Third-Party Interests in Criminal Law

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The U.S. Department of Justice will sometimes decline to prosecute health care fraud if the conviction would diminish health care resources for patients and communities. Environmental crimes may go unprosecuted if third parties would be comparably harmed by the sanction. More generally, prosecutors might not charge corporations if conviction would leave the firm’s employees without jobs. When convictions do occur, judges may reduce sentences (sometimes at the request of prosecutors, sometimes not) to avoid hardship on third parties such as employees of a small business or family members of an individual defendant.

Should the state reduce an offender’s sentence, or forgo prosecution altogether, if criminal punishment would harm third parties? Traditional criminal law theories say “no”; none of the dominant theories make a place for the collateral consequences visited upon others when an offender is punished. We define offenses, and the necessity for prosecution, by the culpability and harm caused by criminal conduct, and set the overarching goals of criminal law—primarily deterrence, retribution, or some mixture of the two—as guides for when and how to punish. Those concerns guide criminal law administration. Despite that commitment, the practice of criminal law sometimes explicitly accommodates concerns for collateral consequences to third parties, citing such harm as reason to decline prosecution or not to impose severe punishments such as incarceration.

This Article explores the implications of this overlooked practice. As a practical matter, concern for collateral harms from criminal sanctions poses difficult problems of defining which third-party interests are significant enough to justify not punishing culpable offenders who have caused harm. Such concern also leads to treating like cases differently. The study of third-party effects yields a description of how criminal justice process actually works—and how it departs from theoretical models. We accommodate third-party interests by moderating prosecution and punishment, but we do so haphazardly and unevenly across the spectrum of criminal practice. From this view, I offer a qualified normative defense of the practice and sketch the means by which we might better execute this concern for collateral consequences of punishment.

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Conceptually, the overt mitigation of collateral consequences calls into question both the descriptive accuracy and the prescriptive utility of both dominant theories of criminal law—retributivism and deterrence-oriented utilitarianism. It does so, I argue, because accommodations to third-party interests are not unjustified lapses in judgment by prosecutors and judges; they are not violations of a model practitioners should be adhering to. Our practical (as opposed to theoretical) concern for third-party interests signals the necessity of criminal law paying attention to its broader social consequences. Third-party interests provide an additional, compelling basis for restricting the use of criminal law to fewer than all cases in which the state has the means to prosecute. (In the same way, a requirement of moral culpability constrains utilitarianism, and a strong commitment to deterrent effects constrains retributivism.) Mitigating third-party interests, in fact, is necessary to maintain the legitimacy of criminal law, even as conflicting commitments to distributive fairness, retributive justice, and crime prevention necessitate some punishment. A pure retributivist or deterrent model of criminal justice that ignores those costs would, in practice, undermine criminal law’s legitimacy. Ironically, however, so would fully abandoning either of those commitments. This dynamic has grown in the last thirty years because of our dramatic increase in criminal punishment, which increases third-party injuries as well. That conflict and the problems of sorting and weighing relevant third-party interests are the principal sources of difficulty for both theorizing and practicing criminal law in light of those interests.

Part I describes the current scope of third-party interests in criminal law, and Part II describes traditional criminal law theories of retributivism and deterrence in light of these interests. The argument of this Article links concern for third-party interests to our current, ambivalent commitment to culpability as an organizing premise of criminal law. Even without the problem of third-party interests, culpability is now neither necessary nor sufficient for criminal punishment. Attention to third-party interests highlights that criminal practice is a regime not organized by overriding retributive or crime prevention commitments but characterized by pragmatic balancing of competing interests. In that mix, culpability, while a primary concern of criminal law, is neither the motivating goal of criminal law nor an absolute constraint on an instrumentalist regime. Culpability remains important; it provides a moral foundation, rhetorical force, and popular motivation for criminal law. It restricts widespread use of alternative sanctions, it supports the large role criminal law plays in social policy, and its absence can be (but is not always) a rationale for declining to charge. It

remains compelling enough that it prevents a purely instrumental approach focused on crime prevention from rising to dominance. But culpability is balanced against (among other things) civil and private alternatives to criminal law (i.e., other means for achieving crime prevention), and the social interests—third-party interests—affected by criminal law.

Across the landscape of criminal law, these factors get different weight in different contexts. As Part III explores, that raises troubling implications for fairness, as well as for effective policy. If third-party interests are a recognition of social costs that may outweigh the social benefits of punishment, we want to get that calculus right as often as possible. What is true about criminal investigation, especially police investigation strategies, is true about criminal charging and sentencing as well: it is inevitably a pragmatic, evolving practice that strives to accommodate multiple interests. The risks are the same in both sectors: we can get ad hoc, disparate treatment of offenders and concomitant loss of legitimacy. Part IV suggests means to improve this process, and Part V argues why we should explicitly consider third-party effects, instead of suppressing concern for them. The last section develops a final implication of this analysis: collateral consequences of criminal punishment, and the pragmatic, policy-making nature of criminal practice, provide a basis for a commitment to parsimony in criminal law. The social costs of punishment and risks to systemic legitimacy counsel for a more sparing use of criminal sanctions and a larger role for alternatives to criminal law.

I. Concern for Third-Party Interests in Charging and Sentencing

Third parties are people other than the offender, the direct crime victim, or the general public who are much more directly affected by crime and punishment than the general public. We sometimes expand the definition of harm arising from crime to include injury beyond the immediate victim—not only, say, the direct victim of the assault, but those made more afraid to walk neighborhood streets as a result of such assaults. These third-party interests (or indirect victims) are sometimes invoked to justify criminal enforcement,
but they are not my focus here. Less obvious, and largely absent from criminal law literature, are the sorts of third parties who may be affected adversely by the punishment of offenders—people adversely affected by criminal justice administration although they are not defendants or victims. These third-party interests—the collateral consequences of punishment—are my present concern.

A. Third-Party Effects in Charging Decisions

Although they have no place in criminal law theory and play only a sporadic role in criminal justice policy debates, third-party interests have emerged in the last decade as explicit components of some federal prosecutorial charging policies and sentencing criteria. The Department of Justice maintains sets of prosecution policy statements—specific to substantive areas such as health care fraud, intellectual property crime, and corporate crime generally—that identify appropriate grounds for charging, declination, or sentencing leniency. The Department’s most general guidelines for criminal prosecution, found in the U.S. Attorneys’ Manual, list only traditional criteria such as deterrent effects, offender culpability, and the seriousness of the offense, along with practical concerns such as availability of admissible proof, cooperating witnesses, and prosecution by other jurisdictions. That document, in other words, reads as it should according to traditional criminal law theory. Guidelines vary and become more specific, however, across the varied substantive terrain of federal enforcement. In

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8. See UNITED STATES ATTORNEYS’ MANUAL § 9-27.000 (1997).
some of these more specific practice contexts, we see explicit concern for third-party interests.

A prominent example is the Justice Department’s “Guidance on Prosecution of Corporations,” which is relevant across a range of substantive areas in which firms are offenders—health care, intellectual property, environmental crime, and a range of financial crimes. The Guidance identifies the “factors to be considered” in deciding whether to criminally prosecute businesses. Along with traditional concerns, the policy tells officials to assess whether prosecution will have “[c]ollateral consequences, including disproportionate harm to shareholders and employees not proven personally culpable.” The guidelines note that prosecutors may assess whether the “likely punishment is appropriate given the nature and seriousness of the crime” in light of “the possible substantial consequences to a corporation’s officers, directors, employees, and shareholders.” Further, because “[v]irtually every conviction of a corporation, like virtually every conviction of an individual, will have an impact on innocent third parties,” prosecutors must “evaluat[e] the severity of collateral consequences” against other, traditional criteria “in determining the weight to be given to this factor.” The Guidance gives little assistance beyond that, except to note that “the balance may tip in favor of prosecuting” when the wrongdoing is widespread or relevant third parties (or shareholders) substantially benefited from it. Implicitly, third-party interests can tip the balance against the prosecution in cases of less widespread wrongdoing, or when third parties receive little or no advantage. The Justice Department policy accords with established concerns among local prosecutors about charging firms and thereby “disrupt[ing] business operations” and “forc[ing] some businesses to close or move to another location, costing people jobs and reducing the local tax base.” Survey data finds state prosecutors, especially in less urban jurisdictions, are sensitive to the effect of corporate prosecutions on the local economy.

10. Id. pt. IX.
11. Id.
13. Michael L. Benson et al., District Attorneys and Corporate Crime: Surveying the Prosecutorial Gatekeepers, 26 CRIMINOLOGY 505, 512 (1988) (reporting that 40% of smaller communities consider the state of the local economy in their decisions to prosecute); cf Michael L. Benson et al., Community Context and the Prosecution of Corporate Crime, in WHITE-COLLAR CRIME RECONSIDERED 269, 279–82 (Kip Schlegel & David Weisburd eds., 1992) (interpreting survey data from local prosecutors to conclude that economically strong communities have more rigorous prosecution of white-collar crime).
More specific charging criteria vary widely among Justice Department divisions with different substantive mandates. Factors that weigh heavily in environmental crimes, for example, such as pre-indictment disclosure of wrongdoing by an offender, may count for little in antitrust charging decisions. Enforcement offices that frequently encounter corporations in criminal investigations, such as the Intellectual Property Section, often refer to corporate charging guidelines in their own, more specific charging policies. Some of these policy statements are not publicly available, but among those that are, the guidelines for health care fraud prosecutions specifically emphasize third-party interests. Health care fraud constitutes serious wrongdoing; it is estimated to cost hundreds of millions of dollars annually, and it may give rise to health risks for patients. Accordingly, the Justice Department explicitly weighs the sorts of criteria we find in traditional criminal law theory, namely, deterrence goals and culpability (the offender's knowledge of wrongdoing and the degree of harm caused). But in addition, the government also considers the impact that prosecution may have on those linked to the offender, such as communities served by a health care provider that committed fraud. This is a prime example of the sort of third-party interests that criminal law theory typically overlooks. This is an acknowledgement not that the crime affects others beyond the direct fraud victims, but that the punishment does—that is, that criminal law itself imposes social costs beyond the obvious monetary costs of administration and burdens on the offender.

This explicit federal charging policy accords with anecdotal evidence from state prosecutors in similar settings. For example, prosecutors handling Medicaid/Medicare fraud cases in Virginia have no written guidelines for charging, but they admit weighing third-party interests in both charging and

14. Holder Memo, supra note 9, pt. III.

15. See DOJ, COMPUTER CRIME AND INTELLECTUAL PROPERTY SECTION, CHARGING AND OTHER STRATEGY CONSIDERATIONS FOR INFRINGEMENT CASES, available at http://www.usdoj.gov:80/criminal/cybercrime/ipmanual/06ipma.htm. More obliquely, the Antitrust Division, in its policy statements on leniency for individuals and firms, lists "fairness to others" as one of several criteria to be considered in declination decisions. That suggests a different but related sort of third-party interest—the unfairness to other offenders if one is granted leniency. See DOJ, ANTITRUST DIVISION, CORPORATE LENIENCY POLICY, available at http://www.usdoj.gov/atr/public/guidelines/lencorp.htm.


and theft of public funds.\textsuperscript{31} Departures for economic injuries arise mostly in white-collar contexts like tax evasion,\textsuperscript{32} antitrust,\textsuperscript{33} and financial fraud.\textsuperscript{34} Interestingly, circuits are more split on allowing departures based on business or employee interests than on family circumstances,\textsuperscript{35} even though employee interests are more established concerns at the charging stage.

In an effort to clarify that such departures arise from policy concerns extrinsic to criminal law's retributivist and deterrence goals, judges sometimes explicitly stated that the sentencing reduction did not imply a lesser degree of offender culpability but instead was a necessary accommodation in light of the excessive injury that an ordinary sentence would impose on others. In \textit{United States v. Johnson},\textsuperscript{36} the defendant, sole caretaker for four young children, participated in a conspiracy to fraudulently inflate paychecks from a public hospital to herself and to others (from whom she received kickbacks).\textsuperscript{37} The appellate court affirmed the trial judge's departure from the Guidelines' range to a sentence that included no incarceration, explaining, "The rationale for a downward departure here is not that Johnson's family circumstances decrease her culpability, but that we are reluctant to wreak extraordinary destruction on dependents who rely solely on the defendant for their upbringing."\textsuperscript{38}

Even before the Guidelines, collateral consequences for communities, employees, and families played a role in white-collar sentencing decisions. However, without the federal Guidelines mandating explanation, the basis for sentencing decisions was much less well documented. In one large study that interviewed judges about their white-collar sentencing decisions (shortly before the federal Guidelines took effect), many judges described explicitly

