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Response

Steering White-Collar Enforcement

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On one level, Miriam Baer's fascinating article, *Sorting White-Collar Crime*,[1] is a paper about why and how Congress ought to statutorily distinguish lower-level federal fraud offenses. On another, it raises a broader question: how should federal criminal justice institutions acknowledge and respond to a latent feature of federal fraud enforcement, namely, the divergence between the lofty aspirations of federal fraud statutes and the relatively lowly offense conduct so often prosecuted under them.

This dynamic—what elsewhere I've described as a divide between the ambition and fruition of federal criminal law[2]—is not isolated to fraud cases. It affects many categories of federal prosecutions, from drugs[3] to national security offenses[4] to offenses against minors.[5] Baer is right to focus on the particular hazards occasioned by federal felony prosecutions of lower-level white-collar crime. While drugs and immigration may form the vast bulk of the federal docket, the suit-clad professional walking out of his office in handcuffs is, I suspect, what many Americans instinctively conjure when they think of the proverbial "federal case."

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1. Miriam H. Baer, *Sorting Out White-Collar* Crime, 97 TEXAS L. REV. 225 (2018).

2. *See* Lauren M. Ouziel, *Ambition and Fruition in Federal Criminal Law: A Case Study*, 103 VA. L. REV. 1077, 1078–79 (2017).

3. *Id.* at 1085–96.

4. *See* Jesse J. Norris & Hanna Grol-Prokopczyk, *Estimating the Prevalence of Entrapment in Post-9/11 Terrorism Cases*, 105 J. CRIM. L. & CRIMINOLOGY 609, 616 (2015) (in empirical study of post-9/11 terrorism cases, finding "only a small percentage of terrorism prosecutions involve a serious threat to public safety").

5. *See* U.S. SENTENCING COMM'N, FEDERAL CHILD PORNOGRAPHY OFFENSES, at 247–48, 248 fig.9-1 (2012) (observing vast difference in numbers of child pornography production as compared to nonproduction cases against consumers and electronic distributors of child pornography, with producers comprising only 10.8% of federal child pornography offenders sentenced in 2010).

And, as Baer reminds us, a good many federal fraud cases are not quite as weighty as the proverb implies. She notes that over a third of federal fraud cases in 2016 resulted in victim losses of less than $95,000.[6] Further, a two-year sentence was the median that year for those who were sentenced to prison at all—one out of six fraud defendants received a non-custodial sentence.[7] From this data, Baer concludes that "fraud crimes for which most offenders are convicted have little to do with the imaginary offenses that animated Congress to set maximum penalties of a decade or more."[8]

Skeptics might argue that sentencing data is an artifact of policy decisions made by the Sentencing Commission that do not best reflect a defendant's relative desert.[9] (Indeed, critiques of the Commission's fraud guidelines are among the factors Baer cites in favor of Congress taking on more of a role in sorting federal fraud offenses.[10]) Federal sentencing data is an imperfect proxy for offense seriousness, to be sure, but it is the best proxy we have.[11] Baer's conclusion is well-founded, certainly enough so to make intellectual investment in her project worthwhile.

The question, then, becomes how the federal criminal justice system should respond to this state of affairs. More specifically: what is the precise problem, or problems, that such a response should aim to solve? And is statutory reform the best tool for solving it? This brief response considers these two questions in turn.

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6. Baer, *supra* note 1, at 247–48.

7. *Id.* at 247 & n.112.

8. *Id.* at 248.

9. The actual or intended dollar loss of the fraud is the primary driver of the Sentencing Guidelines' advisory sentencing range, *see* UNITED STATES SENTENCING GUIDELINE MANUAL § 2B1.1 (U.S. SENTENCING COMM'N 2016), a choice that has received substantial criticism. *See* Mark W. Bennett, Justin D. Levinson & Koichi Hioki, *Judging Federal White-Collar Fraud Sentencing: An Empirical Study Revealing the Need for Further Reform*, 102 IOWA L. REV. 939, 973–75 (2017) (summarizing critiques). In using the term "desert," I draw on modified just desert theory (alternately known as "limiting retributivism"), a theory most closely associated with Norval Morris's philosophy and which has evolved, particularly as applied by sentencing commissions (including the United States Sentencing Commission), to blend concepts of offense seriousness and incapacitation of high-risk offenders. *See* Paul J. Hofer & Mark H. Allenbaugh, *The Reason Behind the Rules: Finding and Using the Philosophy of the Federal Sentencing Guidelines*, 40 AM. CRIM. L. REV. 19, 51–54 (2003) (discussing the application of Morris's theories with respect to federal sentencing guidelines).

