

# CRIMINAL RECORDKEEPING

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## ABSTRACT

*Business managers must create and keep records for decision-making. Yet doing so presents an obvious problem for those who manage illegal businesses: their records would make for powerful evidence in the hands of prosecutors. That problem raises a question—why would one knowingly create and keep such records when their mere existence risks detection and sanction? The answer, in short, is that the interaction of illicit activity’s complexity and continuity compels recordkeeping. A business, including a criminal one, cannot be managed without adequate information about its operations, obligations, and condition. Just how complex and long-lived its affairs are will drive the scale and scope of its recordkeeping requirements.*

*Beyond these high-level intuitions, this Article contributes a theory of how the trueness or falsity of criminal business records, as well as the organizational settings in which they occur, shape their managerial uses and associated criminal-legal risks. This theory in turn yields principles for deterring illicit activity in organizations. When such activity is the kind enabled by recordkeeping, it can be prevented, or at least mitigated, by policies that inhibit the production of business records. It can also be countered by policies that encourage those records’ retention. Despite the contradiction implied by these two principles, together they promote ex ante deterrence and ex post detection and sanction. Although such interventions can be directed at any organizationally complex and long-lived illicit activity, their greatest promise is in informing compliance policies, practices, and programs in licit organizations (like large corporations) that already are obliged, or that seek, to proactively prevent law violations.*

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*“Is you taking notes on a criminal f—ing conspiracy? F— is you thinking, man?”*

Stringer Bell, *The Wire*<sup>1</sup>

## INTRODUCTION

In March 2023, Donald Trump became the first former U.S. president to be charged with a crime.<sup>2</sup> His indictment followed well-publicized investigations into whether he attempted to subvert the 2020 presidential

1. *The Wire: Straight and True* (HBO television broadcast Oct. 17, 2004).

2. Aaron Katersky, John Santucci & Katherine Faulders, *Trump Becomes 1st Current or Former President to Be Indicted*, ABC NEWS (Mar. 30, 2023, 6:24 PM), <https://abcnews.go.com/US/trump-1st-current-former-president-indicted-sources/story?id=97860580> [https://perma.cc/JUM7-NMBW].

election in Georgia,<sup>3</sup> conspired to prevent the peaceful transfer of power,<sup>4</sup> and secreted classified documents to his post-presidency home.<sup>5</sup> Although he was eventually indicted in each case, his first indictment resulted from none of those investigations.<sup>6</sup> Instead, a New York state grand jury charged the former president with thirty-four counts of falsifying business records during his 2016 presidential campaign as part of an alleged effort to cover up an extramarital affair.<sup>7</sup> More specifically, Trump was charged with violating a New York statute that prohibits making a “false entry in the business records of an enterprise” and makes doing so with an intent to commit or conceal another crime (in his case, violations of state elections, state tax, or federal campaign-finance law) a felony.<sup>8</sup>

Commentators were quick to pronounce the New York district attorney (DANY)’s case against Trump to be a “weak” one.<sup>9</sup> Those pronouncements, however, rarely focused on the sufficiency of the evidence DANY would

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3. NPR’s Washington Desk, *A Special Grand Jury Has Been Granted in Fulton County’s Trump Investigation*, NPR (Jan. 24, 2022, 6:05 PM), <https://npr.org/2022/01/24/1075429352/special-grand-jury-fulton-county-da-trump-election-probe> [<https://perma.cc/CXG7-MN8S>].

4. *See generally* OFF. OF THE ATT’Y GEN., U.S. DEP’T OF JUST., ORD. NO. 5559-2022, APPOINTMENT OF JOHN L. SMITH AS SPECIAL COUNSEL 1 (Nov. 18, 2022).

5. *Id.* at 2.

6. Indictment, *State v. Trump*, Clerk No. 23SC188947 (Ga. Super. Ct. Fulton Cnty. filed Aug. 14, 2023); Superseding Indictment, *United States v. Trump*, No. 1:23-cr-00257 (D.D.C. filed Aug. 27, 2024); Superseding Indictment, *United States v. Trump*, No. 9:23-cr-80101 (S.D. Fla. July 27, 2023), *dismissed*, Order Granting Motion to Dismiss, No. 9:23-cr-80101 (S.D. Fla. July 15, 2024), *appeal filed*, No. 24-12311 (11th Cir. July 17, 2024).

7. Indictment, *People v. Trump*, No. 71762-24 (N.Y. Sup. Ct. Apr. 30, 2024).

8. *See* Statement of Facts at 1, *People v. Trump*, No. 71762-24 (N.Y. Sup. Ct. Apr. 30, 2024); N.Y. PENAL LAW §§ 175.05, 175.10 (McKinney 2024). The act also prohibits altering, deleting, or destroying business records; failing to make a true entry when one is affirmatively required to do so; or preventing the making of true entries. *See* Section IV.A.1 for further discussion of these statutes, the conduct they do (and do not) prohibit, and their adoption by other states.