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\textsuperscript{30} United States \textit{v.} Haverstat, 22 F.3d 790 (8th Cir. 1994).
\textsuperscript{31} United States \textit{v.} Johnson, 964 F.2d 124 (2d Cir. 1992).
\textsuperscript{32} United States \textit{v.} Olbres, 99 F.3d 28 (1st Cir. 1996).
\textsuperscript{33} United States \textit{v.} Milikowsky, 65 F.3d 4 (2d Cir. 1995).
\textsuperscript{34} United States \textit{v.} Sonerstein, 20 F. Supp. 454 (E.D. N.Y. 1998).
\textsuperscript{35} An excellent student note examining federal sentencing departures based on family and business concerns found that, as of 1997, every federal circuit except the Seventh permitted departures for family interests. Racz, \textit{supra} note 7, at 1472–73. In fact, the Seventh Circuit has approved of family-based departures. United States \textit{v.} Canoy, 38 F.3d 893 (7th Cir. 1994). In contrast, only the First and Second Circuits permitted departures based on business/employee interests, while three had rejected departures on that basis. \textit{Id.} at 1473. In developments since the note was published, other circuits have implied that economic effects could justify a departure, although no case has yet presented facts in which the effects were sufficiently extraordinary. See United States \textit{v.} Morken, 133 F.3d 628 (8th Cir. 1998); United States \textit{v.} Schreiber, 2000 U.S. App. LEXIS 2094 (6th Cir. Feb. 10, 2000); United States \textit{v.} Lawrence, 1997 U.S. App. LEXIS 23849 (4th Cir. Nov. 26, 1997); United States \textit{v.} Shorapon, 13 F.3d 781 (3d Cir. 1994); United States \textit{v.} Morgan, 1996 U.S. Dist. LEXIS 16065 (N.D. Ill. Oct. 29, 1996) (permitting departure).
\textsuperscript{36} 964 F.2d 124 (2d Cir. 1992).
\textsuperscript{37} Johnson's score under the Sentencing Guidelines was increased based on multiple counts, the large amount of funds stolen, her role as an organizer of the scheme, and obstruction of justice. \textit{Id.} at 126.
\textsuperscript{38} \textit{Id.} at 129.
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weighing the effect of a sentence on third parties who would be adversely
affected by the offender’s punishment, such as family members, employees
of the offender’s firm, clients of the offender’s business, and communities in
which the offending firm is located.\textsuperscript{39} To note a couple of examples, one
judge said: “Whether there are people who are dependent on him or her [i.e.,
the defendant], . . . whether there is going to be an injury to others if I
incarcerate him: that has a profound effect on me and when I sense that, I am
more inclined to be lenient.”\textsuperscript{40}

In a major tax evasion prosecution, another judge explained reasons for
a “light sentence in this case—a work release, staying in their own business
and working with a charitable foundation” by saying the following: “If you
take these two income tax evaders, if you take them and say, ‘Okay, you are
going to spend three years [in prison], . . . forty people, forty of their
employees are [going to be] out of work.’”\textsuperscript{41}

Another judge imposed a probation sentence instead of prison time for
an offender convicted of operating fraudulent businesses so that, as a
condition of probation, the offender could be required to assist his former
employees in finding new employment.\textsuperscript{42} Several judges described a
reluctance to deprive communities of an offender whose services were
deemed important, such as physicians and investment bankers.\textsuperscript{43} Collateral
consequences, then, have been recurring—but often unnoted—concerns in
sentencing as well as charging decisions; the scope of their effects is
uncertain but almost certainly extends beyond those instances documented in
judicial opinions.

\section*{C. State Court Practice}

The common thread of examples so far is that—save for some of the
sentencing decisions—they involve white-collar crime and federal practice.\textsuperscript{44}
One is hard-pressed to find comparable examples in the prosecution policies
that guide enforcement of traditional street-crime laws. State prosecutors
tend to have few written charging policies;\textsuperscript{45} similarly, state court sentencing

\begin{itemize}
\item \textsuperscript{39} \textit{STANTON WHEELER ET AL., SITTING IN JUDGMENT: THE SENTENCING OF WHITE-COLLAR
\item \textsuperscript{40} \textit{Id.} at 154.
\item \textsuperscript{41} \textit{Id.}
\item \textsuperscript{42} \textit{Id.} at 154–55.
\item \textsuperscript{43} \textit{Id.} at 155–56.
\item \textsuperscript{44} As we have increased criminal sanctions substantially for white-collar wrongdoing over the
last twenty years, we see concern for third-party interests emerge explicitly in this context.
\item \textsuperscript{45} In my survey of Virginia’s larger jurisdictions, no local prosecutor had written guidelines
for charging decisions, and all described charging and sentencing factors as discretionary with the
individual prosecutor. \textit{See} Telephone Interview with Christine Brubin, Assistant Commonwealth
Attorney, Norfolk, Va. (Aug. 9, 2001); Telephone Interview with Betty Job, Assistant
Commonwealth Attorney, Roanoke City, Va. (Aug. 10, 2001); Telephone Interview with Andy
Parker, Assistant Commonwealth Attorney, Arlington, Va. (Aug. 9, 2001); Telephone Interview

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sentencing decisions on Medicaid fraud defendants. A nursing home that would otherwise be shut down by a conviction may be allowed a settlement or plea agreement that allows it to continue operation if the home’s patients could not easily be placed in other care facilities. Transportation companies that shuttle patients between homes and hospitals may face lesser charges if a community has no competitor operations ready to provide services. The interests of a firm’s creditors sometimes provide defendants with successful leniency arguments in sentencing.

Notice that third-party interests act solely as a constraint on punishment, like culpability; negligible impact of punishment on third parties will free the way for prosecution, but it adds nothing to otherwise weak rationales for charging. (Culpability, on the other hand, does contribute to these rationales.) Note also that third-party interests create the prospect of different treatment for offenders with comparable culpability and harm caused by their crimes. It is possible to have two offenders who are equally culpable and who caused comparable harm, but only one will face prosecution (or will face more lenient prosecution or sentencing) because his punishment would detrimentally affect others.

In most other substantive law areas, Justice Department guidelines do not explicitly include third-party interests as factors to weigh in charging decisions. In the environmental crimes context, for instance, the Department’s primary policy statement lists only factors related to traditional notions of culpability—voluntary disclosure of offenses, pervasiveness of violations, and cooperation with enforcement officials. Nonetheless, several years after this policy statement, Richard Lazarus—a leading scholar of environmental crimes enforcement and former DOJ staff attorney—described DOJ choices between civil and criminal remedies as political, “largely... random,” and influenced by “any positive and negative third-party effects of an enforcement action, including the extent to which a criminal sanction might adversely affect innocent persons.” Third-party interests, in other words, are sometimes practical considerations in charging decisions even when formal guidelines make no mention of them. The scope of the role that those factors play remains speculative and undocumented—

19. Id.
20. Id.
21. Id.
prosecutors' decisions are essentially private and unreviewable—but likely extends beyond areas in which it is a written charging consideration.

More generally, John Coffee briefly noted these concerns two decades ago in an article on corporate punishment. Comparing punishment of firms and executives, he noted that the "externalities" of punishing firms can "have adverse consequences ... [for] corporate solvency, an increased risk of bankruptcy, possible layoffs and closings of marginal plants, and injury to stockholders and creditors." Thus, criminal sanctions can "sometimes be more harmful than the crime itself, particularly where they are borne by a narrow class"; the burden may fall on "less privileged classes (such as employees, consumers, and others dependent on the corporation) who bear the indirect burden of corporate penalties."

B. Third-Party Interests in Sentencing

Further, third-party interests are a documented consideration in sentencing decisions. Typical of our formal underacknowledgement of the role that third-party interests play, the U.S. Sentencing Guidelines make no explicit provision for their consideration. But judges can consider such interests under the catch-all section that allows for departures based on grounds that the Sentencing Commission did not adequately consider. On this authority, a substantial collection of appellate decisions affirms downward departures for offenders when incarceration would have two sorts of third-party effects: serious injury to offenders' dependent family members and adverse consequences to offenders' businesses, particularly employee job loss. Sentencing reductions for family reasons have been granted across a range of substantive offenses, including drug distribution, public benefits fraud, price fixing in violation of the Sherman Act, conspiracy, bribery,


26. Coffee, supra note 25, at 408; see also Reichman, supra note 25, at 87. ("[W]hen organizations are the violators, administrative and civil remedies may be preferred because those penalties are more likely to repair the damage without unnecessarily harming third parties, for example, clients of securities who may be affected by criminal action [against] a firm.").


is typically less constrained by anything equivalent to the Federal Sentencing Guidelines. Precatory standards drafted by professional associations mention several criteria on which prosecutors may base charging or declination decisions, but none mention third-party interests as explicitly as the federal guidelines do. Sample prosecution policies drafted by local prosecutors’ offices, or enacted in state statutes, similarly reveal no explicit statement of third-party interests as a proper basis for declination.

It may be that, even when no charging guidelines mention them, third-party interests play a regular, informal role in some substantive practice contexts and some state court jurisdictions. On the other hand, they may in fact have little effect on decisions that are governed by criteria that include them. My sense is that the former rather than the latter is true. There is no obvious reason why state court practice would not have a similar level of practice customs uncodified in policy manuals. In the federal context, the Justice Department’s health care fraud and corporate offender policies probably codified pre-existing practice. Informed practitioners and scholars like Lazarus and Coffee suggest the practice is more widespread than written guidelines indicate. While we can get only a general impression about the extent of third-party interests in the criminal process, we know federal prosecutors weigh those consequences, judges adjust sentences based on them, and the practice is probably more widespread than documentary evidence suggests.

There is anecdotal evidence of state-level practices not documented in policy statements. In my informal survey of large-jurisdiction prosecutors in Virginia, whose dockets consist almost exclusively of individuals charged with street crimes, most insisted that they never consider third-party interests in charging. Most added that they only occasionally, in a highly...


47. See, e.g., NATIONAL DISTRICT ATTORNEYS ASSOCIATION, NATIONAL PROSECUTION STANDARDS 192 (2d ed. 1991) (suggesting factors to consider in plea bargaining that focus on defendant and victim considerations and evidence limitations, but also include “undue hardship of the witness caused by testifying”—a form of third-party interest); 1 AMERICAN BAR ASSOCIATION STANDARDS FOR CRIMINAL JUSTICE § 3-3.9 (2d ed. 1980) (suggesting factors to consider in declination decisions that focus on defendant and victim considerations and evidence limitations).

48. See, e.g., WASH. REV. CODE § 9.94A.440(1) (1998) (listing, in commentary to the statute, reasons for declining to prosecute such as: prosecution would be “contrary to legislative intent,” de minimis violation, disproportionate cost, and other pending charges).

49. See Coffee, supra note 25, at 406 (reporting that the Justice Department sought the maximum fine in less than a third of its corporate felonies cases, partly out of a concern for third-party effects); Lazarus, supra note 23, at 2457–58 (citing third-party effects as a significant consideration for prosecutions in the highly political and extremely discretionary decisions to prosecute an environmental crime).
discretionary fashion, adjust sentencing in light of such concerns. Two of six said they occasionally or rarely allow collateral consequences to affect charging; only one stated she considered such factors somewhat regularly. That prosecutor was also the only one to accept the relevance of employment or other interests beyond effects on offenders' families. More broadly, in the context of domestic violence and spousal abuse, the trend has been away from third-party interest consideration. In the last two decades, many state prosecutors and police departments have adopted mandatory arrest and no-drop prosecution policies, requiring prosecution even if the victim opposes it. One can assume that ancillary injuries to third parties rarely hinder a prosecution in such a jurisdiction.

One street-crime context in which third-party interests can explicitly enter the punishment calculus is the penalty phase of death penalty litigation. Capital sentencing is unique in that the Constitution requires the sentencing jury to have discretion to grant a life sentence regardless of the circumstances and aggravating factors surrounding the murder. Juries and judges must be allowed to consider any evidence in mitigation. Under this rubric, defendants commonly submit evidence that a death sentence would adversely affect third parties, especially the defendant's family. Testimony by a defendant's spouse, parents, siblings and children commonly goes not only to the defendant's character but also to the suffering those family members would endure as a result of the defendant's execution. That sort of ancillary harm of punishment is a paradigmatic third-party interest. However, its presence surely arises from the case law's goal of protecting the

50. See Telephone Interviews, supra note 45. Of the Assistant Commonwealth Attorneys (ACAs), Betty Job was the only one to regularly consider third-party interests in charging. ACA's Bruhen and Parker consider those interests rarely or occasionally in charging. Id.; see also Amy Bach, Justice on the Cheap, THE NATION, May 21, 2001, at 25-27 (describing a Georgia assistant prosecutor's statement that if he had been informed that a theft offender had a disabled child and was a single parent, "[t]hat would have made a difference" in his recommending a nonincarceration punishment).

51. See, e.g., FLA. STAT. § 741.2901 (declaring that state attorneys "shall adopt a prosecution policy for acts of domestic violence .... [The decision to prosecute shall be made by] specialized prosecutors over the objection of the victim, if necessary"); PROSECUTION GUIDELINES FOR DULUTH, MINN., reprinted in MARC L. MILLER & RONALD F. WRIGHT, CRIMINAL PROCEDURES: CASES, STATUTES, AND EXECUTIVE MATERIALS 990 (1998) ("The prosecutor will seek to obtain convictions as an optimum result.").

52. See Buchanan v. Angelone, 522 U.S. 269, 276 (1998) ("In the selection phase, our cases have established that the sentencer may not be precluded from considering, and may not refuse to consider, any constitutionally relevant mitigating evidence.").

53. Id.

constitutional rights of the defendant by allowing all forms of mitigating
evidence, rather than from a specific concern for third-party injuries as such.

At the same time, perhaps because third-party effects have been ignored
in most street-crime prosecutions, third-party interests have begun to enter
the debate about street crime as well as white-collar-crime policy. Familiar
contributions to criminal law debate are Randall Kennedy and Kate Stith's
arguments that residents of high-crime neighborhoods, especially African
Americans, are beneficiaries of tough law enforcement policies against drug
dealing and violent crime. Kennedy and Stith describe the deterrent and
incapacitation effects of punishment as a public good that redounds to the
particular benefit of citizens in high-crime neighborhoods where offenses
occurred, who suffer disproportionately from crime’s secondary harms.55

In contrast, an emerging literature emphasizes the costs as well as
benefits to communities of punishing offenders, especially with
imprisonment. A range of empirical scholarship emphasizes the critical role
of social capital or infrastructure in sustaining the vital community practices
of supervising children, informally deterring crime, sustaining functional
families, and maintaining adequate rates of employment.56 As one analysis
observes: “[I]mprisonment of parents . . . can severely diminish the economic
and social capital on which families and communities depend to raise
children successfully.”57 High rates of imprisonment in a community can
contribute to social disorganization and hinder the crime prevention goal of
criminal law. Part of the damage from punishment is to offenders
themselves: their prison records and reduced work experience make them
less employable and discourage investment in

55. See Kennedy, Comment, supra note 6, at 1255–56; Kennedy, Capital Punishment, supra
note 6, at 1425, 2433–34; Stith, supra note 6, at 153. This is not to suggest Kennedy and Stith
advocate harsh punishments regardless of an offender's just desserts. They do not give much
discussion to retributivist rationales, but the implication seems to be that a range of punishment,
including the harsh versions they justify with community-protection arguments, fits the offenses
in question; their arguments help justify sanctions at the upper end of that range.