10. *See* Baer, *supra* note 1, at 253–65.

11. Ouziel, *supra* note 2, at 1092–95 (discussing limitations of federal sentencing data to draw conclusions on offense seriousness). It is also worth noting that since the Supreme Court's decision in *United States v. Booker*, federal fraud defendants—including those at the lowest end of the loss amount table—have regularly received sentences below the Guidelines range. *See* Bennett, Levinson & Koichi, *supra* note 9, at 964. Actual sentences imposed, in other words, reflect individual judges' assessments of an offender's desert—which takes into account, but need not follow, the Commission's assessments.

I. Framing the Problem

Baer's article locates the problem within federal criminal statutes. Because federal fraud statutes do not delineate among degrees of fraud, she argues, sorting the merely bad from the worse offenses occurs at the relatively more hidden back end of the adjudicative process (sentencing) rather than at the public-facing front end (charging). This, says Baer, has undesirable consequences for federal criminal law's expressive value, democratic legitimacy and allocations of institutional power. Expressive value is weakened because when a penal statute does not differentiate among offenders, "the two-bit con artist bear[s] the full stigmatic weight of a fraud conviction, alongside the Ponzi schemer and the CEO who presides over a massive accounting fraud."[12] Democratic legitimacy is undermined because leaving sorting to the sentencing process means effectively taking it out of the hands of politically accountable legislators and putting it into the hands of unaccountable judges and sentencing commissioners.[13] And by allowing prosecutors to wield the threat of a felony conviction for what is, in essence, a lesser offense (whether by virtue of a diminished mental state, a relatively low dollar loss, or some other marker of offense severity), ungraded frauds give prosecutors excessive plea-bargaining power.[14] The solution, Baer argues, is to sort federal fraud offenses at the front end, by adding misdemeanor provisions to federal fraud statutes.[15]

Baer adeptly plots a path between the absence of graded federal fraud offenses and each of the ills she diagnoses. But I wonder whether a different starting point doesn't lead us to the very same destination. To illustrate that other starting point, it is helpful to look at the outputs of widely-prosecuted provisions of the federal criminal code in which offenses are graded. To be sure, federal statutory grading does not utilize the more clear-cut degrees-of-severity method of most state codes. But it effectively accomplishes the same result by sorting offenses according to a range of severity measures and assigning to them different penalty ranges.[16]

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12. Baer, *supra* note 1, at 257.

13. *Id.* at 260–62.

14. *See id.* at 258–60.

15. *Id.* at 272–79.

16. *See, e.g.*, 8 U.S.C. §§ 1321–30 (2016) (immigration offenses graded by nature of the offense (improper entry, illegal reentry, assisting entry, bringing in or harboring aliens, employing aliens and document fraud)); 18 U.S.C. §§ 1028–1028A (identification document fraud, graded by nature of offense (use, production, transfer or trafficking) nature of document, number of documents, and purpose (commission during or in relation to other felony offenses)); 18 U.S.C. §§ 2251–52A (child pornography offenses, graded by nature of offense (use, production, distribution, advertising, transportation, importation, receipt and solicitation) and defendant's prior record of criminal sex offenses); 21 U.S.C. §§ 841–44 (drug offenses graded by nature of offense (use, distribution, facilitation), nature of offender (registered distributor or prescriber, prior felony offender, first-time felony offender) and drug type and weight).