9. *See, e.g.*, Jose Pagliery, *Trump’s Bid to Sink the Manhattan DA’s Case Has Already Made It Stronger*, DAILY BEAST (Aug. 14, 2023, 5:28 PM), <https://thedailybeast.com/trumps-bid-to-sink-the-manhattan-da-alvin-braggs-case-has-already-made-it-stronger> [<https://perma.cc/98U5-TF7A>] (“For months, critics of Manhattan District Attorney Alvin Bragg Jr.’s case have called it weak because the case criminally charges Trump with faking business records—a lowly misdemeanor only bumped up to a felony on a technicality.”); David Orentlicher, *Opinion: Why the Manhattan District Attorney’s Case Against Trump Is So Weak*, CNN: OP. (Apr. 5, 2023, 11:45 AM), <https://www.cnn.com/2023/04/05/opinions/weakness-manhattan-district-attorney-trump-case-orentlicher/index.html> [<https://perma.cc/7N9C-BK4T>]; Victoria Bekiempis, *Many Top NYC Attorneys Loathe Trump—But Don’t Like Bragg’s Chances*, ROLLING STONE (Mar. 30, 2023), <https://www.rollingstone.com/politics/politics-features/trump-indictment-alvin-bragg-stormy-daniels-1234702199> [<https://perma.cc/KEJ4-DDBE>]; Kyle Cheney, Erica Orden & Josh Gerstein, *Bragg’s Case Against Trump Hits a Wall of Skepticism—Even from Trump’s Critics*, POLITICO (Apr. 5, 2023, 2:49 PM), <https://www.politico.com/news/2023/04/05/alvin-bragg-case-against-trump-00090602> [<https://perma.cc/Q2EU-GUZN>]; Jose Pagliery, *Manhattan DA Insiders Worry the Trump Hush Money Case Is Weak Sauce*, DAILY BEAST (Mar. 29, 2023, 8:52 AM), <https://www.thedailybeast.com/manhattan-district-attorney-insiders-worry-the-trump-stormy-daniels-alvin-bragg-hush-money-case-is-weak-sauce> [<https://perma.cc/2DPM-7PBK>].

marshal to prove the charged offenses.<sup>10</sup> Rather, they often turned on the charged statute itself, as if to ask, in disbelief, “is the first indictment of a former president really going to be over a *mere* recordkeeping violation?”<sup>11</sup> For those holding that view, if a prosecutor were to pursue such a historic prosecution, it should be about substantive crimes rather than violations derivative of some other conduct.<sup>12</sup> Is a prosecution over falsifying business records not a sign, skeptics might ask, that DANY could not make a case based on other state offenses that Trump had been accused of, like tax, bank, and charity fraud?<sup>13</sup> And if not charging those serious, substantive offenses, why bother prosecuting mere recordkeeping crimes at all?

These questions around *The People v. Donald J. Trump* were perhaps partly quieted by the fact that in May 2024, a jury convicted Trump of all thirty-four felony counts.<sup>14</sup> But they still invite a deeper consideration of the

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10. See, e.g., Jed Handelsman Shugerman, *The Trump Indictment Is a Legal Embarrassment*, N.Y. TIMES (Apr. 5, 2023), <https://www.nytimes.com/2023/04/05/opinion/trump-bragg-indictment.html> [<https://perma.cc/DQX8-5BCN>].

11. But see *The Situation Room* (CNN television broadcast Aug. 29, 2018) (interview with U.S. Representative Adam Schiff regarding former Trump attorney Michael Cohen’s guilty plea in connection with the scheme that DANY accused Trump of being part of) (“I think people need to understand, these were not mere bookkeeping errors . . . This was a deliberate decision made after discussion to violate the laws by hundreds of thousands of dollars . . . that very well may have determined the outcome of the [2016 presidential] election.”).

12. See Peter Baker, *Trump’s Case Has Broad Implications for American Democracy*, N.Y. TIMES (Aug. 1, 2023), <https://www.nytimes.com/2023/08/01/us/politics/trump-charged-jan-6-election-democracy.html> [<https://perma.cc/A2KX-SPFY>] (“But as serious as hush money and classified documents may be, this third indictment in four months gets to the heart of the matter, the issue that will define the future of American democracy.”); Andrew Goudsward, *Boies Warns Top Attorneys Against ‘Toxic’ Influence of Politics in Law*, REUTERS (May 24, 2023, 8:37 PM), [reuters.com/legal/government/bush-v-gore-lawyer-boies-says-ny-trump-case-undermines-rule-law-2023-05-24/](https://reuters.com/legal/government/bush-v-gore-lawyer-boies-says-ny-trump-case-undermines-rule-law-2023-05-24/) [<https://perma.cc/GZJ2-RRUJ>] (quoting prominent Democratic attorney David Boies as saying that DANY should clear a “higher hurdle” before charging a former president); Mike Murphy (@murphymike), X (June 9, 2023, 9:21 PM), <https://twitter.com/murphymike/status/1667356279373991936> [<https://perma.cc/R426-2BUR>] (“GOP primary voters know the difference [between] a lib[er]al NYC DA pushing a weak charge and piles of secret [national-security] files piled up by toilet [sic] in a storage room because Trump likes to play needy show and tell.”).