56. See generally William Julius Wilson, When Work Disappears 20–21 (1996) (“In
neighborhoods with high levels of social organization, adults are empowered to act to improve the
quality of neighborhood life—for example, by breaking up congregations of youths on street
corners. . . . Neighborhoods plagued by high levels of joblessness are more likely to experience low
levels of social organization [that] trigger other neighborhood problems [such as] crime, gang
violence [and] family breakups.”); John Hagan & Ronit Dinovitzer, Collateral Consequences of
Imprisonment for Children, Communities, and Prisoners, in 26 Crime and Justice: Prisons 121
(Michael Tonry & John Petersilia eds., 1999) (discussing existing research).

57. Hagan & Dinovitzer, supra note 56, at 137 (citing studies).

58. Marc Mauer, Race to Incarcerate 182–87 (1999); Jeffrey Fagan & Tracey L. Meares,
Punishment, Deterrence and Social Control: The Paradox of Punishment in Minority Communities
papers.cfm?abstract_id=223148).
appealing marriage prospects. These consequences for offenders have serious effects on others in their communities. In neighborhoods with high crime rates and large numbers of men with prison records, incarceration diminishes marriage rates, household incomes, two-parent families, and adult supervision of children. It makes communities less economically viable, partly because fewer residents are deemed employable. Immediate families of offenders may suffer loss of a crucial income provider. (More than half of state prisoners are employed at the time of their arrest.) That economic strain, along with the stigma of an imprisoned parent, often precipitates psychological and behavioral problems for children including educational failure, aggression, and withdrawal. Those effects are not limited to a small group. A majority of federal and state prisoners have minor children; about 1.5 million minor children have a parent in prison. Further, when criminal sanctions become so harsh, and bring such serious secondary effects, they lose legitimacy in communities hit hardest by both crime and punishment and generate "cultures of opposition and defiance of the goals of punishment," driving up criminal behavior and offsetting punishment's deterrence value. Generally, incarceration worsens the social organization of poor communities both while the offender is in prison and even after he is released. This diminution in social organization and infrastructure explains why harsh punishment can have marginal or counterproductive effects on crime rates.

D. Rationales for Mitigating Third-Party Effects

These studies of collateral consequences of punishment on families and communities of offenders represent one reason to integrate third-party

59. MAUER, supra note 58, at 184; Fagan & Meares, supra note 58, at 38.
60. MAUER, supra note 58, at 183–84; Hagan & Dinovitzer, supra note 56, at 138–39; Fagan & Meares, supra note 58, at 32–33.
62. Hagan & Dinovitzer, supra note 56, at 134, 138 ("Inmates can no longer take care of their children either physically or financially, placing extra economic and emotional burdens on the remaining family members."); Roberts, supra note 61, at 1016; Fagan & Meares, supra note 58, at 34–35 (noting that, prior to incarceration, many offenders contribute financially to their families through illegal and quasi-legal means).
63. Hagan & Dinovitzer, supra note 56, at 134 (stating that "many offenders drift back and forth over time between legal and illegal work") (citing Bureau of Justice Statistics Study).
64. Id. at 124–27, 138–40, 146–48.
65. BJS SPECIAL REPORT, supra note 61, at 1 tbl. 1 (reporting figures for 1999).
68. Fagan & Meares, supra note 58, at 2–4 (describing the "punishment paradox" as crime rates that do not clearly respond to decades of policies that increase punishment for crime).
interests in rationales for criminal law. They expand the considerations of a utilitarian theory beyond the general and specific deterrent effects on offenders and potential offenders, to highlight that effects on third parties undermine criminal law's crime prevention goal by undermining social structures that are crucial to that goal.\(^6\)\(^9\) Note, however, that this is only one argument for why we might want to constrain criminal punishment in order to limit injuries to third-party interests. No part of this thesis is a fairness or deontological argument that third parties suffer unjustifiably from punishment of offenders—or get less accommodation from criminal law than third parties in other settings, regardless of the effect on crime prevention. Nor is it a social policy calculus extrinsic to criminal law—fairness and crime prevention efficacy aside—that the social costs borne by third parties outweigh the social benefits of punishing offenders.

Compare the third-party interests in white-collar contexts. The basis for concern about, say, a medical provider's patients is not entirely clear. It could be strictly utilitarian: criminal law of health care fraud aims to deter fraud and thereby improve health care. Yet punishing offenders may injure some patients and hinder health care provision, so punishment undermines the very purpose it is designed to serve. This is the analog to Fagan and Meares's punishment paradox in the street-crime context—the internal utilitarian argument for third-party effects. But it does not necessarily work for other contexts—say, environmental crimes or tax fraud. We may well undermine environmental goals by preserving jobs of a polluting firm's employees or undermine tax compliance by protecting a tax fraud's employees; protecting third-party interests may not coincide with advancing statutory goals. But we do have other motivations for concern about third parties. One, as just noted, is a broader social policy assessment. Even if collateral consequences do not undermine criminal law's efficacy, they may amount to more social harm than punishment yields benefits; other mechanisms (e.g., markets and other components of social policy like social services) may be inadequate to mitigate those consequences.

Another reason for concern is normative and may arise from deontological premises.\(^7\)\(^0\) Criminal law punishes wrongdoing, but we often will not do so if third parties are going to be hurt too severely by that punishment. The third parties do not deserve it, the social cost is too concentrated on a few, and criminal law's causation of that cost is too direct.

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\(^6\)\(^9\) For a related argument suggesting that family and social networks are more important to crime control than criminal sanctions, see John Braithwaite, *Inequality and Republican Criminology*, in *CRIME AND INEQUALITY* 778, 283–84 (John Hagan & Ruth D. Peterson eds., 1995).

\(^7\)\(^0\) Note that retributivism is grounded in this same commitment but focuses only on the offender's just desserts, without regard to third parties. There are, of course, other sources that give rise to a nonutilitarian normative commitment to respecting the interests of others as well. Virtue ethics is one such source that is gaining prominence in criminal law. See generally Kyron Huigens, *The Dead End of Deterrence, and Beyond*, 41 *WILLIAM & MARY L. REV.* 943, 1016–31 (2000).
On this view, we have a version of “just desserts” and “distributive fairness” theories for innocent third parties. We inevitably inflict some injury on others when we punish offenders, but at some point those injuries cross the line from marginal to impermissibly large, and we will consequently restrain punishment. Third-party interests, in this sense, serve a function comparable to the harm principle. The traditional liberal theory of criminal law, that stood in opposition to legal moralism, urged that no conduct should be criminal unless it causes harm to others. Comparably, protecting third-party interests means no criminal punishment when serious harm to others follows from liability. Both are limits on criminal sanctions with no basis in the morality of the offender’s conduct.

II. Third-Party Interests and Criminal Law Theory

The parameters of criminal law theory are well established. One traditional view, now influential, belongs to the retributivists, who believe criminal law should be based on a commitment to just desserts that leads us to punish all culpable offenders. This view rests liability on moral blameworthiness, and so it meshes well with legal moralism as a premise for defining the scope of criminal law. The main opposing tradition, dominant until a quarter-century ago and still influential, is deterrence-oriented utilitarianism. Utilitarians think criminal law’s primary or sole purpose should be crime reduction, and so we should punish as much and as many as necessary in order to prevent crime. This view accords well with the harm reduction model of criminal law, the leading rival to legal moralism that would define as criminal only acts that cause harm to others. Intermediate positions combine these two commitments in various ways and dominate government policy as well as scholarly debate. Most utilitarians would


72. See generally Larry A. Alexander, The Philosophy of Criminal Law 2–9 (May 15, 2001) (unpublished manuscript, on file with the Texas Law Review) (summarizing variations in retributivist theories), available at http://papers.ssrn.com/abstract=285954; Michael Moore, Placing Blame: A General Theory of the Criminal Law (1997); Henry M. Hart, Jr., The Aims of the Criminal Law, 23 LAW & CONTEMP. PROBS. 401, 412 (1958) (“[I]t is necessary to be able to say in good conscience in each instance in which a criminal sanction is imposed for a violation of law that the violation was blameworthy and, hence, deserving of the moral condemnation of the community.”).


74. See Andrew von Hirsch, Doing Justice: The Choice of Punishments 49–55 (1976) (concluding that both deterrence and desert rationales are required to justify criminal punishment).
limit punishment to those who are morally culpable, thereby solving the standard criticism that pure utilitarianism justifies punishing the innocent. Some retributivists limit punishment not only by culpability but also by those offenders whose punishment will help reduce crime. Further variations include Harel and Parchomovsky's "fair protection paradigm," which adds to the retributivist model a special commitment to regulate punishment so as to distribute the protection of criminal law equally among citizens. Finally, a third tradition, virtue ethics, which Kyron Huigens has brought to renewed prominence in recent years, is grounded in neither consequentialist nor deontological obligations. Virtue ethics requires an adjudication of offender fault, made in the context of his particular circumstances, as a justifying reason to punish. It acknowledges that the competing concerns served by punishment are incommensurable and chooses among them only by aspiring to a considered judgment that is necessarily normative and expressively constitutive of public character.

All these approaches to criminal law theory typically seek to work on both descriptive and normative levels. That is, they seek to explain how criminal law actually operates and to justify how it ought to operate. Some have clear descriptive inadequacies. It is clear, for example, that retributivism no longer describes the tremendous scope of contemporary criminal law, especially in federal statutes. The problem with this view is the great expanse of contemporary criminal law: the range of conduct criminal law covers is vast and includes much conduct that few consider morally blameworthy; no general theory of retribution can plausibly account for criminal law's contemporary scope. As a result, we also find prominent descriptions of criminal law's purpose as now largely instrumental; criminal sanction is a tool for regulating social behavior. But if third-party interests are significant factors in whether and how much we punish, that instrumental

75. Herbert Packer, The Limits of Criminal Sanction 16 (1968) ("[P]revention of crime is the primary purpose of the criminal law; but that purpose ... has to be qualified ... [by a limit that] a finding of moral responsibility [which] is a necessary although not sufficient condition for determining criminal guilt.").

76. Alexander, supra note 72, at 2 (discussing the varieties of retributive theories of justice); Douglas N. Husak, Retribution in Criminal Theory, 37 San Diego L. Rev. 959 (2000) (analyzing the theories of Michael Moore, who places retribution at the heart of the rationale for punishing violations of the criminal law).

77. See Harel & Parchomovsky, supra note 5, at 509–11.

78. See Huigens, supra note 70, at 950–51, 978–80, 1030; see also Kyron Huigens, Solving the Apprendi Puzzle, 90 Geo. L.J. 387 (2002) [hereinafter Huigens, Apprendi Puzzle].


80. For examples, see infra notes 167–68 and accompanying text.

81. George P. Fletcher, Basic Concepts of Criminal Law 203 (1998). This regulation may derive from a variety of underlying intentions, including deterrence aims and educative ambitions to support popular commitment to law obedience.
account is incomplete as well. Criminal law is concerned with more than its ability to control undesirable conduct by offenders. If third-party interests matter, then criminal law is concerned also about its broader utility as a tool of social policy that has far-reaching effects not only on offenders and victims but others in various relationships with them—neighbors, family members, employees, patients, customers, and policy holders. Neither dominant mode of criminal theory, then—retributivism or utilitarianism—explains the practice of criminal punishment. More importantly for present purposes, none of these views captures a component of our actual practice of criminal justice that has significant normative and instrumental appeal: limiting criminal law to the punishment of those culpable offenders whose punishment will not impose excessive burdens on innocent third parties.

Further, neither main theory, nor hybrids of the two, provides a fully compelling account of how criminal law ought to be structured. Third-party interests, like the growth of nonculpable crimes, reveal the weakness of theory for disciplining criminal practice. Concern for collateral consequences suggests there is a widely shared intuition to minimize them through charging and sentencing practices, at least sometimes; retributivism is not always compelling enough to overcome that concern (nor other, traditional utilitarian goals and an array of other practical issues). Yet it is sufficiently significant to criminal law’s contemporary legitimacy that culpability is an important factor in structuring law enforcement discretion and thereby limiting a purer version of deterrence-oriented utilitarianism.

The broader perspective that examining criminal law practice and policy brings to criminal law theory leads to the observation that traditional criminal law theory is inadequate because it is largely a theory of punishment. What we need are broader theories of criminal justice, of which punishment theory is only a part, and which situates criminal law as one tool in a larger social policy. That broader scope provides a basis for taking full account of practice, for assessing the inconsistent attention to third-party interests, and for suggesting means of reform.