Begin with federal drug prosecutions, which make up the bulk of the federal criminal docket[17] and which emanate from a graded statutory regime.[18] That regime sorts offenses based on (i) the nature of the offense (for instance, personal use, manufacture or distribution, or use of a communication facility to further a drug offense—what prosecutors refer to as a "phone count"); (ii) the nature of the offender (a registered distributor or prescriber, a prior felony offender, or a first-time felony offender); and (iii) the type and amount of drug involved.[19] Notwithstanding this sorting, a substantial portion of convicted federal drug offenders operate at the lowest rungs of the trafficking trade.[20]

Federal drug prosecutions are not the only category in which a statutory regime that sorts along relative desert exists alongside an offender population that skews to the relatively less deserving. The graded statutory structure for federal child pornography has yielded far more prosecutions against end consumers than producers and distributors.[21] The graded structure for identity theft has produced a convicted offender population in which only little more than half committed a statutorily-defined "aggravated" offense in 2016, while the remainder did not.[22]

Baer does not advocate sorting federal fraud offenses through the use of mandatory penalties, a feature of each of the above-discussed graded

17. Drug offenders comprise the single largest portion of the federal prison population, *see Inmate Statistics: Offenses*, FED. BUREAU PRISONS, https://www.bop.gov/about/statistics/statistics_inmate_offenses.jsp [https://perma.cc/WQ9A-WRW9] (calculating drug offenders as 46.1% of the federal prison population as of November 2018), as well as the largest category of offenders prosecuted in the federal system. *See* ADMIN. OFFICE OF THE U.S. COURTS, *Table D-3—U.S. District Courts–Criminal Defendants Filed, by Offense and District—During the 12-Month Periods Ending September 30, 2016 and 2017* (Sept. 30, 2017), U.S. CTS., http://www.uscourts.gov/sites/default/files/data_tables/jb_d3_0930.2017.pdf [https://perma.cc/QL2U-XVQX] (In 2017, 24,356 federal criminal defendants were charged with drug offenses; the next most common offense category was immigration, with 20,438 defendants charged.).

18. *See* 21 U.S.C. §§ 841–44.

19. *Id.*; *see* OFFICE OF GEN. COUNSEL OF THE U.S. SENTENCING COMM'N, DRUG PRIMER 4 (Mar. 2013) (noting that 21 U.S.C. § 843(b), outlawing the use of a communication facility to further a drug offense, is known as a "phone count").

20. *See* Ouziel, *supra* note 2, at 1091–95 (discussing sentencing and other data indicating that a substantial portion of federal drug prisoners are lower-level, non-violent, first-time offenders).

21. *See* U.S. SENTENCING COMM'N, FEDERAL CHILD PORNOGRAPHY OFFENSES, at 247–48, 248 fig.9-1 (2012), https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/sex-offense-topics/201212-federal-child-pornography-offenses/Full_Report_to_Congress.pdf [https://perma.cc/2HTV-W7P5] (observing vast difference in numbers of child pornography production as compared to nonproduction cases against consumers and electronic distributors of child pornography, with producers comprising only 10.8% of federal child pornography offenders sentenced in 2010).

22. *See* U.S. SENTENCING COMM'N, MANDATORY MINIMUM PENALTIES FOR IDENTITY THEFT OFFENSES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM, at 2, 4 (2018), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2018/20180924_ID-Theft-Mand-Min.pdf [https://perma.cc/7WAU-NYWN] (indicating that slightly over half of identity theft cases resulted in convictions under § 1028A, the aggravated identity theft statute).

statutory regimes. Rather, she advocates reducing the statutory penalty ceiling for lower-level offenses.[23] In this respect, it is worth considering the first instance of a federal penalty reduction by way of statutory grading in a half-century and its effect on adjudicative outputs. In 2010, Congress increased the quantity of crack cocaine that would trigger heightened minimum and maximum penalties under the graded statutory structure for drug offenses.[24] Yet that change appears to have had little impact on the sorts of offenders and offenses prosecutors pursued. While the total number of federally-prosecuted crack offenders has continued on a downward trajectory that began two years before the amendment's enactment, the percentage of low-level crack offenders out of the total pool has remained roughly the same.[25]

The usual caveats apply, of course; conviction and sentencing data may be a product of charge bargaining (in which prosecutors allow offenders to plead guilty to lesser offenses than would otherwise be proven at trial)[26] or at the very least of Guidelines negotiations controlled almost entirely by the litigants.[27] Nevertheless, the entire discussion proceeds, as it must, on sentencing data.[28] And when we compare the sentencing data that Baer cites on fraud offenses prosecuted in an ungraded statutory regime to the data available on other offenses prosecuted within graded regimes, there is a common thread. In both situations, the number of relatively lower-level

23. Baer, *supra* note 1, at 276.

24. *See* Fair Sentencing Act of 2010, Pub. L. No. 111–220, § 2 (2010). The amendment was made retroactive in the First Step Act of 2018, Pub. L. No. 115-391, § 404 (2018).