13. See generally Michael R. Sisak, *Judge Rules Donald Trump Defrauded Banks and Insurers While Building Real Estate Empire*, AP NEWS (Sept. 26, 2023, 7:41 PM), <https://apnews.com/article/donald-trump-letitia-james-fraud-lawsuit-1569245a9284427117b8d3ba5da74249> [<https://perma.cc/V4PJ-PB3V>]; Michael R. Sisak, *Trump Organization Fined \$1.6 Million for Tax Fraud*, AP NEWS (Jan. 13, 2023, 11:18 AM), <https://apnews.com/article/politics-legal-proceedings-new-york-city-donald-trump-manhattan-e2f1d01525dafb64be8738c8b4f32085> [<https://perma.cc/294A-9WJK>]; Luis Ferré-Sadurní, *Trump Pays \$2 Million to 8 Charities for Misuse of Foundation*, N.Y. TIMES (Dec. 10, 2019), <https://www.nytimes.com/2019/12/10/nyregion/trump-foundation-lawsuit-attorney-general.html> [<https://perma.cc/MTB9-PGY8>].

14. Verdict Sheet, *People v. Trump*, No. 71762-24 (N.Y. Sup. Ct. Apr. 30, 2024); see also Jed Shugerman, *I Thought the Trump Conviction Would Never Hold Up. But a Huge Problem Just Got Fixed*, SLATE (June 10, 2024, 10:00 AM), <https://slate.com/news-and-politics/2024/06/will-trump-conviction-be-overturned-appeal.html> [<https://perma.cc/JA9W-4393>]; see also Colbert I. King, Opinion, *The Jurors Just Rendered a Verdict on Bragg’s Critics, Too*, WASH. POST (May 31, 2024, 4:49

normative and pragmatic bases for criminalizing recordkeeping-related conduct. They also invite theorization of recordkeeping's role in criminal activity. This Article takes up those invitations. It observes that recordkeeping crimes are more than mere foot faults pursued when meatier offenses cannot be charged. Rather, this Article justifies recordkeeping prohibitions in connection with criminal activity because recordkeeping enables illicit conduct. In Trump's case, for instance, prosecutors alleged that recordkeeping misconduct enabled him to illicitly evade public-disclosure obligations and thus conceal information which might have been material to voters amidst a presidential election.<sup>15</sup>

Recordkeeping, in other words, can be necessary to the commission of more substantive violations. Although this point finds its readiest application in white-collar contexts, it applies with equal power to any illicit activity involving organizational complexity or continuity,<sup>16</sup> including organized street crime.<sup>17</sup> Trump, for example, has been convicted of recordkeeping offenses that, despite allegedly adulterous origins, are essentially white-collar in nature.<sup>18</sup> But as a criminal defendant, he finds company among a range of actors—from wayward accountants<sup>19</sup> to drug

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PM), <https://www.washingtonpost.com/opinions/2024/05/31/trump-trial-jurors-alvin-bragg-critics/> [<https://perma.cc/XR6K-9QFY>] (“Manhattan’s first Black district attorney, Bragg was widely painted as an ambitious Democrat who sought the national stage to take down a former GOP president, but who, legally speaking, was in over his head. That was essentially the narrative until late afternoon on Thursday, when 12 Manhattan jurors spoke. After watching five weeks of trial, and sorting through mounds of evidence and witness testimony, they found Trump guilty on all 34 counts of falsifying business records to conceal a hush money payment to an adult-film actress.”).

15. See *supra* note 7 and accompanying text; Statement of Facts, *supra* note 8, at 1; see also Post-Summation Instructions, *People v. Trump*, No. 71762-24 (N.Y. Sup. Ct. Apr. 30, 2024).

16. Cf. *H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 241 (1989) (defining “continuity” in the context of racketeering activity as “both a closed- and open-ended concept, referring either to a closed period of repeated conduct, or to past conduct that by its nature projects into the future with a threat of repetition”).

17. Scott H. Decker & David C. Pyrooz, *Gangs: Another Form of Organized Crime?*, in *THE OXFORD HANDBOOK OF ORGANIZED CRIME* 270, 271 (Letizia Paoli ed., 2014) (situating street gangs within a universe of organized crime that includes “transnational organized crime, drug smuggling networks, human trafficking and smuggling operations, and terrorist groups”).

18. The definition of “white-collar crime” is contested among criminologists, legal scholars, and law-enforcement agencies, but Trump’s conduct—financial misdealing in the context of an election campaign—would seem to satisfy any such definition. See David O. Friedrichs, *White Collar Crime: Definitional Debates and the Case for a Typological Approach*, in *THE HANDBOOK OF WHITE-COLLAR CRIME* 16 (Melissa L. Rorie ed., 2020) for a review of the definitional question.

19. See Letter from U.S. Dep’t of Just., Crim. Div., to Jeffrey H. Knox, Partner, Simpson Thatcher & Barlett LLP, and Eric Corngold, Partner, Friedman Kaplan Seiler & Adelman LLP, at A-2 (Mar. 5, 2019) [hereinafter Bankrate NPA] (concluding a non-prosecution agreement between prosecutors and Bankrate, Inc., whose CFO led an accounting fraud that he managed via a “cushion” spreadsheet).

dealers<sup>20</sup> to terrorists<sup>21</sup> and even to abortion-rights outlaws<sup>22</sup>—for whom recordkeeping was helpful, even necessary, for carrying on illegal ends. That is, up to the point that those records risked turning state’s evidence.

