me instead of an innocent man. I vow that I'll do everything I can to prevent it from happening again and his memory from fading." The wife of the deceased is persuaded that Cordle is genuinely remorseful. Victims of other drunk drivers write to the judge to explain how meaningful to them is Cordle's apology and taking responsibility. After his sentencing, Cordle says, "I'm going to do everything I can to walk out of prison a better man than I walked in." In prison he begins a social media campaign called *saveyourvictim* to encourage others to take responsibility for preventing anyone from drunk driving. He is sentenced to 6½ years, with no chance of early release and a lifetime suspension of his driver's license.⁵⁶ Cordle certainly deserves punishment for his offense, but

54. Robinson & Sarahne, *The Opposite of Punishment*, *supra* note 43.

55. *Id.* at 11–13.

56. Kisa Mlela Santiago, *Man who Confessed to Drunken Driving in Viral Video gets 6½ Years*, HIN.TV.COM (Oct. 24, 2013), <https://www.cnn.com/2013/10/23/justice/ohio-dui->

it seems inappropriate that this genuinely remorseful offender seeking to atone should be punished so much more than Starlesha Lewis, who shows no remorse.

In another case, Michelle Jones is a teen mother caring for a disabled son by herself when her poor parenting leads to his death. She goes to prison, devotes herself to becoming a better person, and takes advantage of all of the educational opportunities available within the correctional system, beginning with getting a high school diploma through getting an undergraduate college degree. In an attempt to atone for her past crime, she devotes herself to helping other inmates in their education and in their reform. She earns a reputation at the prison and beyond as someone who is truly remorseful and seeks to devote her life to atone for her offense. Upon release, she is accepted into a Harvard PhD program, but before classes begin Harvard withdraws its offer because of their assessment of her culpability for her original offense.⁵⁷ It would be useful to have statutes that prohibit or at least discourage this kind of discrimination if an offender has truly met the demanding requirements we set out to be judged a redeemed offender.

As a matter of timing, an offender might satisfy the strict requirements for public redemption at any time after conviction but, like reform, as a practical matter true atonement is likely to take some time.

VIII. TAKING ACCOUNT OF AN OFFENDER'S POSITIVE POST-OFFENSE BEHAVIOR

The previous four sections have argued that some offenders because of their positive post-offense conduct ought to be acknowledged and rewarded in some way. One could leave this as a simple principle of direction to criminal justice decision makers—sentencing judges, correctional officials, probation and parole supervisors, and others, including perhaps clemency and pardon boards—to take such positive post-offense conduct into

confession-sentencing/index.html; *Matthew Cordle Sentenced to 6.5 years in Prison*, <https://becauseisaidiwould.com/mattsentence/>.

57. Janna Malamud Smith, *Harvard's Cowardly Rejection of Michelle Jones*, WBUR (Sep. 21, 2017), <https://www.wbur.org/cognoscenti/2017/09/21/harvard-michelle-jones-janna-malamud-smith>. Jones disputed their assessment that led to the revocation of their offer, but Harvard was unmoved.

account. Or, one could try to imagine some more ambitious system that tried to distinguish among the different groups of positive post-offense conduct to provide greater rewards or at least higher priority for benefit or opportunity to the offenders with more impressive positive post-offense records.

Even if one were to try to create such a more ambitious system, as a practical matter the best way to do this may be to start by providing discretionary application of a general principle of preferring positive post-offense offenders over others; then, after gaining some experience in such application, trying to articulate more specific and nuanced application rules.

Even without this experience, however, it might be a useful thought experiment to try to brainstorm a bit about what such a more nuanced system might look like, with the understanding that we simply lack the current experience required to put such a system into operation.

One could imagine a system in which criminal justice decision makers recognize the four positive post-offense statuses discussed above—the responsible offender, the debt-paid offender, the reformed offender, and the redeemed offender—and grant some reward or preferential treatment to such offenders, whether on the decision maker's own initiative or upon request of the offender, his representative, or a third party. If the immediate decision maker refuses to recognize a status that the offender believes he or she is entitled to, we could have a standing authority available to review the case and render a decision.