25. As estimated by drug weights, role in the offense, criminal history, and use of a weapon in connection with the offense, see U.S. SENTENCING COMM'N, REPORT TO THE CONGRESS: IMPACT OF THE FAIR SENTENCING ACT OF 2010, at 11, 15 (Aug. 2015), https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/drug-topics/201507_RtC_Fair-Sentencing-Act.pdf [https://perma.cc/5GRN-GFDJ].

26. Because charge bargaining goes unreported, there are few empirical studies documenting its use. A study by Professor Brian Johnson found that charge bargaining occurred in approximately 12% of federal cases between 2003 and 2006 and that drug cases were second only to immigration cases in infrequency of charge bargaining. *See* Brian D. Johnson, The Missing Link: Examining Prosecutorial Decision-Making Across Federal District Courts 56, 63, 71–72 (2014) (unpublished report, National Institute of Justice), Grant No. 2010-IJ-CX-0012, https://www.ncjrs.gov/pdffiles1/nij/grants/245351.pdf [https://perma.cc/X3VS-RD4J]. An earlier, qualitative study of Federal Sentencing Guidelines circumvention practices in ten districts found that Guidelines circumvention occurred in approximately 20% to 35% of cases resolved by guilty plea and that of the various methods of circumventing Guidelines and mandatory penalties, charge bargaining was "the most important." *See* Stephen J. Schulhofer & Ilene H. Nagel, *Plea Negotiations Under the Federal Sentencing Guidelines: Guideline Circumvention and Its Dynamics in the Post*-Mistretta *Period*, 91 NW. U. L. REV. 1284, 1290–94 (1997).

27. *See* Ouziel, *supra* note 2, at 1093–94 (explaining the process by which the prosecution exerts control over the facts found at sentencing).

28. *See supra* notes 9–11 and accompanying text; Ouziel, *supra* note 2, at 1095 ("[P]recisely because it is the only data we have on federal . . . offender characteristics, sentencing data has become, for better or worse, the 'facts' about federal . . . prisoners.").

offenders is both significant and—at least for those outside the cadre of federal criminal justice system "insiders"[29]—probably quite surprising.

This divergence between the ideals and realities of federal criminal prosecution is at the heart of the problems Baer identifies—problems of expression, democratic legitimacy and allocations of institutional power. Federal criminal law's expressive power is undermined when legal outcomes are out of sync with public expectations. Democratic legitimacy suffers when prosecutors and agents do not fulfill Congress's legislative intent. Federal prosecutors amplify their power when they prosecute a larger range of offense conduct, from the most serious to the less so. While Baer locates these problems in ungraded penal statutes, one could just as easily place them at the feet of the agents and prosecutors who choose what cases to pursue.

This is the other path to the problems of expression, legitimacy and prosecutorial power: the path that begins not with statutes, but with discretionary choices of how statutes will be leveraged. This is not to say Baer's thesis is wrong; to the contrary, it seems quite right. It is simply to ask where reform should lie. Should we change federal penal statutes to better reflect enforcement realities by adding misdemeanor provisions or other lower degrees of culpability? Or should we endeavor to change enforcement patterns to better effectuate statutes' aims?

II. Choosing Among Solutions

Putting aside the issue of Congressional capacity to enact substantive penal reform, there are clearly upsides to a federal misdemeanor provision. Baer discusses them at length,[30] and I won't revisit them here. Instead, I want to consider her prescription's potential effects on the exercise of enforcement discretion.

For instance: Would the type of frauds prosecuted by the feds be the same, save that a substantial portion (say, one third[31]) get classified as misdemeanors? And if a substantial portion were so classified, would the public support these federal prosecutions or criticize them as a waste of taxpayer dollars? Alternatively, if either the misdemeanor label on its own or a negative public reaction to its use ends up pushing federal prosecutors away from smaller-scale fraud investigations, what result then? Would federal prosecutors turn their focus to more serious fraud offenses, or would the lightened docket free them to focus on other federal priorities entirely, such as drug and immigration prosecutions? Or would it simply result in a lower federal criminal docket overall?