So why do participants in criminal (or quasi-criminal)<sup>23</sup> activities create and keep records that could become potent evidence against them, thus increasing their chances of being caught, convicted, and punished? This Article answers that question with a novel theory of recordkeeping as essential to organizationally complex and long-lived illicit activity.<sup>24</sup> This theory points to the use of records by illicit actors as being criminogenic in that it enables and increases returns to crime.<sup>25</sup> That finding makes criminal recordkeeping a meaningful lens for thinking about complex illicit activity. Indeed, against a conventional wisdom that criminal actors do not, or at least ought not, keep records, this Article shows that indeed they do, and more, that criminal recordkeeping can be boundedly rational behavior.<sup>26</sup> More pragmatically, this theory informs efforts to deter, detect, and sanction that activity.<sup>27</sup> And given that illicit acts often occur inside otherwise lawful organizations, the Article yields further applications for corporate compliance.<sup>28</sup> In presenting its theory of criminal business records, the Article proceeds in three parts.

Part I theorizes why those involved in criminal activity choose to document their illicit acts. It identifies four reasons: (1) to manage activity,<sup>29</sup>

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20. See *infra* note 25.

21. See Benjamin Bahney, Renny McPherson & Howard J. Shatz, *Glimpse of Bin Laden Techniques in Captured Records of Al-Qa’ida in Iraq*, RAND BLOG (May 27, 2011), <https://www.rand.org/pubs/commentary/2011/05/glimpse-of-bin-laden-techniques-in-captured-records.html> [<https://perma.cc/8TEE-NMA2>].

22. See generally LAURA KAPLAN, *THE STORY OF JANE: THE LEGENDARY UNDERGROUND FEMINIST ABORTION SERVICE* (1995) (chronicling the mission and organization of the Jane Collective, a group that provided abortion services in Chicago, Illinois when doing so was still illegal in that state).

23. For purposes of this Article, quasi-crimes are serious regulatory violations—like tax evasion or securities fraud—that have criminal analogs or that may be prosecuted both civilly and criminally. See CELIA WELLS, *CORPORATIONS AND CRIMINAL RESPONSIBILITY* 7–8 (2d ed. 2001) (comparing crimes and quasi-crimes).

24. See *infra* Section I.A.

25. See Steven D. Levitt & Sudhir Alladi Venkatesh, *An Economic Analysis of a Drug-Selling Gang’s Finances*, 115 Q.J. ECON. 755, 764 (2000) (reporting on a drug-selling gang’s financial records as “serv[ing] two purposes: (1) a tool for managing the day-to-day operations of the gang, much as a CEO relies on management information systems (MIS) data in a firm, and (2) a means of tracking operations for reporting to higher levels in the gang hierarchy”).

26. This notion is sometimes referred to as the “Stringer Bell rule.” See *infra* note 196 and accompanying text. But the lesson of the rule is overinterpreted that one should never keep records related to criminal activity. Consistent with the theory presented in Part I, however, a more apt interpretation is that one should not keep gratuitous records about criminal activity, or that records should not be kept by subordinates without the approval of management.

27. See *infra* Section IV.A.

28. See *infra* Section IV.B.

29. See *infra* Section I.A.1.

(2) to scale activity,<sup>30</sup> (3) to evade controls against activity,<sup>31</sup> and (4) to conceal activity.<sup>32</sup> These four purposes reveal commonalities between recordkeeping in licit and illicit contexts. Both contexts require records for management and scaling in the form of recruiting more participants and interacting with more counterparties.<sup>33</sup> But differences also emerge between these two qualitatively distinct organizational contexts. Although organizationally complex activity requires recordkeeping as a prerequisite for management or scale, licit activity does not require evasion of controls (because controls are meant to prevent *illicit* activity) or concealment (because licit activity is not subject to punishment).

In either case, the need to *create* business records is driven by organizational complexity,<sup>34</sup> whereas the need to *keep* those records is driven by organizational longevity.<sup>35</sup> I explain that the decision to create records depends on whether their managerial benefits will outweigh their production costs.<sup>36</sup> For illicit activity, production costs include not only the literal, direct costs of creating a record (which licit organizations bear too) but also the increased risk of detection and sanction that follows that very act of creation.<sup>37</sup> After records are created, whether they are kept depends on a similar benefit-cost analysis between the managerial uses of retained records and the costs from retaining them.<sup>38</sup> Again, for illicit organizations, retention costs include increased risk of detection and sanction if, for instance, records are captured by law enforcement or disclosed by an informant.<sup>39</sup> Given the illegal nature of criminal enterprises and their consequent need to avoid detection, their recordkeeping imposes considerably higher production and retention costs compared to

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30. That is, to increase the organizational complexity of the illicit activity to include increasing numbers of participants and counterparties (including those who might not know that they are interacting with a criminal enterprise and would object to doing so). *See infra* Section I.A.2.

31. *See infra* Section I.A.3.

32. *See infra* Section I.A.4.

33. *Cf.* Tim Mironov, *A Data-Driven Approach to Scaling Your Company*, VENTUREBEAT (Apr. 20, 2022, 5:10 PM), <https://venturebeat.com/data-infrastructure/a-data-driven-approach-to-scaling-your-company> [<https://perma.cc/J322-YAXV>] (“Implementing data-driven processes lets [startups] base decisions on facts from the beginning and can support pivots that are often necessary.”).

34. For this Article, by “complexity” I mean the product of actors (including managers, employees, and agents) and the actions they take. For a fuller overview on the interdisciplinary study of organizational complexity, see STIG O. JOHANNESSEN, *COMPLEXITY IN ORGANIZATIONS: A RESEARCH OVERVIEW* (2022).