III. Variation in Salience of Third-Party Interests

If third-party interests do play a salient role in some charging and sentencing decisions, it shows us a couple of interesting things in light of dominant criminal theory. For one, it shows us the resistance of criminal


83. I emphasize contemporary legitimacy because retributivism was a much less important, or even reputable, concern of criminal law in the first two-thirds of the twentieth century. See Garland, supra note 1, at 1–26 (describing the social and intellectual history of modern criminal theory and policy).
justice practice to conceptual description and conceptual discipline—meaning the constraints that theory (or commitment to principle) seeks to put on practice. There is something about third-party interests that sometimes prompts officials to take them into account despite any traditional, articulable grounds for doing so. In this sense it may evidence something like Rawls’s notion of “reflective equilibrium,” in which we check decisions from general principles against more intuitive judgments about proper outcomes for particular cases. Second, it shows us the continuing inability to recognize or limit evaluative, emotional choices in criminal law—the sorts of formally unrecognized distinctions that scholars have identified in the design and application of criminal law doctrines. Both observations tell us that criminal law is political in a more deep and interesting sense than just biased according to the preferences of the powerful. It mediates multiple commitments, some of which we neglect to recognize and evaluate in theoretical debates.

Both of those points may help explain what seems, from my somewhat impressionistic account, a troubling feature of the justice system’s attention to third-party interests. We pay uneven attention to such interests across the landscape of criminal law. At least as a matter of official charging and sentencing policy, third-party interests get more explicit and regular attention in white-collar crimes than in street crimes, especially at the charging stage. This observation is tentative because, again, it is hard to get firm and widespread accounts of prosecutorial discretion in charging, and actual practice may vary from official policy statements. Nonetheless, the fact that we acknowledge third-party interests overtly and officially in one setting more than others, and do so most explicitly with corporate offenders, is significant. What is it about some third-party interests that lead us to depart from traditional criminal law models focused on the criteria of culpability, wrongdoing, and deterrence? Why not do so for other interests? Criminal law observers, after all, have learned to be skeptical about equity in the administration of criminal justice. Studies abound detailing racial and class disparities in death penalty prosecutions and incarceration rates generally (especially with regard to drug crimes). Law operates imperfectly, but it


86. We saw in cases under the federal Sentencing Guidelines that, at least as to an offender’s dependent family, third-party interests were taken into account in drug and other non-white-collar crimes. See supra notes 55–68 and accompanying text.

87. See, e.g., Michael Tonry, Malign Neglect—Race, Crime, and Punishment in America 58–66, 105–16 (1995) (detailing the empirical studies of jail populations and
often is imperfect in predictable and troubling ways; socially disfavored groups suffer the disadvantage. In this light, the impression that some groups may gain moderation of punishment by protecting third-party interests—or some third-party interests get more protection than others—is worth exploring.

One possibility is that decisions to constrain criminal law according to adverse effects on others are considered policy choices about the value of affected interests. Some third-party interests are more compelling than others; some are greater in magnitude and more directly affected by punishment than others. More significantly, some third-party interests are more concentrated, while others are more diffuse. Where injuries are clear, direct, and concentrated, state action can both be easily linked (and blamed) for third-party harms and significantly mitigate them. This is true in some corporate contexts. A firm may have a distinct and large set of employees, creditors, patients, or customers who will be affected. In street crime, by contrast, leniency for any particular offender often will have little direct, incontrovertible impact. The exceptions—cases of exceptional family circumstances—have a plausible if haphazard chance of at least a sentencing accommodation. The sorts of collateral consequences Fagan and Meares identify are diffuse and long-term, affected by prosecution policies only through an aggregate of cases. The effects of third-party interests in distressed communities are cumulative, resulting in, inter alia, less informal child supervision, dimmer employment prospects, stunted local economic growth, and lower rates of marriage. The distinction in direct-and-concentrated versus diffuse injuries produces a structural bias without necessarily any “classist” or other illicit motive.

It may be that this structural distinction will keep third-party interests much more relevant to some sectors of criminal justice than others. The variation occurs even within the broad categories of “street” and “white-collar” crime. Indeed, there may be good reasons we see third-party effects emerge explicitly in health care and corporate offender guidelines while they play a weaker or haphazard role elsewhere. In health care fraud, a


88. One can certainly marshal arguments that distinguish the interests of hospital patients’ and drug dealers’ families on other grounds. Health care fraud is arguably more amenable to noncriminal remedies (civil fines, regulatory sanction and oversight, compensatory damages).

89. See supra note 50 and accompanying text (describing informal survey of state prosecutors, most of whom refused to moderate charging and some of whom adjusted sentencing based on family circumstances).
consequence of conviction is disqualification from Medicare/Medicaid program participation, which is to say, from providing health care services. In some communities, that clearly translates into a critical reduction in crucial services. More generally, corporations are offenders whose fate, almost by definition, could affect the livelihood or fortunes of many others. Not that every corporate prosecution jeopardizes worker or creditor interests, but firms are a category in which those effects can be both significant and very visible.

Moreover, because recognition of third-party interests is a cost on criminal law—it prompts us to forgo criminal punishment when we otherwise would pursue it—it may be that protecting some third-party interests imposes too high a cost on criminal law. That is, although we concede substantial collateral consequences from punishing offenders, punishment is nonetheless so important that it outweighs those other interests, especially when those interests can be only indirectly accommodated by criminal justice policy shifts over a range of case decisions. We will always have some collateral consequences to punishment, so we have to ignore costs below some level we judge to be both de minimis and exceedingly diffuse. And even serious collateral consequences will rarely, if ever, dissuade us from prosecuting the most serious crimes, whether murder or massive financial fraud or environmental harm. Perhaps the variations we sense among third-party interests roughly fall along these lines.

There is surely something to this rationale, but this account raises several concerns. For one, we already allow diffuse social injuries from crime (as opposed to punishment) to justify harsher sanctions. Mandatory sentences are much higher for crack than powder cocaine for this reason: crack is associated—often in indirect, somewhat diffuse ways—with increased violence, family instability, and other social consequences. The

90. As one report observed:
Although [HCA Healthcare Corp.'s] practices involve widespread criminal actions in HCA's hospital system, the guilty pleas will be formally entered by two inactive subsidiaries. The government agreed to structure the deal in that way to allow HCA to avoid an automatic bar from Medicare, a step that is required for any company that admits to criminally defrauding the program. Because of the role played by Medicare in the company's finances, such a bar would be tantamount to a corporate death sentence.
Kurt Eichenwald, HCA to Pay $95 Million in Fraud Case, N.Y. TIMES, Dec. 15, 2000, at C1.


92. For a general discussion of the issue, see David A. Sklansky, Cocaine, Race, and Equal Protection, 47 STAN. L. REV. 1283, 1289, 1293–94 (1995) (noting racial disparities in federal crack and powder cocaine defendants, discussing the congressional debates of the social harms of crack, and arguing that racist images played a role in the sentencing disparity).
collateral consequences that justify higher penalties for crack cocaine look a lot like the consequences we disregard when they arise from punishment.\textsuperscript{93} The distinction now applied to justify tough sentences generates complaints of unfair treatment.\textsuperscript{94} As Bill Stuntz has pointed out, crack and powder cocaine usage breaks down in large part along racial and class lines, so the disparity gives the appearance of punishing some users more than others because of their race and class.\textsuperscript{95} Variations in whether we allow collateral consequences can generate a comparable complaint, and indeed can aggravate the initial one.

This concern sounds in fairness, both to offenders and third parties, and thereby implicates systemic legitimacy. If some culpable offenders receive alternative treatment because of the fortuity of their linked fate with innocent third parties, disparate treatment among offender groups starts to look like unfairly favorable treatment. Similarly, if some third parties have their injuries treated with more solicitude than others by the criminal justice system, that aggravates distributive unfairness claims and complicates the normative message of criminal sanctions.\textsuperscript{96} Distinctions in diffuse and direct injuries may explain disparate treatment, but they might not do enough to justify it, generating an appearance of inequity.

Moreover, to incorporate collateral consequences into either a fairness or utilitarian calculus of criminal justice policy, we have to assign value and weight to those interests. In that task we face the risk of politicized or skewed assessment of interests, which can heighten the arbitrariness of already difficult distinctions. For this reason, too, the preceding account likely obscures more than it reveals. We need criteria for determining whether some interests are worthier than others, and whether the need for punishment of some offenders is more compelling than others so as to outweigh those interests. The process is more suspect because it occurs so far from public scrutiny, largely in prosecutors’ (and to a lesser extent, judges’) discretionary choices. Prosecutors have near total discretion in charging decisions that are largely immune to judicial or public review.\textsuperscript{97}

\textsuperscript{93} Note that crack can certainly be directly associated with violence, as when a user or dealer commits violence to buy or sell the drug. But those offenders can be punished for the independent crime of violence in addition to the drug crime. We raise the drug crime sentence because of crack’s broader association with violence, family-life burdens, and community harm.

\textsuperscript{94} See Sklansky, supra note 92.

\textsuperscript{95} William J. Stuntz, Race, Class, and Drugs, 98 COLUM. L. REV. 1795, 1799-800 (1998).

\textsuperscript{96} As I develop further, this suggests a delicate predicament: to maintain its legitimacy, criminal justice needs both to depart from traditional retributivist and deterrence models to moderate collateral consequences, but at the same time not depart so far, and not so unevenly, that it exceeds the distributive fairness limits implicit in traditional retributivism. See infra Part V.

\textsuperscript{97} See Abrams, supra note 24, at 1275 ("[T]he American prosecutor has complete discretion with respect to the selection of the charge . . . ."); see also United States v. Armstrong, 517 U.S. 456, 470 (1996) (adopting a standard that makes racially biased prosecution virtually impossible to
Internal charging policies, which in any case are broad, multifactor standards, are voluntary and unenforceable.98

Close observers of criminal justice are reflexively suspicious of disparities in the criminal process that arise from unexamined, and partially inscrutable, mechanisms. Studies revealing death penalty and other charging and sentencing variations along racial lines, noted above, provide examples of this skepticism.99 Studies of charging of drug offenses100 and capital and noncapital sentencing101 continue to confirm the occurrence of racially disparate treatment and outcomes, even though we virtually never find proof of intentional bias. In a related vein, we recognize how doctrines work in practice to favor unacknowledged substantive positions that formal rule statements obscure. As one example, Victoria Nourse has demonstrated how the manslaughter doctrine of provocation reflects a specific vision of gender roles and provides leniency to men who kill women in a range of domestic scenarios beyond the classic adultery “heat of passion” incidents.102

Along the same lines, Dan Kahan has argued for the normative value of “disgust” as an evaluative sentiment in criminal law that is obscured by modern voluntarist and deterrence-based theories of criminal law.103 Both theories deny a role to the “evaluative appraisals” implicit in criminal judgments but result only in “push[ing] disgust down below the surface of law, where its influence is harder to detect.”104 Kahan wants to make those evaluations more visible, because “sensibilities are likely to deviate least from the moral ideal when the evaluations they embody are most fully exposed to view.”105 On this view too, criminal law not only makes evaluative substantive choices among offenders and types of offending, but does so in a way that doctrine obscures and cannot restrain.

98. This is not to say, of course, that prosecutorial decisionmaking is completely unconstrained or random. Cases that are charged are publicly visible, and political pressures can influence charging. Internal policies, especially for federal prosecutors, surely have some influence, as do policies or laws granting high-level authorities supervisory power over line prosecutors. See, e.g., CONN. GEN. STAT. §§ 51-275 to 277 (1985); DEL. CODE ANN. tit. 29, § 2502 (1997) (both establishing that state departments of justice are to be supervised by the state attorney general). The point remains that factors influencing leniency or declination decisions are largely invisible.

99. See supra note 87 and accompanying text.


101. See Baldus et al., supra note 87; Mustard, supra note 87.

102. See Nourse, supra note 85, at 1337–38. Carol Steiker has argued that a range of criminal law rules make implicit substantive choices among offenders’ motives that are often unexamined and normatively problematic. Steiker, supra note 85, at 1863–65.


104. Id. at 72.

105. Id. at 73.
The same sorts of evaluative choices characterize the weight we give to third-party interests and the offending conduct for which those interests may moderate punishment. But to these general notions of choices among the moral worth of individuals and activities, it is helpful to add an additional framework that likely shapes choices about recognition of collateral consequences. In a new social history of criminological theory, David Garland has described the alternating dominance of social prevention and situational prevention thinking.\textsuperscript{106} The former, which has characterized public policy for much of the last century, emphasizes individual dispositions toward criminality as sources of crime.\textsuperscript{107} That view can justify a range of responses, from utilitarian efforts to deter or rehabilitate, to retributivist efforts to impose on individuals their just desserts. In contrast, situational prevention thinking emphasizes that crime is in large part a product of events, contexts, and circumstances.\textsuperscript{108} Its premise is more structural, foreseeing crime in some settings in which people predictably give in to opportunity, social pressure, and influence.\textsuperscript{109} It guides prevention strategies that focus first on changing those structures rather than human character.\textsuperscript{110} Those strategies may include “hardening targets” through security, increasing surveillance, or community-oriented policing that strengthens social influences against crime.\textsuperscript{111} This latter approach puts less emphasis on criminal punishment as an effective tool of crime prevention—either as a means of deterrence or of moral reform.\textsuperscript{112}

The social prevention model has dominated modern crime policy and underlies the rise of both retributivism and the drastic increase in incarceration rates in the last three decades.\textsuperscript{113} But situational prevention has not disappeared completely, and it has made modest inroads in the last fifteen to twenty years.\textsuperscript{114} Interestingly, however, its influence is uneven across criminal law, and that may help explain uneven attention to third-party interests. Situational prevention is a premise of (some forms of) community policing, which focuses on street crime. But many of the crime prevention mechanisms we see in white-collar settings, which lack parallels in the street context, fit this model as well. Most prominently, federal charging and sentencing policies that encourage corporate “compliance programs” and a

\textsuperscript{107} \textit{Id.} at 6–7.
\textsuperscript{108} \textit{Id.} at 4–5.
\textsuperscript{109} \textit{Id.} at 3 (outlining the essential propositions of situational crime prevention).
\textsuperscript{110} \textit{Id.}
\textsuperscript{111} \textit{Id.}
\textsuperscript{112} \textit{Id.} at 3–11.
\textsuperscript{113} \textit{Id.} at 12.
\textsuperscript{114} \textit{Id.} at 8–13.
variety of self-auditing and self-reporting programs are paradigmatic situational prevention tools. Federal policies provide explicit leniency in sentencing, or a ground for declining prosecution altogether, if firms maintain effective programs that discourage and detect internal law-breaking and effectively remedy injuries.