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29. *See* STEPHANOS BIBAS, THE MACHINERY OF CRIMINAL JUSTICE 30–40 (2012) (defining as "insiders" prosecutors, judges, and defense attorneys, who understand and control the workings of the criminal justice system to the exclusion of the public).

30. *See* Baer, *supra* note 1, at 253–65, 273–76 (discussing the advantages of graded statutes generally and the potential benefits of a federal misdemeanor fraud provision).

31. *See supra* notes 6 and accompanying text.

We should, in other words, take seriously the expressive value of a misdemeanor carve-out for fraud prosecutions—not just for the public and defendants, but also for prosecutors and agents. Among other things, over time it will likely steer agents and prosecutors away from cases in its ambit. And while that might at first blush seem desirable, there are ramifications worth considering.

One is the effect on larger fraud prosecutions. Some of the biggest fraud prosecutions in recent years were precipitated by corporate collapse, not lower-level accomplices turned.[32] But prosecuting large-scale frauds only after they have exacted considerable damage is not, from a market-health or victim standpoint, the most effective mode of enforcement. Laws and other enforcement structures ought to encourage and enable prosecutors to build higher-level fraud cases from the bottom-up, before massive financial damage and disruption occurs. Such bottom-up case building will require opening investigations into seemingly smaller frauds that, only upon deeper examination and evidence-collection, reveal themselves in full.

Second, in the fraud context specifically, large numbers of small cases involving similar fraudulent conduct can be bellweathers of a more widespread pandemic. For instance, the Department of Justice's anemic enforcement of mortgage foreclosure fraud on the heels of the 2008 financial crisis was later attributed, in part, to a reluctance to exert investigatory resources on seemingly lower-level cases.[33] Yet these small cases turned out

32. The investigation of Bernie Madoff, the architect of the largest Ponzi scheme in American history, began only after his scheme unraveled and he confessed to his sons. *See* U.S. SEC. & EXCH. COMM'N, OFFICE OF INVESTIGATION, OIG-509, INVESTIGATION OF FAILURE OF THE SEC TO UNCOVER BERNARD MADOFF'S PONZI SCHEME, at 20–22, 265, 267 (2009), http://www.sec.gov/news/studies/2009/oig-509.pdf [https://perma.cc/JT6Q-AANV]; *see also* James Bandler & Nicholas Varchaver, *How Bernie Did It*, FORTUNE (Apr. 30, 2009), http://archive.fortune.com/2009/04/24/news/newsmakers/madoff.fortune/index.htm [https://perma.cc/4KT3-JK3G] ("[I]f Madoff had still enjoyed access to large sums of cash in December, he would have continued paying his investors. The collapse of a Ponzi scheme means there is no money left. In the end, victims will likely collect only a tiny fraction of what they lost . . . ."). The major corporate accounting fraud scandals of the early 2000s were investigated and prosecuted only after the uncovered frauds caused the subject companies' stock prices to plummet. *See, e.g.*, Paul Adams, *WorldCom Fraud Was Brazen, Easy to Spot, Experts Say*, BALT. SUN (June 27, 2002), https://www.baltimoresun.com/business/bal-bz.accounting27jun27-story.html [https://perma.cc/WW56-3F8M] (reporting a similar series of events in the WorldCom fraud investigation); Carrie Johnson, *Former CEO of Rite Aid to Enter Guilty Plea*, WASH. POST (June 17, 2003), https://www.washingtonpost.com/archive/business/2003/06/17/former-ceo-of-rite-aid-to-enter-guilty-plea/8c3153e0-b767-4f9b-a6c0-da1534fb7e3f/?noredirect=on&utm_term=.60693d7f12de [https://perma.cc/EM4T-E83N] (describing how Rite- Aid executives' massive accounting fraud was ultimately outed by company's own accountants, resulting in a massive sell-off of Rite-Aid stock and subsequent federal investigation); Joseph Kahn & Jonathan D. Glater, *ENRON'S COLLAPSE: THE OVERVIEW; Enron Auditor Raises Specter of Crime*, N.Y. TIMES (Dec. 13, 2001), https://www.nytimes.com/2001/12/13/business/enron-s-collapse-the-overview-enron-auditor-raises-specter-of-crime.html [https://perma.cc/L48C-XCFE] (reporting a similar series of events in the Enron fraud investigation).