35. Clement Mintah, Mohamed Gabir, Felicia Aloo & Elvis Kwame Ofori, *Do Business Records Management Affect Business Growth?*, PLOS ONE, Mar. 10, 2022, at 1, 16 (reporting results that “business records management improves the long-term viability of a company”).

36. *See infra* Section I.B.

37. *See infra* Section I.B.

38. *See infra* Section I.B.

39. *See infra* Section I.B.

recordkeeping for lawful purposes. As Part III explains, however, those costs differ depending on organizational setting.

Part II considers the relationship between criminal *business records* and criminal *evidence*.<sup>40</sup> It distinguishes this Article's recordkeeping from other forms of evidence in that business records are *instrumental to* rather than the *by-product of* illegal activity.<sup>41</sup> Although this distinction does not exist as a matter of evidentiary law, it nevertheless possesses analytic power that could support anti-crime interventions that distinguish between instrumental and by-product evidence.<sup>42</sup> Part II further theorizes the distinction between true records that accurately reflect illicit acts and false records that obscure them.<sup>43</sup> Their differences point to two subsets of criminal recordkeeping. Whereas true records are useful for decision-making (such as by accounting for the enterprise's profits and losses and tracking its assets and liabilities), false records are useful for overcoming anti-crime controls and avoiding detection (such as by deceiving third parties into believing illicit transactions to be proper).<sup>44</sup>

Part III applies Part I's theory in the three settings in which criminal recordkeeping occurs. The first setting is an organization that is itself illicit and in which agents engage in illicit activity.<sup>45</sup> In that setting, recordkeeping takes place to facilitate illegal activity within an organization that itself has no lawful purpose. The second setting is a licit organization in which agents engage in illicit activity.<sup>46</sup> In that setting, recordkeeping takes place to facilitate illegal activity within an organization that otherwise has a lawful purpose. And the third setting is a licit organization in which agents engage in licit activity in an illicit way.<sup>47</sup> In that setting, recordkeeping takes place to facilitate lawful activity within a lawful organization, yet that lawful activity is performed in an unlawful way. Part III compares production and retention costs incurred in these three settings, which in turn informs the policy interventions called for in Part IV. In short, illicit activity in illicit organizations has high production costs and lower retention costs; illicit activity in licit organizations has both high production and retention costs; and licit activity in licit organizations, done illicitly, has low production costs and higher retention costs.<sup>48</sup>

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40. See *infra* Section II.A.

41. See *infra* Section II.A.

42. See *infra* Section II.A.

43. See *infra* Section II.B.

44. See *infra* Section II.B.

45. Like a drug-selling gang selling drugs. See *infra* Section III.A.

46. Like a construction company that pays bribes to obtain contracts. See *infra* Section III.B.

47. Like a public company preparing financial reports, albeit preparing them in ways that deceive investors. See *infra* Section III.C.

48. See *infra* Sections III.A–C.

Part IV explains that cost differentials between records used for licit or illicit purposes can be exploited for crime prevention and enforcement. Policy interventions that prevent production would at the margin deter crime and improve compliance *ex ante*, whereas interventions that encourage retention would enhance enforcement *ex post*.<sup>49</sup> One such policy intervention would be the revision of state and federal statutes that currently prohibit production of false records (like the statutes at the center of *People v. Trump*) to also prohibit the production of true records intended to enable criminal activity.<sup>50</sup> In its closing section, Part IV focuses on criminal business records in otherwise lawful organizations to show that these two principles especially apply in the context of corporate compliance policies, programs, and practices.<sup>51</sup>

### I. A THEORY OF CRIMINAL RECORDKEEPING

This Part theorizes why those engaged in a criminal enterprise<sup>52</sup> would create records that could help law enforcement detect and sanction them. It explains that, just like lawful enterprises,<sup>53</sup> a criminal enterprise must produce and retain business records<sup>54</sup> sufficient for its managers to both understand their financial and other conditions and make decisions they believe will maximize the enterprise's success.<sup>55</sup> In contrast, business records are unnecessary when activity is not complex or long-lived. In those

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49. See *infra* Section IV.A.

50. See Indictment, *supra* note 7; Statement of Facts, *supra* note 8.

51. See *infra* Section IV.B.

52. This Article uses the New York statute under which Trump was convicted for the definitions of “enterprise” and “business records.” An “enterprise,” (or “business,” “organization,” “firm,” or so on) is “any entity of one or more persons, corporate or otherwise, public or private, engaged in business, commercial, professional, industrial, eleemosynary, social, political or governmental activity.” N.Y. PENAL LAW § 175.00(1) (McKinney 2024). Although a “criminal enterprise” might in many cases be synonymous with a “criminal conspiracy,” the two are distinct. First, a criminal enterprise can comprise a single illicit actor, as the discussion of the Stauffer case, *infra* note 159, shows. More, some criminal conspiracies are not business-like in nature and so are outside this Article’s scope. A murder-for-hire, for example, is a conspiracy, but it would lack business-like ends, complexity, or longevity.

53. Indeed, state corporate laws assume that a business entity will keep “books and records.” See, e.g., DEL. CODE ANN. tit 8, § 220 (West 2024).

54. A “business record” is “any writing or article, including computer data or a computer program, kept or maintained by an enterprise for the purpose of evidencing or reflecting its condition or activity.” N.Y. PENAL LAW § 175.00(2) (McKinney 2024).