Given the nature of the matters at issue, which commonly call for value judgments of the community, such a standing authority would best be a jury of some sort,⁵⁸ such as the standing grand jury currently used to return indictments and to help in larger investigations. Indeed, for economy's sake, one might initially want to use the existing grand jury system for this purpose. A standing grand jury could hear a large number of cases in a single day, especially if most were submitted on written application with written responses from interested parties. The post-offense grand jury could in any given case choose to hear further evidence from live witnesses. Because the determination does not carry the weight of criminal conviction

58. Paul H. Robinson & Barbara A. Spellman, *Sentencing Decisions: Matching the Decisionmaker to the Decision Nature*, 105 COLUM. L. REV. 1124, 1138–48 (2005).

and punishment, there would be little need for the unanimous verdict used in criminal trials. A majority or some kind of supermajority ought to be enough.⁵⁹

The post-offense grand jury would not be responsible to determine the nature and specifics of the reward, which would remain within the decision maker's authority, but would have the authority only to reverse a decision maker's decision to refuse to recognize the offender's membership in one of the four positive post-offense groups.⁶⁰ Given the new and unique nature of the inquiry, however, it would make the most sense to experiment with a variety of procedures before committing to any one.⁶¹

Whatever the procedures one ends up using to determine positive post-offense status, the larger question is: What should be the beneficial consequences that follow from membership in any one or more of the positive post-offense groups?

The basic operating principle is simple enough: offenders who satisfy the requirements for any positive post-offense group ought to be given priority, all other things being equal, over offenders who have not earned membership in any of the groups. The "all other things being equal" caveat may be a bit too strict. We would want members of positive post-offense groups to have priority over nonmembers in as many cases as possible, but it must be acknowledged that there will be some instances in which we will want to allocate a resource or an opportunity to a nonmember, even over a member, if, for example, the treatment program will be dramatically more effective for the nonmember than for the member. With the exception of such cases (of a special societal benefit flowing from award to a nonmember), the

59. We have elsewhere recommended a specific adjudication procedure for the redeemed offender. Robinson & Sarahne, *The Opposite of Punishment*, *supra* note 43, at 17–19. But because of the unique character of these cases and their relative infrequency as compared to the other three positive post-offense categories, the redeemed-offender procedures would be feasible or appropriate only for that group.

60. One also may want the grand jury to be able to reverse a decision to recognize membership in a group and to grant a reward. For example, a third party may want to challenge a decision to recognize and reward an offender by allowing license to possess firearms, gain the right to adopt or have custody of a child, etc., where a challenging party is able to show the grand jury that the offender does not in fact qualify for membership in the group that would justify such a reward.

61. One can imagine that at sometime in the future, after accumulating a good deal of experience in judging and accounting for positive post-offense conduct, one might want to experiment with broadening the authority of the post-offense grand jury.

system ought to give preference to members over nonmembers in as many situations as possible.

The opportunities or benefits that may be subject of this preference for members is a long and varied list. It might include educational programs, training programs, treatment programs, and other such opportunities, most of which operate within the constraints of limited resources that require choices among eligible offenders. Membership in one of the positive post-offense groups also might be used to give an offender some benefit in determining the method of punishment, such as the level of restrictiveness of incarceration, the use of non-incarcerative sanctions, taking account of an offender's preferences in the selection of sanctioning methods (while not reducing the total punishment amount), or taking account of an offender's preference for sanctioning location, to give just a few examples. Membership also might be used to reduce or mitigate the extent of the collateral consequences of conviction that would otherwise apply after the sentence is complete. Such collateral consequences may include a wide variety of aspects of an offender's life, including restrictions on voting, business and occupational licensing, immigration and travel, housing and residency possibilities, registration and reporting requirements, family and domestic rights, motor vehicle licensing, employment and volunteering opportunities, educational grants and student aid, military service, jury service, eligibility for public welfare benefits and food stamps, and more.⁶²

Unfortunately, most laws imposing collateral consequences on offenders tend to ignore an offender's positive post-offense conduct.⁶³ For example, federal law prohibits any person convicted of a crime punishable by imprisonment for more than a year from possessing a firearm.⁶⁴ Federal law also denies assistance under state programs funded by the Social Security Act or

62. Michael Pinard, *An Integrated Perspective on the Collateral Consequences of Criminal Convictions and Reentry Issues Faced by Formerly Incarcerated Individuals*, 86 B.U. L. REV. 623, 635–36 (2006); Michael Pinard & Anthony C. Thompson, *Offender Reentry and the Collateral Consequences of Criminal Convictions: An Introduction*, 30 N.Y.U. REV. L. & SOC. CHANGE 585, 586–87 (2006); Michael Pinard, *Reflections and Perspectives on Reentry and Collateral Consequences*, 100 J. CRIM. L. & CRIMINOLOGY 1213, 1214 (2010).

63. For a comprehensive compilation of the collateral consequences imposed in all American jurisdictions, see the National Inventory of Collateral Consequences of Conviction, <https://niccc.csgjusticecenter.org/>.