As a broad and speculative claim, situational prevention thinking has somewhat greater sway in white-collar contexts than in street crime, where social prevention premises motivate the dramatic harshness of penal sanctions and the twin rationales of retributivism and deterrence that justify them. The implication for third-party interests is this: in a system committed to social prevention assumptions—to the primacy of individual criminality—it is much harder to trade off punishment for other values, such as mitigating indirect harm to others. But in a regime premised on situational prevention, that trade-off is much easier, because officials have little stock in the efficacy of punishment in the first place, either as deterrent tool or a means of balancing moral accounts. They put more faith in other means of crime prevention. Therefore, moderating or forgoing punishment is not as big a sacrifice, and competing concerns like third-party interests can gain in relative importance.

If both those arguments are true, we have even more reason to be suspicious of strong concern for collateral consequences in corporate crime and marginal concern in street crime. The distinction does not result from fair assessments of the relative merits of various interests—and distinctions in offender treatment will not be fully defensible—if they arise in part from different theoretical assumptions about crime. At least, that is true if we assume that the switch in premises is not fully justified by the difference in contexts, and history suggests the swings between theories are a product of alternating political and intellectual currents.

All of this suggests the ways in which we can get wrong the assessment of third-party consequences and the role they should play. And it points to the need, at minimum, for a more conscious and deliberate, if not more transparent, method for determining their role in criminal justice—and the role of criminal justice in light of collateral consequences.


116. See Holder Memo, supra note 9 (instructing that corporate-compliance plans are one ground for federal officials to decline to prosecute a firm, although the existence of a plan is not sufficient alone to decline prosecution); U.S. SENTENCING GUIDELINES MANUAL § 8C2.5 (2001) (permitting sentencing leniency for compliance plans).

117. See generally Garland, supra note 106 (arguing that shifts in criminological and social control practices vary with evolving cultural assumptions and political debate).
IV. How Should Third-Party Interests Be Treated?

If my analysis is correct about the inconsistency with which we regard third-party interests, we can see where the difficulty arises. It is hard to evaluate the merits of widely varying claims of collateral consequences in the contexts of very different crimes. That job is difficult and value-laden, although it is not so different from other evaluative projects law faces. On top of that problem, however, is the secondary issue of how we integrate those interests into criminal law's traditional purposes and commitments. Here we return to the problem of the awkward fit between third-party interests and traditional criminal law theory.

Retributivism limits attention to an offender's mental state, conduct, and the harm he caused, leaving no role for broader social consequences of punishment. Deterrence theories, on the other hand, as Fagan and Meares' argument demonstrates, could make room conceptually for third-party interests, but traditionally have not; instead, they focus mostly on the quantum of punishment (and probability of detection) needed to deter offenders. Hybrid theories combining those two camps maintain the limitations of both, at least in as far as each fails to assess collateral consequences. As practitioners adapt those theories for charging, plea, and sentencing decisions, they must overcome the defining limitations of those premises. How, then, should practitioners account for third-party interests, and how should criminal punishment theory be revised into a criminal justice theory that accommodates third-party interests?

My view is that criminal justice practice demonstrates that traditional retributive and deterrence-focused utilitarian theories are untenable as fully prescriptive courses for criminal justice policy; instead, they work best as foundational building blocks. Third-party interests, and the social consequences of criminal punishment more broadly, are too compelling to play no role in allocating criminal sanction. Rule-based approaches that dictate versions of "punish all culpable offenders (within resource limits)" or "punish when necessary to deter" are incapable of disciplining, as well as describing, practice. Criminal practice evolves alternatives (and probably

118. This sort of decision is common, for example, in regulatory settings. See, e.g., Richard H. Pildes & Cass R. Sunstein, Reinventing the Regulatory State, 62 U. Chi. L. Rev. 1, 64-66 (1995).

119. See Harel & Parchomovsky, supra note 5, at 518 (describing retributivism as a "wrongfulness-culpability framework" focused on "the wrongfulness of the act" and "the culpability or accountability of the perpetrator").

120. Fagan & Meares, supra note 58.

121. The basic deterrence calculus considers two variables: the odds of getting caught committing a crime and the amount of punishment it takes to deter one from committing a given crime. The former discounts the latter, so we can raise the quantum of punishment if we are unable or unwilling to raise the likelihood of detection. See Paul H. Robinson & John M. Darley, The Utility of Desert, 91 N.W. U. L. Rev. 453, 463 (1997) ("[A]s probability of arrest or conviction is reduced... one can achieve the fixed quantum of punishment only by increasing the magnitude of the prison sentence.").
has long done so sporadically) that mediate some collateral consequences. But the evidence suggests the practice is ad hoc, inconsistent, and in need of conceptual definition.

Of course, criminal law is hardly the only area of law that faces issues of third-party interests. They confront practitioners and theorists in a wide variety of settings. Takings doctrine, for instance, shares the problem of defining what government actions affecting private interests are compensable rather than justified as acceptable costs imposed upon community members for public purposes. Problems of regulatory and derivative takings in particular face similar line-drawing problems, though the difficulties in that setting do not implicate the potentially zero-sum trade-off between the primary goal of government action (punishing offenders, taking or regulating land) and ancillary harms. Bankruptcy is another example. Courts there face mediating debtors' and creditors' competing claims and choices between reorganization (in hopes of creating more value in the future that could satisfy all claims) and liquidating remaining assets. Surrounding those choices, however, are third-party interests—employees of firms in reorganization proceedings, or families of personal debtors. Administrative law is replete with complex issues of multiple costs and benefits from regulatory action. Comparably, the law of corporate governance struggles with what role, if any, to give third-party interests (such as firm employees and communities) in board and management decisions when those concerns conflict with shareholder interests. As a final example, legal ethics confronts issues of whether a lawyer's duty ever extends beyond her client's interests, to the interests of the opposing party, third parties, or public justice interests generally.

Criminal law can learn from other areas how to address such competing demands. In particular, I focus on the last three comparisons to suggest that criminal law has more in common with the legal ethics analogy than corporate governance due to several distinctions. More specifically, I adapt the form of William Simon's "contextual view" of legal ethics to sketch an analogous model that improves our understanding of current criminal practice. If we also add the scaled-down decision procedure methods from administrative law to provide a better picture of criminal law's

122. For recent surveys of, and contributions to, the vast takings literature, see, e.g., Hanoch Dagan, Takings and Distributive Justice, 85 VA. L. REV. 741 (1999); Susan Rose-Ackerman & Jim Rossi, Disentangling Deregulatory Takings, 86 VA. L. REV. 1435 (2000).


124. The distinctions include the varying degrees of market influence on each setting and the ease and tradition of employing clear rules to dispose of collateral consequences.

full social implications, this approach promises a better prescription for allocation of punishment.

Consider first the law of corporate governance. That field contains a long-standing debate over whether the corporation's board and managers should have obligations solely to shareholders or should act in accordance with the interests of a broader set of stakeholders and constituencies, including the firm's employees and communities in which the firm has a large economic presence.\textsuperscript{126} Think of this debate as a parallel to criminal law's question of whether enforcement officials should administer criminal law solely with regard to retributive premises and/or utilitarian goals, or whether it should consider as well the effects of government action in pursuing those ends on a broader set of interests—stakeholders, as it were, in criminal justice administration. Firm managers considering employee interests may make different decisions than if they focus exclusively on investors' returns; they may be less aggressive in cost-cutting by worker layoffs, for example. Comparably, prosecutors adjust charging or sentencing choices if they take into account the third-party interests of, say, a health care firm's patients or a shoplifter's family.\textsuperscript{127}

\textsuperscript{126} I hold aside the merits of that debate and consideration of the alternative "nexus of contracts" view of the corporation. See, e.g., Jonathan R. Macey, \textit{Fiduciary Duties as Residual Claims: Obligations to Nonshareholder Constituencies From a Theory of the Firm Perspective}, 84 \textit{CORNELL L. REV.} 1266, 1266–74 (1999) (summarizing debate about the competing paradigms). My interest is simply in describing the shareholder primacy model (whatever its merits in corporate law) as a useful metaphor for describing criminal law, including the point that some of its weaknesses suggest analogous problems in criminal adjudication.

\textsuperscript{127} As an aside, consider the irony if in fact we more readily take into account those broader sets of interests for corporate crime. This is so even while the interests of those same parties—firm employees and communities in which firms operate, for example—are still very much in play as to the corporation's duty to take account of them. So we have the small irony of the firm benefiting from (and thus presumably supporting) recognition of third-party interests when it faces criminal law, while wanting the ability (if not the mandate) to ignore those interests with regard to its own, private corporate behavior. Put another way, it benefits firms to define the interests mediated by criminal law to include those of third-party stakeholders, while it benefits firms (or at least firm owners) to define those same interests as irrelevant to the considerations that guide corporate decisionmaking.

This conceivably raises a forfeiture or waiver argument. Should the criminal law, applied to the firm, be mediated by third-party interests when firms themselves deny an obligation to those interests that would mediate their own decisionmaking? (Again, leave aside for now the issue of whether it is fair to assign to firms generally the shareholder primacy view of the firm.) That seems to be the wrong question, because criminal law does not account for third-party interests out of some entitlement to the defendant firm that the firm may waive. Law accounts for those interests due to the fairness, social necessity, or policy efficacy of mitigating those interests. Whether firms should account for such interests in their own decisionmaking is similarly a matter of policy; the shareholder primacy model is an argument that the best social policy is one that solely pursues the highest returns for investors. Nonetheless, it is not hard to see the normative appeal of a sort of social-compact principle that suggests that firms, in return for a criminal law mediated in their favor by consideration of third-party interests, should give management the leeway to consider those same interests in running the firm.

Mediating criminal law by third-party interests, after all, is a sort of windfall for offenders, in terms of the criteria for punishment the criminal law ostensibly operates. If public law deems those
Third-party interests present criminal law with comparable issues: should the criminal law consider effects on others at all, or should it consider only purposes within its incontrovertible purview, i.e., dictating punishment in light of culpability and harm? But there are plausible arguments under both views that, even if actions detrimentally affect other interests, other components of social policy should respond to those injuries. Social policy should help the communities and employees injured by either criminal sanctions on the town’s big employer or the corporate decision to relocate a plant. Social policy should help the community whose sole health care provider faces criminal sanction, or the spouse and children of an individual facing substantial prison time.\footnote{128}

In corporate law, the shareholder primacy view counsels boards and managers to focus solely on returns to investors; other interest groups may suffer interim harms, but shareholder primacy is the most efficient means for increasing wealth, which other components of social policy might then attempt to distribute more equitably.\footnote{129} This thesis presents a parallel to criminal law. Utilitarianism directs criminal law toward “deterrence primacy.” Everyone, including third parties injured in the interim by the punishment of offenders, is ultimately better off if criminal law takes a single-minded focus on crime prevention. (If we ameliorate third-party injuries, it occurs through social policy mechanisms other than criminal justice.) There is a similar parallel with retributivism, despite the switch from utilitarian to deontological premises. Retributivism urges a commitment to “culpability primacy.” Focus on harm and blameworthiness; others may suffer ancillary harms as we punish offenders, but we must use tools other than criminal justice to address them.