55. That is, whatever “success” means for such an enterprise. Typically, but not always, it will be financial profit. Cf. Oliver Hart & Luigi Zingales, *Companies Should Maximize Shareholder Welfare Not Market Value*, 2 J.L. FIN. & ACCT. 247 (2017). In some cases, though, non-financial goals might drive illicit activity. Members of the Jane Collective, for instance, undertook as a social mission organizationally complex, continuous, and illicit activity to provide abortion services. See KAPLAN, *supra* note 22.

cases, information needed to manage either licit or illicit activity can be committed to memory.<sup>56</sup>

Business records hold four distinct purposes in a criminal enterprise; the first two are shared with lawful activities. Those purposes are to manage activity,<sup>57</sup> to scale activity,<sup>58</sup> to evade controls against activity,<sup>59</sup> and to conceal activity.<sup>60</sup> As this Part explains, producing and retaining business records come with costs. For lawful activity, these costs are fairly modest, such as the labor expense associated with preparing a financial report or the computing expense associated with maintaining an electronic database.<sup>61</sup> For illicit activity, however, such costs are substantial because they directly relate to participants' risks of being detected and sanctioned. Managing those costs, and their related risks, is thus of central importance to those involved in complex, long-lived illicit activity.<sup>62</sup>

#### A. *Why Make Criminal Business Records?*

Many unlawful business activities, apart from being illegal, are quite similar to those of lawful businesses. Purchasing and selling goods and services, earning revenue, compensating employees and contractors, marketing, receiving and extending credit, paying out profits to owners, and so on, are actions taken in both lawful and unlawful settings.<sup>63</sup> A retail pharmacy, for instance, must manage supplier relationships, track inventory, pay employees, and attend to customers, as must a drug-selling

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56. See Nelson Cowan, *Evolving Conceptions of Memory Storage, Selective Attention, and Their Mutual Constraints Within the Human Information-Processing System*, 104 PSYCH. BULL. 163, 165 (1988) ("Information fades from sensory storage rapidly; it may persist longer in short-term storage; and it may be permanent in long-term storage.").

57. See *infra* Section I.A.1.

58. See *infra* Section I.A.2.

59. See *infra* Section I.A.3.

60. See *infra* Section I.A.4.

61. A prime example of such direct costs includes the preparation of financial statements by a public company. The Securities and Exchange Commission, for instance, estimates that preparing an annual report on Form 10-K—the bulkiest part of which are financial statements—takes an average 2,249.36 people-hours. U.S. SEC. & EXCH. COMM'N, OMB NO. 3235-0063, FORM 10-K.

62. Cf. Justin J. Dintino & Frederick T. Martens, *The Process of Elimination: Understanding Organized Crime Violence*, 45 FED. PROB. 26, 28 (1981) ("[S]imilar to the licit organization, an illicit organization will seek to minimize unnecessary risks.").

63. But see Martin Gallagher, *Modelling Entrepreneurial Endeavour in the Nexus Between Terrorism and Organised Crime: Does Supporting Terrorism Present a Red Line in Organised Criminals Pursuit of Profit?*, in EXPLORING CRIMINAL AND ILLEGAL ENTERPRISE: NEW PERSPECTIVES ON RESEARCH, POLICY & PRACTICE 51, 61–62 (Gerard McElwee & Robert Smith eds., 2015) ("[A] belief could be formed that organised crime groups sound very like legitimate businesses. They aren't. . . . [T]hey have to take account of the threat of law enforcement activity, suffer from an inability to advertise and must constantly consider the prospect of robbery and violence from rivals . . .").

gang.<sup>64</sup> Because both commercial settings require tracking what has been done and how resources have been allocated toward an organizational purpose—namely, making profit from selling drugs—recordkeeping is just as necessary a function for criminal actors as it is for their law-abiding counterparts.<sup>65</sup>

That is not to say, of course, that *all* illicit activity requires recordkeeping, just as the same cannot be said of *all* lawful commercial activity. But activities that require managing resource allocation (complexity) or that happen over a period of time (longevity) require commensurate recordkeeping. Complexity and longevity force recordkeeping because, as they increase, they quickly outstrip mental analytical capacity.<sup>66</sup> A complex and ongoing activity simply generates too much data to manage in one's mind.<sup>67</sup> In other words, the scale and scope of recordkeeping needs is a function of the complexity and temporal horizon of the activity it supports.

Consider these comparisons. Selling one's unneeded furniture requires no accounting: sell the items, collect the cash, and that is it.<sup>68</sup> But even the smallest or most informal used-furniture *business*—as a going concern—requires at least some basic bookkeeping to track what is bought and sold and whether at a profit or loss.<sup>69</sup> A national furniture retailer with thousands of stores, in comparison, must keep staggering amounts of data to account for and manage what is bought and sold, employee labor, fixed costs, and

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64. See Levitt & Venkatesh, *supra* note 25, at 757 (“These data [on a drug-selling gang’s finances] were maintained by the leader of the group as a management tool for tracking the gang’s financial activities and for monitoring the behavior of gang members. Updated monthly, the data include breakdowns of costs and revenues into major components, as well as information on the distribution of profits as wages to gang members at different levels of the hierarchy.”).