64. 18 U.S.C. § 922(g).

benefits under the supplemental nutrition assistance program to anyone convicted of certain controlled-substance-related felonies.⁶⁵ State laws relating to collateral consequences also commonly ignore an offender's positive post-offense conduct. For instance, Arkansas law denies eligibility to SNAP benefits (food stamps) to any person found guilty of a felony related to certain controlled-substance offenses.⁶⁶ California law bans adoptions by a person convicted of certain offenses or by a person living with such an offender.⁶⁷ In Alabama, a person who has been convicted of a felony may not apply to be a private investigator.⁶⁸ In Florida, the law excludes students who have been convicted or adjudicated delinquent for any felony, first-degree misdemeanor, or some drug offenses, from eligibility for a tuition assistance program that aims to assist underprivileged youth in their pursuit of post-secondary education.⁶⁹ Under New York law, a person who has been convicted of a felony cannot serve as a juror.⁷⁰ Such statutes that impose collateral consequences upon conviction ought to more frequently take into account an offender's positive post-offense conduct.

Even though some collateral consequences of conviction are discretionary, their governing statutes rarely provide guidance for the exercise of that discretion, guidance that we think ought to recognize the importance of the positive post-offense conduct categories described above. For example, Alabama Fair Housing Law, which protects against discrimination in housing, provides that it “shall not prohibit conduct against a person because the person has been convicted . . . of the illegal manufacture or distribution of a controlled substance. . . .”⁷¹ In Indiana, the State may use the results of criminal history check of a child's parent, guardian, custodian, or a household member thereof, to determine whether to approve a family reunification or deny it.⁷² In applying these statutes, we think it is highly relevant

65. 21 U.S.C. § 862a.

66. Isabella Moller, *Convicted Criminals Without Food Stamps, Continue in Crime Circle*, KARK.COM (Feb. 14, 2017), <https://www.kark.com/news/convicted-criminals-without-food-stamps-continue-in-crime-cycle/>.

67. Cal. Fam. Code § 8712.

68. Code of Ala. § 34-25B-12.

69. Fla. Stat. § 1009.984.

70. NY CLS Jud § 510.

71. Alabama Code, Title 24, Housing § 24-8-7(f).

72. Ind. Code Ann. § 31-34-21-5.5(d).

for the decision maker to take into account whether the offender is responsible, debt-paid, reformed, or redeemed.

One final important issue concerns the priority given among the offenders who are members of more than one of the positive post-offense groups. First, should offenders who are members of more than one group have priority over offenders who are members of a fewer number of groups? Second, should there be a hierarchy of preference for membership in some groups over other groups?

As to the first question, an offender might be responsible and debt-paid but not reformed. Or, an offender might be just the opposite, not responsible and not debt-paid but nonetheless reformed. The point is that all three of these forms of post-offense behavior exist independent of one another. (The redeemed offender is a special case, because it essentially requires, in addition to remorse and atonement, that the offender also be debt-paid and reformed.⁷³)

While membership in any one of the four groups ought to be acknowledged and rewarded, the rationale underlying the preference suggests that offenders who are members of more than one group ought to get priority over those who are members of only one. The offender who is responsible and reformed ought to have preference over the offender who is responsible but not reformed.

As to the second question, we would argue that there ought to be a recognized priority of some groups over others: the redeemed offender ought to be preferred over the others, the reformed offender ought to be preferred over the debt-paid offender and responsible offender, and, arguably, the debt-paid offender ought to be preferred over the responsible offender. The argument for this may best rest upon the claim that each

73. As a practical matter, it is probably also the case that in most cases the redeemed offender will also be a member of the responsible offender group. A redeemed offender is usually one who acquiesces in receiving the punishment he deserves, and refrains from maneuvering for a reduction in punishment that may call into question the genuineness of his remorse. This obviously requires him not to engage in the type of post-offense misbehavior described in *supra* text accompanying notes 30–41 (Part II). This expectation for the redeemed offender is subject to few caveats, however. For example, an offender may behave badly during the time leading up to his conviction, and thus be excluded from the responsible offender group, but later feel genuine remorse and seek to atone, thereby getting the status of the redeemed offender. Robinson & Sarahne, *The Opposite of Punishment*, *supra* note 43, at 5.

one of the statuses represents some greater exercise of will or achievement than the one before it. To be a responsible offender, one need simply refrain from further deceit or victimizing others. To be a debt-paid offender, one must affirmatively suffer the full deserved punishment. Being a reformed offender requires a true exercise of will that is itself admirable. And being a redeemed offender requires all of the above and more: a genuine sense of remorse and desire to atone.

The discussions above describe how positive post-offense conduct might be acknowledged and rewarded through application of a general preference principle that applies the same to all potential benefits and opportunities. But it is possible to supplement this general principle with additional specific guidance relating to specific benefits and opportunities. That might be useful because the nature of the positive post-offense conduct may itself logically suggest some particular benefit or reward. In other words, although membership in one of the positive post-offense groups ought to yield a general preference for the member over the nonmember, for multiple memberships over single memberships, and for certain groups over other groups, a separate set of arguments may suggest that certain specific benefits ought to logically follow from certain positive post-offense statuses.