One position in the corporate law debate envisions a board free from a singular focus on shareholder returns, so that it can allocate gains among all interests sufficiently important that we allow them to create such windfalls, then comparable interests perhaps should provide a basis—in the public law of corporations, as well as normative and scholarly arguments about corporate obligations—for permitting managers to account for those interests in addition to shareholder interests. Shareholders benefit from the salience of third-party interests in criminal law; perhaps they should also face their mediating effect in the law of corporate governance. I sketch this for its equity implications rather than as a compelling argument in the corporate governance debate, in which it would play a subsidiary role at best. The primary concerns in that debate include the salience of these interests to the firm, the firm’s ability to accommodate them, the social value of the firm’s paying attention to them, and the effect on overall wealth creation. See, e.g., David Millon, New Game Plan or Business as Usual? A Critique of the Team Production Model of Corporate Law, 86 VA. L. REV. 1001 (2000).\footnote{128} More generally, both criminal law and corporate law implicitly choose between specific visions of the good, assessing what legal regime will yield the best social outcome. Is wealth generation, unhindered by deontological commitments, the primary goal of corporate governance, and is that goal best served through a shareholder primacy model? Is society better off administering criminal justice with a focus solely on blameworthiness, crime prevention, or some combination, or should we pay attention also to the ancillary costs of punishment on others and thereby on the overall social gains and costs of punishment?\footnote{129} Millon, supra note 127 at 1001 & n.3.
stakeholders in the firm.\textsuperscript{130} That is, the board can take all interests—including employees', communities', and creditors'—into account, and conceivably impose costs on some to better serve others.\textsuperscript{131} Yet alternatives to the shareholder primacy view lack its virtue of simplicity and clarity. A board guarding the interests of all stakeholders needs allocation rules; it needs a methodology for dividing the pie. Arguably, none of the theoretical competitors to shareholder primacy have yet articulated such a method.\textsuperscript{132} As a result, boards that eschew shareholder primacy to divide gains among broader constituencies open themselves to political pressures—to lobbying by each group, in effect.\textsuperscript{133} This has the problem of "validat[ing] existing, exogenously determined power relationships" among stakeholders, yielding potential inefficiencies.\textsuperscript{134} One argument for shareholder primacy is that it minimizes those risks while offering a straightforward, easily applicable paradigm for decisionmaking. Further, in the corporate setting, there is a strong market influence. Barring transaction costs, firms will attract more investors if they adopt governance means that maximize shareholder wealth; the dominant view, logically enough, is that shareholder primacy does so.\textsuperscript{135} Shareholder primacy externalizes third-party injuries; other alternatives likely internalize them at least in part. Boards can be expected to respond to those incentives.\textsuperscript{136}

In contrast, consider legal ethics. The dominant model of professionalism we can call client primacy; the attorney should do all she can to maximize her client's interests without regard for the interests of the opposing parties or third parties. On this view one can justify misleading cross-examination tactics, or the decision not to highlight adverse law and facts that opponents or judges have not noticed.\textsuperscript{137} Against that model (and

\textsuperscript{130} Id. at 1002 nn.4–5.
\textsuperscript{131} I hold aside arguments (which are far beyond my competency to mediate) of whether such approaches are equal to or better than shareholder primacy at wealth creation.
\textsuperscript{132} Millon, supra note 127, at 1040–41.
\textsuperscript{133} Id. at 1025–27. Again, I hold aside the nexus-of-contracts paradigm that takes a very different view of a firm’s relations with nonshareholders.
\textsuperscript{134} Id. at 1027.
\textsuperscript{135} Id. at 1010–11 & n.26.
\textsuperscript{136} For an alternative view that describes firms through a "team production model" rather than a shareholder primacy model, see Margaret M. Blair & Lynn A. Stout, \textit{A Team Production Theory of Corporate Law}, 85 VA. L. REV. 247 (1999).
\textsuperscript{137} Lawyers and ethicists have described variants and alternatives to this model. \textit{See generally} THOMAS L. SHAFFER & ROBERT F. COCHRAN, JR., LAWYERS, CLIENTS AND MORAL RESPONSIBILITY (1994) (describing four versions of lawyers' roles in attorney-client relationships). For present purposes I will note one other. William Simon describes the dominant model's chief competitor as the "public interest model," which I will describe (somewhat awkwardly) as urging "legal-substance primacy." On this view, the attorney does whatever is necessary to ensure cases are resolved in accord with the purpose of substantive rules. Thus, a lawyer would eschew strategies (misleading cross-examinations, declining to cite adverse authority, excessive procedural maneuvering) that serve a client's interests but frustrate legal merits. \textit{See} SIMON, supra note 125, at 8–9.
Third-Party Interests in Criminal Law

its other competitors), William Simon argues for an alternative he calls the “contextual view” of lawyers’ ethical and strategic decisionmaking. In contrast to the “categorical,” or rule-based, approach of the dominant model that imposes on lawyers an overriding commitment to client interest, Simon urges attorneys to take “such actions as, considering the relevant circumstances of the particular case, seem likely to promote justice,” which he makes synonymous with legal merit.¹³⁸ Lawyers’ duties vary with context. If procedures are reliable, lawyers may focus on client interests. If they are not, lawyers may have a duty to mitigate the process failure so that the outcome tracks the meritorious result of a reliable process. The approach may justify, say, misleading cross-examination in one case and prohibit it in another. The point for our purposes is that, on Simon’s view, the lawyer loses an easy, clear-rule regime with a singular commitment and adopts instead a substantive commitment to justice (and interests beyond the client’s) that demands a more complex decisionmaking process.¹³⁹

The parallel to corporate governance is easy to see. Both contexts have a prevailing model of decisionmaking with a singular commitment (shareholder or client interests) served by a categorical dictate to maximize that interest with little or no regard for collateral consequences.¹⁴⁰ In this sense, Simon’s legal ethics model contrasts with the singular focus, shareholder primacy model of corporate governance as well as traditional accounts of legal ethics.

Now develop the comparison to criminal law. If criminal law departs from the primacy of retributivism or deterrence—if it follows Simon’s ethics model rather than corporate law’s shareholder primacy—can we fashion a coherent theoretical alternative? If criminal law adopts a more contextual, multifactored, substantive approach to the use of criminal liability—as it seems to have done haphazardly already by weighing third-party interests in charging and sentencing—how do we do it? By what criteria do we balance culpability, crime prevention, and third-party interests? Can criminal law fashion a more workable competitor to traditional theories than corporate law

¹³⁸ SIMON, supra note 125, at 9–10, 138–69 (describing the contextual view in detail).

¹³⁹ My adaptation of Simon’s model should be less controversial than Simon’s theory has been in legal ethics debates. His work is controversial largely because of questions about whether the lawyer, as opposed to other actors such as judges, should be taking the primary responsibility for overall justice. In contrast, I have borrowed the contextual, noncategorical style of decisionmaking he urges, but in this setting it remains with the professional actors—prosecutors and judges—whose job is clearly to make discretionary decisions about charging and sentencing.

¹⁴⁰ Lawyers might face somewhat weaker market pressures to adopt strict, client-centered ethics, but those pressures are hardly negligible. If clients perceive that lawyers serve their personal interests better with a strict client-primacy or hired-gun style, they can create a market pressure on attorneys that may outweigh countervailing forces such as professionalism commitments. See JOHN HEINZ & EDWARD LAUMANN, CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR 101–09 (1982) (discussing how an attorney’s economic position and client base affect his professional ethical behavior).
The risks, sketched in the previous section, are apparent. If the impression is accurate that we unjustifiably distinguish between third-party interests across criminal law contexts, discounting those consequences too greatly in street crime, those risks are already manifest. Criminal law, after all, is equally as capable as corporate governance of validating existing power relationships.\textsuperscript{141} We may defer prosecution of powerful offenders whose crimes tend to implicate the interests of relatively appealing third parties (and who are savvy about emphasizing those harms in precharging, plea, or sentencing negotiations), while we ignore the interests of politically weak or unappealing third parties. If regard for third-party interests varies as I have suggested, we may already have such a regime. That outcome, like a politicized allocation of corporate profits, may be inefficient in balancing punishment's gains with its social costs. We could have sub-optimal criminal justice that yields less social benefit than otherwise.

Note that once we acknowledge collateral consequences of punishment as a cost of criminal justice, we face the risk of sub-optimality regardless of how we treat third-party interests. If we ignore those consequences by employing a renewed commitment to traditional criminal theory, we have no sense of how great the social costs of third-party injuries are and whether punishment's benefits outweigh them. On the other hand, attempts to accommodate those interests will not improve policy outcomes much if assessments of those interests are skewed across class, race, and substantive-crime contexts. And responding to those interests poses serious problems of compromising equitable treatment and retributivist aims.

Some forms of the third-party-harms challenge are more tractable than others. We can subdivide these challenges into three sets of increasing difficulty. The (relatively) easiest to address are those punishments with community-level consequences—the sort that Fagan, Meares, and Roberts draw attention to\textsuperscript{142}—that could be addressed at the level of sentencing policy, rather than charging and sentencing of individual offenders. Some sentencing policies (drug sentencing, especially for crack cocaine, is an obvious example) could be modified to reduce collateral consequences without undermining basic retributivist premises. There is little conceptual difficulty in accounting for third-party harms at the level of punishment policy. Such reforms need not mean only shorter prison terms. Third-party interests argue for an expansion of our current, small-scale practices of

\textsuperscript{141} See supra text accompanying note 134.
\textsuperscript{142} See Fagan & Meares, supra note 58, pt. III (discussing the effects of punishment on poor communities); Roberts, supra note 61, at 1006 (describing "devastating" consequences high incarceration has on the black community).
creative, alternative sentences. Those practices can include jail terms served on weekends or with work release; prison sentences that start months after a conviction to allow time to resolve family needs; or the range of sharing punishments that fulfill retributivist and expressivist aims without incarceration.\footnote{143}

Big problems remain in individual case decisionmaking. This set can be divided in two. The easier (and surely smaller) subset are those cases in which offender culpability has some rough connection to, or alignment with, third-party interests. Consider a variant on the \textit{Johnson} case discussed above.\footnote{144} Take the offender who commits, for example, embezzlement in order to support the dependents who would be injured by her imprisonment, the employer who raids a pension fund to capitalize a struggling firm and keep workers in their jobs,\footnote{145} or a health care provider who defrauds Medicare to keep a locality’s sole health facility viable. These “Jean Valjean” cases are surely a minority, and the link between culpability and third parties will often be contestable (what of selling drugs to supplement family income?). But in a core group of cases, leniency that serves third-party interests also aligns with diminished culpability due to offenders’ motivations.\footnote{146} In the discretionary range that such motivations create, concern for collateral consequences can push the sentencing decision toward leniency or alternative sanctions.

The most troublesome (and probably largest) group of cases is those in which sentence accommodations conflict with dictates of retributivism and deterrence policy and create an inequitable windfall for an offender vis-à-vis similar offenders. It is for these cases that—unless we bar third-party concerns completely—we need to devise a better strategy for addressing collateral consequences.

My sense, informed by criminal law’s scattered efforts thus far with collateral consequences, is that a contextual approach, tracking Simon’s ethics model, holds greater (though perhaps not great) promise than continued allegiance to culpability or deterrence primacy. Criminal law,
more than corporate governance or even other law practice settings, is a
public project with a public justice commitment and explicit role in public
policy. Prosecutorial decisionmaking in particular has always been regarded
as highly discretionary.\textsuperscript{147} As a subset of law practice with a unique public
justice commitment, such decisions more readily fit Simon's contextual
model of decisionmaking, although third-party interests have not traditionally
been a part of the considerations criminal law readily acknowledges.

Further, unlike corporate governance (and lawyers' representation of
clients), we \textit{intend} prosecution policy to be political in the affirmative sense
that it confronts inevitable value judgments. Whatever aspirations the share-
holder primacy model may have for minimizing the political nature of a
broader approach to corporate governance, criminal law has little ambition to
remove from its administration all value-laden choices among its multiple
commitments. Yet we want prosecutors to be political in the sense of well-
run administrative agencies minimally affected by the flaw that public choice
theory highlights—excessive influence of strong interest groups that exact
rents from sub-optimal policy choices.\textsuperscript{148} A contextual approach to charging
that includes collateral consequences can begin to look a lot like a scaled-
down version of the sorts of sophisticated decision procedures employed by
many administrative agencies. The vast range of regulatory activity encom-

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\textsuperscript{148} DANIEL FARBER \& PHILIP FRICKEY, \textit{Law and Public Choice: A Critical
Introduction} (1991). For a positive theory of pressures on prosecutorial discretion, see Daniel C.
Richman, \textit{Federal Criminal Law, Congressional Delegation, and Enforcement Discretion}, 46
\textit{UCLA L. Rev.} 757, 774–82 (1999). For an account describing the Justice Department Criminal
Division as serving an agency function, see Kahan, \textit{supra} note 147, at 488–92.

If we do undervalue third-party injuries in street crimes, we can view that as a form of rent
seeking; the excessive costs for retribution and deterrence benefits are shifted onto other segments
of the populace. If Fagan and Meares, \textit{supra} note 58, are right about the counter-productivity of
criminal punishment in this context, the rents gained are largely illusory. Retributive satisfaction
may remain, but deterrence may be ineffective. This aspirational agency-like behavior is more
feasible for federal prosecutors, who have less direct political accountability but nonetheless
respond to political influences. JAMES EISENSTEIN, \textit{Counsel for the United States} 54–100
(1978); \textit{COMPTROLLER GENERAL OF THE UNITED STATES, REPORT TO CONGRESS: U.S.
ATTORNEYS DO NOT PROSECUTE MANY SUSPECTED VIOLATORS OF FEDERAL LAWS} (1978);
Kahan, \textit{supra} note 147, at 479–81, 486–87. Most state prosecutors are elected, and crime is a topic
with perennial political salience in the last three decades. We suspect state prosecutors are more
vulnerable to political-process flaws, and thus less likely to meet the aspirational model of agencies,
than their federal counterparts. To the extent that this rough distinction is correct, we should expect
federal prosecutors to have a more sophisticated approach to balancing the multiple interests of
criminal justice administration; charging guidelines acknowledging third-party interests reflect this
and accountability between state and federal prosecutors). Nonetheless, the task for them is
difficult. Direct, concentrated effects on nursing-home patients or workers are compelling, even
against the natural instinct to punish culpable, harm-causing offenders. It is more difficult to
include diffuse, longer-term effects on poor communities as a rationale for moderating sanctions on
offenders.
passes an array of problems in which officials weigh multiple, conflicting interests in choosing among policy options. Endangered species protection, to take a random example, may implicate biodiversity values that favor the protection of a species in the face of economic development that might injure the species. Job loss and economic costs may fall very disproportionately on some groups, but other economic interests—tourism trades, perhaps—may fall on the side of species protection. Add to those competing interests the uncertainty of which policy options provide adequate species protection (e.g., not building the dam, building it to accommodate species needs, or developing an alternate species habitat), the prospect of sunk costs by private or public entities that may be unrecoverable, and political pressures on agencies arising from these interests. In such scenarios, agencies face more complex versions of the multivariable judgments that we are beginning to acknowledge in criminal law. Both require politics in the sense of value-laden policy-making.