65. See JASON RYAN, JACKPOT: HIGH TIMES, HIGH SEAS, AND THE STING THAT LAUNCHED THE WAR ON DRUGS 31 (2011) (quoting a former Drug Enforcement Administration agent) (“People involved heavily in the drug trade, particularly on the importation side, have a lot of overhead expenses: purchase of boats, airplanes, paying vessel captains and off-loaders, purchase/rental of stash houses, attorney’s fees, etc.”).

66. See J. E. (Hans). Korteling, G.C. van de Boer-Visschedijk, R.A.M. Blankendaal, R.C. Boonekamp & A.R. Eikelboom, *Human- Versus Artificial Intelligence*, 4 FRONTIERS A.I. 1, 3 (2021) (“Our intelligence is . . . relatively high compared to other animals, but in absolute terms it may be very limited in its physical computing capacity, albeit only by the limited size of our brain and its maximal possible number of neurons and glia cells.” (citation omitted)).

67. See *id.*

68. In their personal affairs, most individuals use cash-basis accounting to record income and expenses when they receive or make payments. See RAJ GNANARAJAH, CONG. RSCH. SERV., R43811, CASH VERSUS ACCRUAL BASIS OF ACCOUNTING: AN INTRODUCTION 3 (2014).

69. See *Basic Bookkeeping and Working with an Accountant*, WOLTERS KLUWER (Dec. 30, 2020), <https://www.wolterskluwer.com/en/expert-insights/basic-bookkeeping-and-working-with-an-accountant> [https://perma.cc/26BH-XBUU].

so on.<sup>70</sup> It will require elaborate financial systems and efforts for capturing, tracking, and summarizing all those data so as to support day-to-day business functions—like paying suppliers and employees—and for strategic managerial decision-making.<sup>71</sup> Those needs will include analyzing changes in the data over time.<sup>72</sup> A one-store furniture retailer, on the other hand, might have qualitatively similar recordkeeping needs, although it can get by with less elaborate financial systems to meet them. That function would explain the different recordkeeping requirements of, for instance, a local street-drug conspiracy<sup>73</sup> versus a pharmaceutical company engaged in a nationwide kickback scheme.<sup>74</sup> Both would be in the business of illegally selling drugs, but their recordkeeping needs would differ considerably.

Recordkeeping by illicit actors is criminogenic in that it enables and increases returns to crime.<sup>75</sup> Not only does it make some criminal activity *possible*, but more accurate and complete recordkeeping makes crime more *profitable* by enabling managers to make more efficient decisions. Greater returns to crime in turn incent more criminal activity.<sup>76</sup> These uses for recordkeeping are managerial in nature in that they permit managers to make decisions about and evaluate the success of criminal activity, both in current periods and retrospectively.<sup>77</sup> In that light, recordkeeping itself facilitates illicit conduct. This point reveals two purposes of criminal recordkeeping: (1) to manage<sup>78</sup> and (2) to scale illicit activity.<sup>79</sup> These

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70. See Kelly D. Martin et al., *Data Privacy in Retail*, 96 J. RETAILING 474, 474 (2020) (reporting that retailers collected thirty-three trillion gigabytes of data in 2018 and are projected to collect 175 trillion gigabytes in 2025).

71. Cf. *id.* (discussing the amount of data generated from daily business transactions).

72. See Thomas DeCarlo, Tirthankar Roy & Michael Barone, *How Sales Manager Experience and Historical Data Trends Affect Decision Making*, 49 EUR. J. MKTG. 1484, 1485 (2015) (“Sales managers often face decisions that involve predictions of future performance. In making such forward-looking decisions (e.g. those involving territory selection and salesperson hiring), managers frequently rely on historical data (e.g. past sales exhibited in certain segments or by certain salespeople) to develop inferences about future performance.”).

73. See Levitt & Venkatesh, *supra* note 25.

74. See, e.g., Deferred Prosecution Agreement at 21, *United States v. Insys Therapeutics, Inc.*, No. 1:19-cr-10191 (D. Mass. filed June 5, 2019) (“The Speaker Program included certain speaker practitioners who had the potential to prescribe [a powerful nasal-administered opioid] and was used to induce them to write more, medically unnecessary prescriptions in exchange for payment of money by Insys in the form of honoraria.”).

75. See Mirko Draca, Theodore Koutmeridis & Stephen Machin, *The Changing Returns to Crime: Do Criminals Respond to Prices?*, 86 REV. ECON. STUDS. 1228, 1255 (2019) (presenting results “suggest[ing] that the returns to illegal activity are an important input into criminal decision-making”).

76. Stephen Machin & Costas Meghir, *Crime and Economic Incentives*, 39 J. HUM. RES. 958, 975 (2004) (“All variables we tried reflecting incentives for committing crimes have significant and large impacts on crime rates: increased wages and deterrence measures reduce crimes, while *increases in the direct economic returns from crime increase criminal activity.*” (emphasis added)).

77. Cf. DeCarlo et al., *supra* note 72.

78. See *infra* Section I.A.1.

79. See *infra* Section I.A.2.

purposes are shared with licit enterprises, which also need to create and maintain records to conduct business. But unique to illicit activity, recordkeeping has two additional purposes: (3) to evade anti-crime controls<sup>80</sup> and (4) to conceal criminal activity.<sup>81</sup> The next four subsections take those purposes in turn.