33. *See* U.S. DEP'T OF JUSTICE OFFICE OF THE INSPECTOR GEN. AUDIT DIV., AUDIT OF THE DEPARTMENT OF JUSTICE'S EFFORTS TO ADDRESS MORTGAGE FRAUD 9–11 (Mar. 2014),

to be tentacles of a pervasive fraud by lenders that pushed millions of Americans out of their homes.[34] Indeed, one wonders whether the existence of a misdemeanor provision would have further depressed the Department of Justice's mortgage fraud prosecutions, notwithstanding the importance to homeowners' security and the economy's health.

In short, not all small cases are alike. There are undoubtedly some smaller fraud prosecutions the feds should not have expended resources bringing, and there are surely many more they could have, and should have, pursued. Statutes, drafted *ex ante* and in blunt terms,[35] are not very good at helping prosecutors sort one from the other. Even a statute that sorted by *mens rea* as opposed to loss amount would sometimes mis-signal; relative culpability and mental state do not always move in tandem.[36]

There are risks, then, to aligning federal fraud statutes with federal fraud enforcement. An alternative approach would seek to align federal enforcement with the statutes' overarching aims.

This, admittedly, is an ambitious project, one that requires a deep dive into the institutional incentives and capacities currently guiding federal fraud enforcement along with a searching examination of what, exactly, Congress and the Executive Branch would wish of fraud enforcement in an ideal world. Yet that investment is well worth our time. It should lead to discussions about

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https://oig.justice.gov/reports/2014/a1412.pdf [https://perma.cc/W9TQ-6TYY] [hereinafter OIG AUDIT] ("According to some Special Agents, the emerging foreclosure rescue schemes do not typically have high dollar loss amounts . . . and such cases may not meet certain USAO prosecutorial thresholds. . . . [T]he sheer volume of mortgage fraud [suspicious activity reports] as compared to actual case initiations during this time frame may indicate significant mortgage fraud cases were going unaddressed . . . .").

34. *See generally* DAVID DAYEN, CHAIN OF TITLE: HOW THREE ORDINARY AMERICANS UNCOVERED WALL STREET'S GREAT FORECLOSURE FRAUD (2016); *see also* OIG AUDIT, *supra* note 33, at 17 ("Although distressed homeowner fraud cases may involve low dollar losses, we were told that they can cause significant harm to communities throughout the United States.").

35. *See* Adam J. Kolber, *The Bumpiness of Criminal Law*, 67 ALA. L. REV. 855, 862 (2016) ("The all-or-nothing nature of statutory elements contributes to the bumpiness of criminal law. An element is either satisfied or not.").

36. *See* Douglas N. Husak & Craig A. Callender, *Wilful Ignorance, Knowledge, and the "Equal Culpability" Thesis: A Study of the Deeper Significance of the Principle of Legality*, 1994 WIS. L. REV. 29, 55 (1994) ("[T]he culpability of wilfully ignorant defendants is highly sensitive to the facts of their particular circumstances. Some wilfully ignorant defendants may be just as culpable as defendants who act knowingly, while others may be less culpable. Still others may even be *more* culpable than defendants who act knowingly.") (misspelling of willful in original); Ira P. Robbins, *The Ostrich Instruction: Deliberate Ignorance as a Criminal Mens Rea*, 81 J. CRIM. L. & CRIMINOLOGY 191, 234 n.265 (1990) (offering a hypothetical in which a person willfully blind to the contents of a suitcase he carries on a plane may be more culpable than if he intentionally packed it with narcotics, as in the willful blindness scenario the suitcase could have contained a bomb).

appropriations,[37] budgeting,[38] investigatory outsourcing,[39] and the relative worth of criminal prosecution over other methods of fraud deterrence.[40] It should also lead us to more granular dissections of accountability measures.[41] Prosecutorial accountability is particularly challenging in the white-collar crime arena, to be sure,[42] but the relative dearth of internal oversight is jarring.[43] We could do better.