Recognition of third-party interests concedes that criminal law is a policy-making practice with complicated cost-benefit assessments rather than a deontological one of a strict retributivism, or a traditional deterrence model focusing on odds of detection and amount of punishment. Once we concede the complexities of criminal justice policy-making, we can see how a retributivist approach to criminal law may yield excessive social costs. An offender’s just desserts may be severe punishment, but a full view may reveal that the lost jobs, medical access, or child care for innocent parties are costs that exceed the satisfaction of that retributivist goal. Cut loose from retributivism as a predominant guidepost and acknowledging the policy-making nature of criminal practice, the additional analogy of formal decision procedures in agency policy-making provides a means to enrich the new model of criminal justice practice.

Multidimensional decision procedures attempt to assess a broad range of costs and benefits arising from government action, in an effort to improve the precision, rationality, and transparency of action. Cost-benefit analysis (CBA) is one such decision procedure. CBA is flawed by endowment-dependence, since preferences are calculated on scales based on willingness to pay or willingness to accept; it masks qualitative differences by depicting all values and preferences along a single metric. Yet, like other decision procedures, it can be employed in service of a variety of normative policy commitments—that is, CBA need not yield only assessments of the greatest efficiency among competing policy choices. Another option is a


Qualitative version of direct multidimensional assessment (DMA), which avoids CBA's endowment bias but at a cost of precision. DMA urges agencies to assess policy impacts along a range of relevant dimensions and make qualitative trade-offs in a process that concedes the political/moral nature of value judgments. Yet DMA does so without precise attempts to incorporate subjective strengths of preferences (or even very precise categories for the large range of relevant dimensions). Either form of decision procedure can be used in service of a variety of normative commitments beyond efficiency.

This sort of process, at a lower level of complexity, is what prosecutors sometimes do, or should do, in charging decisions, at least in an ad hoc, informal manner. We cannot expect enforcement officials to engage in anything close to full-blown cost-benefit analysis. But we can more consciously conceptualize charging, bargaining, and sentencing decisions in the style of such decision procedures with attention to criminal law's broader social consequences as well as its commitments to core goals of retribution and deterrence. In this way, CBA or DMA is not an abdication of criminal law's moral premises, nor a panacea for mitigating collateral consequences. Thinking of criminal justice practice in this mode merely makes more conscious and specific the costs as well as the gains of punishment. We mediate those trade-offs in light of normative policy commitments to some combination of retributivism and deterrence. The aim is to alleviate the distortions in charging decisions discussed in the previous section—those preferences are distorted, 29 J. LEGAL STUD. 1105, 1109–10 (2000) [hereinafter Adler & Posner, Implementing]. Adler and Posner reconceptualize CBA in service of overall well-being rather than efficiency. Adler & Posner, Implementing, supra, at 1106, 1109–16. The advantage of this version is that it sets up CBA as a procedure for serving whatever independent normative commitments policy-makers are obligated (or choose) to pursue. A policy option may increase overall social wealth but still be normatively objectionable for increasing wealth inequality; CBA helps assess both the wealth gain and (with less success due to valuation difficulties) the greater inequality. This leaves policy-makers with a better basis on which to choose options in accord with normative commitments. Adler & Posner, Implementing, supra, at 1109–11.

Some argue that all consequentialist modes of analysis such as CBA (or much of economic analysis generally) are substantially flawed by flattening and distorting value to quantifiable variables. For an articulate statement of this view, see Kyron Huigens, Law, Economics, and the Skeleton of Value Fallacy, 89 CAL. L. REV. 537, 558–67 (2001) (book review).

The leading definition of efficiency is Pareto optimality, defined as an option that leaves at least one person better off than the status quo and no one worse off than the status quo. Adler & Posner, Implementing, supra, at 1108. In criminal law, once we concede that third-party interests are widespread, occasions in which criminal punishment would be Pareto efficient are few. To the extent we try to justify criminal law in efficiency terms, we have to use the definition of Kaldor-Hicks optimality: an option that yields a net gain relative to the status quo by which the gains could be redistributed to those who are made worse off by the change. Id. Much criminal punishment probably meets this criterion: some third parties incur modest harms, but those losses are outweighed by gains in the form of retribution and deterrence.

151. See Pildes & Sunstein, supra note 118, at 64–66 (arguing that costs and benefits must be analyzed in terms of the interests that will be affected).

that arise from ignoring collateral consequences in some settings while giving them explicit attention and weight in others.

Further, such decision procedure models integrate nicely with the adaptation of Simon's ethical discretion model. Criminal law theory gives us foundational normative guideposts; the contextual approach to lawyering discretion provides a model for decisionmaking that serves those premises; and bare-bones multidimensional decision processes improve our assessment of the range of interests at stake in those processes. Justice Department guidelines for health care fraud and corporate crimes are plausible efforts in this direction, as are federal sentencing departures for family needs. Those policies are more conscious and developed approaches to thinking through the multiplicity of concerns in criminal law than traditional theory and practice policies.153

While the problems of this approach—including how to value these sorts of qualitative and sometimes speculative injuries—are substantial, a sketch of its main features is fairly simple. Foremost, policy-makers weigh the gravity of criminal law's traditional interests against third-party injuries. Even desperate family needs will not justify forgoing incarceration for murder, though it may for fraud, theft, or some drug dealing (and it may justify the choice between life and death as punishment). Job losses, customer or creditor hardship, or injury to a locality's tax base rarely would justify completely forgoing prosecution for a firm's massive, deliberate dumping of toxic waste that endangers health, but it may outweigh some forms of sanction for more technical, less harmful environmental wrongs.

Lawyers and judges must make a judgment on the gravity of third-party injuries. They should also weigh the mechanisms outside of criminal law for ameliorating collateral consequences. The stronger and more available those mechanisms, the weaker the case for restraining criminal law to avoid third-party consequences. In a strong economy, job losses from prosecuting firms weigh less heavily than in times when lost jobs are not easily replaced. Similarly, care for dependent family members weighs less heavily against incarceration when extended family, close friends, or adequate social services are available to provide care in the offender's place.

153. Further, this approach shares common ground with the third tradition of criminal law theory, virtue ethics. The current leading advocate of virtue ethics in criminal theory, Kyron Huigens, describes the virtue ethics view that we can make guilt and sentencing decisions:

in only one way: by the exercise of mature judgment immersed in the human context of the particular case.... [P]unishment has much to do with the character of the punishing majority as it has to do with the character of the offender.... Ultimately, the question the sentencing judge faces is whether she can impose a given sentence consistently with her sense of her own personal and professional character.

Huigens, Apprendi Puzzle, supra note 78, at 441–42. As a methodology, that approach is thin, but it shares with Simon the inevitability of context-specific personal judgment guided by broader commitments. It also is compatible with a style of CBA, although a virtue ethicist resists flattening value judgments to quantitative elements.
Against that judgment, officials can assess, as they routinely do now in many white-collar contexts, the adequacy of civil sanctions and remedies rather than criminal punishment for wrongdoing. Often, civil mechanisms are sufficient for deterrence and restitution goals but fall short for purposes of retribution and expressive condemnation of culpability. Further, they must assess the stage of the criminal process at which collateral consequences are best accommodated. The most likely choices will be between the charging decision and sentencing. Many injuries can be lessened through sentencing (unless mandatory sanctions limit that option), thereby preserving the moral stigma of convictions for wrongdoing as well as distributive continuity of equivalent criminal judgments (if not punishments) for comparable wrongdoing.

A decision process developed along these lines looks familiar within the tradition of broad prosecutorial discretion and tracks Simon’s discretionary approach that adapts to varying practice contexts. It conceptually mimics a scaled-down decision procedure analysis that takes account of third-party injuries. Given the relative lack of complexity these decisions will typically involve, however, a more accurate analogy may be Rawls’s “reflective equilibrium” between general principles and more intuitive judgments about particular cases. Such an approach can move us toward addressing two big concerns raised by third-party interests. The first concern is uneven accommodation across criminal law practice, which stems in part from relative political power and appeal of those interests. The second concern is the need for criminal law, rather than other components of social policy, to moderate collateral consequences.

The interest-group problems of public choice theory remain. Adopting a more explicit multifactored model of decisionmaking informed by CBA or DMA thinking likely will not overcome those public choice problems, but it should yield at least marginal improvement. Those public choice problems exist, after all, regardless of decisionmakers’ methodology. The virtue of the new model is the explicit concern for collateral consequences (among other social costs of enforcement). Even if they are disregarded or undervalued due to political distortions, that is unlikely to be worse than haphazardly ignoring them in the first place.

V. Legitimacy, Third-Party Interests, and Criminal Theory

Both the emerging practice of assessing third-party interests and this proposal for more effectively accommodating those interests accept the necessity of criminal law confronting the collateral consequences of

154. See generally RAWLS, supra note 84, at 17-53 (describing the process of mediating between the conflicting commands of rule-application outcomes and non-rule-based “considered judgments” about case outcomes).
enforcement. That is a departure from the traditional and theoretical understanding of criminal law. The issue is more acute now because there are presently more third-party harms than ever before. Over the last three decades we have drastically increased incarceration rates, especially on street-crime offenders. We have also broadened and toughened criminal liability for white-collar wrongdoing, a realm previously dominated by civil sanctions supplemented by relatively weak, sporadically employed criminal punishments. A predictable but unnoted consequence of the expansion of criminal punishment is an increase in third-party harms arising from punishment. An issue that formerly was less pressing for criminal law became more acute; as punishment became more severe and widespread, so did collateral consequences of punishment. As a result, for the first time, we see concern for third-party interests explicitly appearing in formal charging guidelines. And we see it most explicitly in white-collar contexts because the interests there are direct and concentrated, but also because defendants and third parties in those settings more often prompt empathy.

Nonetheless, why does criminal law have to address these social consequences of enforcement, as opposed to other components of social policy—unemployment insurance for laid-off workers, bankruptcy policy and insurance for creditors, social service programs for family dependents? Part of the answer is the inadequacy of substitutes: unemployment insurance is not the same as a job, and foster care is not fungible with intact families. But another part of the answer is that at some point, increases in the magnitude and visibility of third-party injuries affect the legitimacy of criminal law itself. That threat to criminal law’s legitimacy and efficacy becomes so grave that criminal law has to reconsider, and downgrade, its primary commitments to retributivist and deterrence premises.

The law already makes comparable compromises with its central commitments to further public legitimacy and efficacy goals. Evidence rules, for example, are structured to serve interests other than truth determination. Criminal verdicts, Charles Nesson argued (controversially), may be unacceptable even if based on a high probability of factual accuracy, because the evidence on which they are based may not convince the public that the critical event at issue in trial actually happened as the jury concluded it did. Statistical evidence may show high probability that a defendant did X, but that does not mean we know he did, or that the public believes he did.

155. I mean here those consequences are more pressing than ever in modern times, defined as roughly the last 100 years. One can certainly find historical periods before twentieth century when criminal punishment was much more severe and widespread than now. See, e.g., FRANK MCLYNN, CRIME AND PUNISHMENT IN EIGHTEENTH-CENTURY ENGLAND (1989).

156. This is my reading, inter alia, of judges’ explanations for their white-collar sentencing practices discussed in Part I, supra at notes 39–43.

The verdict, Nesson argued, must convey a message about the event or conduct, not about the evidence. Concomitantly, verdicts can be acceptable, even if based on a low probability of accuracy, if they make a convincing statement about what happened. In this way, law maintains its legitimacy and publicly conveys its substantive content, paradoxically at the price of some factual accuracy. More recently, Chris Sanchirico has defended limits on character evidence by arguing that they create incentives that affect offenders’ future conduct, even though easing those limits would provide a rational basis for drawing conclusions about conduct contested at trial. In other words, we trade off probative evidence that aids in truth-seeking for the utilitarian purpose of influencing future behavior. We compromise fact-finding for deterrence.

Criminal law sometimes makes a comparable bargain in light of third-party interests. Third-party interests are a means for calibrating public acceptability of the criminal process; the public would be less receptive of a process that had serious collateral effects on valued interests. That is partly why collateral effects in street-crime prosecution play a less substantial role; they are not as visible or politically salient. A system that had excessive collateral effects would lose support; it would come to seem inappropriate if not unjust, even if it passes scrutiny under a test of just desserts. To maintain legitimacy and public acceptability, criminal punishment needs to be justified not merely on the basis of the wrongdoer’s culpability or on deterrence goals. Our public view of punishment needs to conclude, in essence, “this is a socially appropriate response to this conduct. Our public policy is correct to expend these resources, inflict this sanction, and impose these collateral costs.”

This thesis means that a criminal justice system run by either prominent branch of criminal law theory—retributivism, deterrence or some combination—without attention to collateral consequences would be clearly inadequate as social policy and would conceivably face periodic crises of legitimacy. To avoid such a crisis, the criminal justice system has to (a) violate its foundational premises and suppress collateral effects by moderating punishment or (b) impose collateral effects, especially when they are diffuse, on parties with little political salience—although that

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158. Id. at 1363.
160. We might draw an analogy to war: another nation’s conduct may justify inflicting a violent response upon them, yet not merit the loss of American lives required to inflict that response. A just war may have an excessive social cost. A definitive work on just wars is MICHAEL WALZER, JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS (1977).
161. This does not apply if the foundational premise is deterrence and we accept an argument like Fagan and Meares's that collateral consequences hinder criminal law's deterrence efficacy. See supra text accompanying notes 58–59.
Third-party interests in Criminal Law approach incurs its own legitimacy costs. We employ both of those strategies now.