For example, it would seem hard to dispute that a redeemed offender, or even a reformed offender, ought to regain the right to vote. If the justification for the original disenfranchisement is that it would be unwise to have societal rules and leaders determined by lawbreakers who have willfully violated societal norms,⁷⁴ the argument no longer applies to reformed and redeemed offenders because they have now shown their acceptance and respect for those societal norms. The same sort of arguments can be made

74. See, e.g., *Green v. Bd. of Elections of City of New York*, 380 F.2d 445, 451 (2d Cir. 1967) (“The early exclusion of felons from the franchise by many states could well have rested on Locke’s concept, so influential at the time, that by entering into society every man ‘authorizes the society, or which is all one, the legislature thereof, to make laws for him as the public good of the society shall require, to the execution whereof his own assistance (as to his own decrees) is due.’ A man who breaks the laws he has authorized his agent to make for his own governance could fairly have been thought to have abandoned the right to participate in further administering the compact. On a less theoretical plane, it can scarcely be deemed unreasonable for a state to decide that perpetrators of serious crimes shall not take part in electing the legislators who make the laws, the executives who enforce these, the prosecutors who must try them for further violations, or the judges who are to consider their cases.”).

about the need for post-sentence surveillance or reporting. What the reformed and the redeemed offender have done logically suggests that such conditions will commonly be unnecessary and inappropriate.

In contrast, these arguments do not apply to the debt-paid offender. Just because an offender has paid his debt does not mean that he or she now has a respect for societal norms or is no longer in need of surveillance or supervision.⁷⁵ Other potential benefits or rewards might similarly have a logical connection with one kind of positive post-offense group or another.⁷⁶

The same kind of logical connection might give preference to the responsible or the debt-paid offender over the reformed or redeemed offender. For example, some treatment and rehabilitation programs might be particularly useful for the first two groups, for whom they are designed, but wasted on the last two groups, who are beyond needing them.

SUMMARY AND CONCLUSION

Although an offender's conduct before and during the crime is the traditional focus of criminal law and sentencing rules, an examination of post-offense conduct can also be important in promoting criminal justice goals. After the crime, different offenders make different choices and have different experiences, and those differences can suggest appropriately different treatment by judges, correctional officials, probation and parole supervisors, and other official decision makers.

Positive post-offense conduct ought to be acknowledged and rewarded. The essay has described one kind of positive post-offense conduct—an offender's good deed unrelated to his or her offense—where acknowledgment and reward may be appropriate but are not appropriately provided

75. On the other hand, the failure to be a responsible offender or a debt-paid offender ought not disqualify an offender from regaining his vote if he is indeed a reformed or a redeemed offender. It is his status as a member of these last two groups that seems most relevant to the disenfranchisement issue, not his failure to become a member of the first two groups.

76. For example, restricting certain offenders' access to public housing may be justified on protecting public safety grounds, and reducing security risks associated with some criminal behaviors, like drug abuse. See Milena Tripkovic, *Collateral Consequences of Conviction: Limits and Justifications*, 18(3) CRIMINOLOGY, CRIM. JUST. L & SOC'Y 18, 20 (2017). These rationales, however, do not apply to the reformed or the redeemed offender.

through the criminal justice system. Such a good-deed offender ought to stand in the same position as a non-offender who does the same.

But the essay also describes four kinds of positive post-offense conduct that merit special recognition and preferential treatment within the criminal justice system: the responsible offender, who avoids further deceit and damage to others during the process leading to conviction; the debt-paid offender, who suffers the full punishment deserved (according to true principles of justice, not the sentence actually imposed); the reformed offender, who takes affirmative steps to leave criminality behind; and the redeemed offender, who out of genuine remorse tries to atone for the offense.

Although it would take some experience dealing with these issues before one could realistically propose a system to give special accommodation for positive post-offense conduct, one could, as a thought experiment, imagine some basic features of such a system: general direction to decision makers in the criminal justice process to give preference for positive post-offense conduct of any of the four types, with a preference among members of those types for offenders in multiple groups and a preference for offenders in the later of the four groups over the earlier. Decisions refusing membership in a group could be appealed to a grand-jury-like body of citizens. And the matters for which preference could be given could include a wide range of issues, including, for example, the selection and shaping of sanctioning methods, giving preferential access to education, training, treatment, and other programs, and eliminating or restricting collateral consequences of conviction that continue after the sentence is completed.

Such an acknowledgment and reward system for positive post-offense conduct not only can serve to encourage such conduct but also can be justified by principles of fairness and justice. Similarly situated offenders commonly behave differently after their offense. Those who behave better deserve to be treated better.