To be sure, this approach has drawbacks too—not least of which is the challenge of harnessing leverage points spread across different branches and institutions whose enforcement preferences may not always align. But if harnessed, these leverage points have significant benefits over statutory grading. Unlike debates over statutory penal reform, which can quickly be hijacked by interest groups and political pressures,[44] discussions about prosecutorial resource expenditures tend to unfold largely below the radar, allowing for more thoughtful deliberation. Resource-titration is also more nimble than statutory reform: Congress and executive branch actors can direct fraud enforcement more precisely and adapt it more quickly to

37. *See generally* Daniel C. Richman, *Federal Criminal Law, Congressional Delegation, and Enforcement Discretion*, 46 UCLA L. REV. 757 (1999) (discussing appropriations as a limitation on federal enforcement discretion).

38. On the immense power of the White House's Office of Management and Budget ("OMB") to mold agency policy through budgetary processes, see Eloise Pasachoff, *The President's Budget as a Source of Agency Policy Control*, 125 YALE L.J. 2182, 2186 (2016).

39. David S. Hilzenrath, *Justice Department, SEC Investigations Often Rely on Companies' Internal Probes*, WASH. POST (May 22, 2011), https://www.washingtonpost.com/business/economy/justice-department-sec-investigations-often-rely-on-companies-internal-probes/2011/04/26/AFO2HP9G_story.html?utm_term=.6474aa032a82 [https://perma.cc/FXD6-3MS4].

40. *See* Daniel C. Richman, *Corporate Headhunting*, 8 HARV. L. & POL'Y REV. 265, 280 (2014); Miriam H. Baer, *Choosing Punishment*, 92 B.U. L. REV. 577, 607–08 (2012).

41. *See* Ouziel, *supra* note 2, at 1126–29; Baer, *supra* note 40, at 599 ("[*A*]*t the policy level*, punishers have a fair amount of latitude to do as they please, in part because we lack reliable and legitimate methods for measuring and testing retributive policy. Our metrics are not much more sophisticated than tabulating annual enforcement actions, criminal cases, convictions, and fines and pointing out particularly salient wins or losses.").

42. *See* Richman, *supra* note 40, at 268 ("[S]ince a financial collapse is not itself evidence of criminal conduct, and white collar criminal activity is rarely revealed with any clarity except by those responsible for prosecuting crimes, how does one assess the adequacy of those prosecutorial efforts?").

43. In the eight-year period since 2010, the DOJ's Office of Inspector General produced a single report on anything even approaching fraud enforcement. *See generally* OIG AUDIT, *supra* note 33. That report, a 2014 audit of the Department's mortgage fraud prosecutions, revealed an overall lack of compliance with Congressional directives and Main Justice's own stated priorities, as well as systematic failure to even track its own mortgage fraud workload. *See id.* at i–iii. In 2018 alone, the DOJ's internal watchdog published the results of 60 audits, in addition to numerous investigations. (All DOJ OIG reports from 1994-2019 are available at https://oig.justice.gov/reports/all.htm.)

44. *See generally* LISA L. MILLER, THE PERILS OF FEDERALISM: RACE, POVERTY, AND THE POLOTICS OF CRIME CONTROL 49-84 (2008) (exploring the role of interest groups in the federal criminal legislative process); *see also* Carl Hulse, *Why the Senate Couldn't Pass a Crime Bill Both Parties Backed*, N.Y. TIMES (Sept. 16, 2016), http://www.nytimes.com/2016/09/17/us/politics/senate-dysfunction-blocks-bipartisan-criminal-justice-overhaul.html?_r=0 [https://perma.cc/U6JX-2QD8].

changing circumstances. And, with the right sort of evaluative metrics, they can ultimately make fraud enforcement more accountable.

Baer, of course, has herself long urged more careful consideration of the effects of prosecutorial decision-making on the ecosystem of white-collar crime.[45] With this article, Baer pivots to statutes, and in so doing gives us a new and useful lens through which to understand the challenges and pitfalls of federal fraud enforcement. As we take advantage of that lens, though, let us not neglect the larger picture, in which the decision making of prosecutors and agents is paramount.

45. *See generally* Miriam Hechler Baer, *Cooperation's Cost*, 88 WASH. U. L. REV. 903 (2011); Miriam Hechler Baer, *Governing Corporate Compliance*, 50 B.C. L. REV. 949 (2009).