Third-party interests are one reason (along with a range of others, like the efficacy of civil over criminal sanctions for some deterrence ends) why we need a theory not merely of criminal punishment but of criminal justice—one that downgrades traditional criminal punishment theory from its claim as the sole or overriding guide to criminal practice. Neither retributivist or deterrence theory can be a self-sufficient descriptive and motivating rationale for criminal justice. Criminal punishment theory is instead one component—though an important one—in a larger calculus about both practical policy choices (whom to prosecute and how) and social justice. Criminal justice, in practice, is a multivariate process, and it intersects with noncriminal strategies for achieving the same ends. Practitioners continually juggle competing concerns of crime prevention, expressive effects, retribution, and, to a lesser but noteworthy extent, collateral interests.

Yet the dilemma is that we cannot diminish commitments to retributivism and deterrence too much. The realization that practice not only does not fulfill theory, but cannot and should not—that legitimacy goals may conflict with retributivist and deterrence goals—has substantial costs. Retributive theory in particular implies a commitment to fairness and treating like cases alike.\(^{162}\) Third-party interests open the door to the prospect that cases may vary only in ways we do not consider fair grounds for distinguishing them, i.e., by the third parties to whom offenders are fortuitously connected. We do not say comparable cases are dissimilar because one offender is more closely linked to vulnerable citizens than another. Yet third-party interests are compelling enough to lead us to treat otherwise similar cases differently on that basis—treatment that sometimes looks like a windfall.

That complicates the legitimacy thesis—for retributive justice, equitable treatment, and expressive effects are themselves forces critical to sustaining the legitimacy of the criminal process. And legitimacy sustained by aligning culpability and liability has consequentialist benefits for crime control goals as well—the "utility of desert."\(^{163}\) Third-party interests, then, are sufficiently compelling that criminal justice administration must sometimes accommodate them. But a system that distinguishes too much between like cases based on third-party interests may appear unfair for that very reason. Officials face this dilemma because the public faces the same choice in what

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162. Any feasible utilitarian system would have to adopt such a commitment as well, though the pure form of utilitarian-deterrence theory does not necessarily require it.  
163. See generally Paul H. Robinson & John M. Darley, The Utility of Desert, 91 Nw. U. L. Rev. 453 (1997) (arguing that the retributivist alignment of criminal liability with the community's shared principles of justice—with the purpose of both avoiding and reducing future crimes—both provides consequentialist benefits and a greater overall utility than a consequentialist approach to criminal liability).
it demands from the criminal process: we want to punish culpable wrongdoers, but we do not want to injure innocents, especially vulnerable ones. Third-party interests show us that we sometimes cannot do one without the other. In a cultural era characterized by a social prevention worldview, with its emphasis on individual culpability rather than an event- and situation-based approach to prevention, criminal sanction plays a prominent role in crime policy and requires a sufficiently expressive component to reflect our retributivist and deterrence commitments. That sort of shift in intellectual and social history is hard to contravene completely. The best officials can do now is roughly what we have already haltingly and haphazardly begun: balance third-party interests against the primacy of culpability and harm through more sophisticated decisionmaking procedures, aiming to reach a context sensitive accommodation (in part through creative sentencing options) that fulfills fairness commitments to all parties, collateral ones as well as defendants and victims.

Officials can get by with a fair amount of such rough judgments because of the public's high cost of monitoring criminal justice administration in sufficient detail to detect those disparities. The agents can avoid some of the principals' scrutiny on those distinctions and thereby serve the principals' conflicting interests in reducing the collateral effects of punishment. They can also get by with some amount of those distinctions because, again, some are not politically salient; distributive justice among street offenders and third parties linked to them is a relatively low public priority. But at some point ignoring those costs in a part of a criminal justice system already battered by such legitimacy threatening practices as racial profiling, uneven enforcement strategies, and sentencing disparities becomes too much. Criminal policy has to change to mitigate those harms.


165. The inevitability of this balancing of incommensurable values is one reason that the virtue-ethics position in criminal theory provides a useful description of practice. Virtue ethics recognizes that, in the punishment decision, we weigh competing, intransitive interests. Because one value must be compromised to serve another, punishment decisions (like value choices generally) inevitably have a tragic dimension. See Huigens, Apprendi Puzzle, supra note 78, at 438–40; Huigens, supra note 150, at 546. The choice to serve one value (minimizing third-party harm) necessarily means that another strong value (fully proportionate punishment for wrongdoing) is compromised. The extent of that conflict is not fully evident in revealed preferences. Nonetheless, we do reveal a preference for moderating punishment to accommodate collateral consequences in some instances and not in others. While a utilitarian description conceals the difficulty of that choice (in choosing punishment, we do not reveal whether we valued third-party interests at 1 or 9), it is not inaccurate to note that we do find ways for developing preferences between incommensurable options. For an argument that incommensurability is not insurmountable for utilitarian models, see Richard A. Epstein, Are Values Incommensurable, or Is Utility the Ruler of the World?, 1995 UTAH L. REV. 683, 686–98.

166. See Baldus et al., supra note 87 (capital-sentencing disparities); Harris, supra note 4 (racial profiling); Tracey L. Meares, Place and Crime, 73 CHI.-KENT L. REV. 669 (1998)
Mediation of third-party interests is also made easier by the fact that culpability is not a firm constraint on, or determinant of, criminal law. As others have noted, we have an array of criminal laws and doctrines that allow conviction without a plausible finding of the offender's moral blameworthiness. Previous generations pointed to strict liability statutes as the primary example.\textsuperscript{167} Today we can point as well to the excesses of the federal criminal code. An estimated 300,000 regulations are criminally enforceable,\textsuperscript{168} and an array of statutes punishes things that provide criminal scholars with amusing anecdotes, from disturbing mud in caves on federal land to invoking "Smokey the Bear" without permission.\textsuperscript{169} Similarly, long-standing criminal doctrines restrict juries' ability to make fully accurate judgments about offenders' moral blameworthiness in familiar crimes, creating a distinction between those indisputably judged culpable and those who get convicted. The doctrine of \textit{ignorantia lexis} denies a defense to offenders who make good-faith, reasonable efforts to find out whether their conduct was legal.\textsuperscript{170} Murder defendants are typically denied defenses of necessity and duress;\textsuperscript{171} some jurisdictions forbid the insanity defense;\textsuperscript{172} others impose a strict "imminence" requirement for self-defense claims that prompt convictions of battered women who kill abusive husbands.\textsuperscript{173} In each

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  \item [(enforcement strategies); Stuntz, \textit{supra} note 95 (uneven enforcement in drug crimes); Mustard, \textit{supra} note 87 (federal sentencing disparities).

\textsuperscript{167} See United States v. Dotterweich, 320 U.S. 277 (1943) (affirming conviction of corporate officer under a food and drug statute the Court interpreted as imposing strict liability); State v. Lindberg, 215 P. 41 (Wisc. 1923) (affirming conviction of bank director for borrowing from his own bank under a statute interpreted to impose strict liability without a defense of reasonable mistake); Hart, \textit{supra} note 72, at 422-25 (1958) (criticizing strict liability and urging that constitutional doctrine bars it). \textit{But see} Alan C. Michaels, \textit{Constitutional Innocence}, 112 HARV. L. REV. 828, 834 (1999) (arguing that strict liability is constitutional only if "the intentional conduct covered by the statute could be made criminal by the legislature").


\textsuperscript{171} \textit{See} Regina v. Dudley & Stephens, 14 Q.B.D. 273, 288 (1884) (denying defense of necessity for homicide); Henry v. State, 613 So.2d 429, 432 n.6 (Fla. 1992) (no duress defense in homicide); State v. Finnell, 688 P.2d 768 (N.M. 1984) (same). \textit{But see} MODEL PENAL CODE § 3.02 cmt. 3 (supporting necessity in some homicide cases); id. § 2.09 (allowing duress defense in homicide cases).

\textsuperscript{172} \textit{See} IDAHO CODE § 18-207 (Michie 1997); MONT. CODE ANN. § 46-14-102 (Michie 1997); UTAH CODE ANN. § 76-2-305(1) (1995).

\textsuperscript{173} \textit{See} Norman v. State, 378 S.E.2d 8 (N.C. 1989) (imposing a strict imminence requirement in a self-defense claim of a battered spouse, on grounds a broader rule would permit erroneous
scenario, it is quite plausible that juries, and society more broadly, would not judge the defendant morally blameworthy given a full range of facts and authority these doctrines deny.\footnote{74}

Further, just as the nonculpable can be convicted, not all culpable conduct is punished. Because criminal law is not defined by a theory of legal moralism—a theory that would make all immoral acts criminal—immoral conduct and substantive criminal law are not coextensive. Moreover, we do not choose to punish all conduct defined as culpable by criminal statutes. Robinson and Cahill recently surveyed the array of doctrines and practices that prevent punishment of the culpable—from some of the doctrines noted above to witness immunity, statutes of limitation, resource limits, and exclusionary rules.\footnote{75} We often decline to prosecute because civil mechanisms address the wrongdoing and meet many of the same ends, or because the victim has reached a settlement with the defendant or otherwise does not encourage prosecution.\footnote{76} Culpability, then, is an important but not defining concern. Our practice has never been a "strong retributivist" position of punishing all culpable conduct.\footnote{77} Criminal law pervasively trades off culpability to serve other values. Giving third-party interests a greater role complicates the calculus but hardly calls for a departure from established criminal law practices. It calls only for a departure from traditional theories that inadequately describe practice.

VI. Conclusion: Parsimonious Criminal Justice

Even holding finances aside, criminal justice is not cost-free. Punishment is not an unambiguous social good, even when we punish a clearly culpable offender in precise proportion to his wrongdoing. Punishing offenders can hurt others in nonmarginal ways and raise the difficult sorts of questions about policy trade-offs that are familiar in administrative law but obscured in criminal law. Criminal justice is appropriately conceptualized as a complex regulatory endeavor, informed by strong normative premises but not fully organized by them. Like administrative agencies, criminal justice is inevitably committed to balancing a broad array of competing social interests.

\footnote{74}{See Bilionis, supra note 79, at 1279–81 (making the argument that a range of doctrines separates culpability judgments from criminal convictions). I drew the foregoing doctrinal examples from Bilionis’s discussion.}

\footnote{75}{Robinson & Cahill, supra note 82.}

\footnote{76}{For a discussion of the use and effects of civil, regulatory, and private alternatives to criminal sanctions, see Darryl K. Brown, Street Crime, Corporate Crime, and the Contingency of Criminal Liability, 149 U. Pa. L. Rev. 1295 (2001).}

\footnote{77}{For a description of “strong retributivist” theory and a summary of variations in retributivist theories, see Alexander, supra note 72, at 2–3.}
From this we can draw a final point. Those trade-offs call not only for a pragmatic approach to accommodating them, but more generally for a policy of parsimony in criminal justice—meaning a less-than-maximal use of criminal punishment. John Braithwaite has offered an approach to criminal justice, motivated by republican theory, that has a defining commitment to parsimonious use of criminal sanctions. His nonretributivist view is that "[t]he right level of punishment is not determined by the just desserts of offenders. The right level of punishment, according to the [republican] theory, is as low as we can take it without clear evidence emerging that crime has increased as a result of cuts to the system."\(^{178}\) I will hold aside arguments in republican theory for that principle and modify it to give a more prominent space to retributive and expressive concerns critical to criminal law's popular legitimacy. The social costs of criminal sanctions counsel for this view independently. A commitment to parsimony in criminal law pushes errors of undervalued third-party interests toward the side of nonpunishment. That policy can work as a modest counterweight to political dynamics for punishment of least-favored offenders and third parties whose interests are most likely to be discounted.\(^{179}\)

Both retribution and deterrence theory are, by implication if not necessity, maximal theories of criminal law. Under either model, we would use criminal law a lot. Yet attention to third-party effects, and the legitimacy implications arising from them, suggest that we do not want maximal commitment to criminal law. We could not sustain it politically even if we had the resources to do so, unless those costs are kept largely on politically marginal groups.

One arguable gesture in the other direction is white-collar crime. While enforcement of white-collar criminal laws has increased in the last two decades, it also gives more attention to third-party effects and is integrated more fully with an extensive regime of civil and regulatory remedies that often displace criminal law as the state's response to harmful wrongdoing.\(^{180}\) The effectiveness of those alternatives makes it easier to moderate criminal punishments that have harsh collateral consequences, because we can still achieve many of criminal law's goals—deterrence, restitution, and expressive penalties for wrongdoing\(^{181}\)—with civil fines and regulatory sanctions. A broad set of civil tools helps reduce our reliance on criminal law, moving us toward a regime of parsimony. Observers differ on whether

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178. Braithwaite, supra note 69, at 280.
180. See Brown, supra note 176, at 1327–32.
181. The central criminal law goal that civil sanctions cannot fulfill is an expressive judgment of culpability and condemnation of wrongdoing.
Justice Department practice reflects such a policy, but its formal policy dictates assessing civil remedies before criminal ones in key contexts. To move toward parsimony and reduce third-party injuries more broadly throughout criminal justice, we may need not only to overcome problems of diffuse harms and political process, but also to develop alternative, civil means to fulfill many of criminal law's nonexpressive functions.

The injustices of our criminal justice system have many sources, but one of them can be described as an excessive commitment to principled criminal punishment, whether that principle is retributivism or deterrence. That orientation slows the evolution of civil alternatives to criminal law, reflects an undervaluing of structuralist, social prevention strategies for crime prevention, and obscures the collateral consequences of punishment that sometimes impede crime deterrence goals as well as distributive equity and more effective social welfare strategies. Acknowledging third-party interests in criminal law and evolving ways to work through them can be one means toward correcting an over-reliance on criminal law that is nominally but ineffectively committed to retributivism and deterrence. It also promises a more realistic criminal justice theory better able to describe and guide criminal justice practice.

182. See Holder Memo, supra note 9, at pts. II(A)(8), X.