### 1. *Managing Criminal Activity*

Most essentially, business records enable the management of business activity, including illicit activity. Consider the example of a corporate agent—a sales executive—who wishes to pay bribes to gain an unfair advantage for her employer in some contracting market.<sup>82</sup> Suppose that the agent reckons that smaller bribes paid over time to multiple persons will be more effective than paying the same amount in a lump sum to a single payee.<sup>83</sup> By doing so, she can corrupt more people to act in her favor and by staggering their compensation can ensure that they do so. With this approach, the agent will likely need some ledger of (1) how much she has paid (2) to whom and (3) when, so as to assess whether she is receiving the *quo* meant for her *quid*.<sup>84</sup> Although transactions from a simple scheme could be committed to memory, as the scheme’s complexity tests the limits of human recollection, a more delible ledger would be needed.<sup>85</sup> If this repeat, multi-payee scheme generates greater opportunities for the employer firm

80. See *infra* Section I.A.3.

81. See *infra* Section I.A.4.

82. See Richard F. Connors, III, Comment, *In the Global Fight Against Corruption, Transnational Bribery Is Still Winning*, 52 SETON HALL L. REV. 957, 963 (2022) (observing that bribery is “unfair and anti-competitive because it severely disadvantages businesses that do not, or cannot, succumb to extortion or afford to pay bribes”).

83. One example is the Detroit school-supply scandal, in which vendor Norman Shy bribed twelve public-school principals to exercise their purchasing authority in exchange for kickbacks. See Tresa Baldas, Kat Stafford, Kathleen Gray & Ann Zaniewski, *Feds: 12 Detroit Principals Stole \$1M in Kickback Scheme*, DETROIT FREE PRESS (Mar. 31, 2016, 4:36 PM), <https://www.freep.com/story/news/local/michigan/detroit/2016/03/29/feds-charge-9-current-and-former-detroit-school-principals/82375712> [<https://perma.cc/A94B-RJX2>].

84. See Deferred Prosecution Agreement at A-5, *United States v. Stericycle, Inc.*, No. 22-cr-20156 (S.D. Fla. filed Apr. 18, 2022) [hereinafter *Stericycle DPA*] (“The co-conspirators made and caused to be made hundreds of bribe payments to foreign officials employed by government agencies and instrumentalities in Brazil, Mexico, and Argentina to obtain and retain business advantages and to direct business to Stericycle. . . . In each of the three jurisdictions, the co-conspirators used spreadsheets to track the bribe payments . . . .”); see also Information at 4, *United States v. Shy*, No. 2:16-cr-20218 (E.D. Mich. Sept. 21, 2016) [hereinafter *Shy Information*] (“[Shy] maintained a ledger to keep track of how much money [he] owed [co-defendant and assistant schools superintendent Flowers] in kickback payments as a result of the fraudulently submitted invoices.”).

85. See James P. Walsh & Gerardo Rivera Ungson, *Organizational Memory*, 16 ACAD. MGMT. REV. 57, 63 (1991) (“[I]ndividuals store their organization’s memory in their own capacity to remember and articulate experience and in the cognitive orientations they employ to facilitate information processing. Moreover, individuals and organizations keep records and files as a memory aid.”).

than a one-off bribe, then it is the sales executive's ledger that has allowed her to manage the more complex, long-lived, and profitable scheme.<sup>86</sup> The written ledger's utility is thus in offering a greater return, dollar for dollar, to bribery.

## 2. *Scaling Criminal Activity*

The interplay of complexity and longevity explains one purpose of criminal recordkeeping: the *managing* of illicit activity. It also points to recordkeeping as a prerequisite for the *scaling* of that activity, that is, to make the activity more complex in scope by recruiting more participants and interacting with more counterparties.<sup>87</sup> The sales executive in the prior example, acting alone, might achieve profitable, albeit ill-gotten, contracts for her company. Yet there is only so much one sales executive can do focusing on a deal at a time. But what if her use of bribery to obtain contracts inspires a new business-development strategy for the employer itself? What if other sales executives, under the encouragement or direction of senior management, start to pay bribes in their pursuit of new contracts? The scale of bribery would then be too great for the original sales executive's ledger to adequately apprise management of bribe payments and their returns. *Her* ledger would leave management ignorant of the successes and failures of fellow agents who pursue corrupt deals in parallel.

Thus, *each* agent who participates in the scheme must keep a ledger, and the data contained within those ledgers must in turn be aggregated before they are useful for management.<sup>88</sup> Financial analysts and planners, who are not directly involved in business-development efforts, would need to be recruited to process and aggregate that information.<sup>89</sup> Only then would managers have adequate information on which to evaluate and make decisions about the (now larger-scale) bribery scheme. In that light, the recordkeeping purpose of *scaling* a criminal enterprise has a direct

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86. *Cf. id.*

87. See Wim Huisman, *Criminogenic Organizational Properties and Dynamics*, in THE OXFORD HANDBOOK OF WHITE-COLLAR CRIME 435, 447 (Shanna R. Van Slyke, Michael L. Benson & Francis T. Cullen eds., 2016) ("For a number of reasons, organizational complexity might be positively correlated to regulatory noncompliance. Complex organizations might be more difficult to control and might provide more opportunities for subsidiaries to use illegal means to achieve goals.").

88. As Ronald Coase observed in *The Nature of the Firm*, the firm exists to economize transaction costs, including by aggregating in the hands of management information possessed by actors within the firm. 4 *ECONOMICA* 386, 394–95 (1937). This economy is all the more important as the firm grows larger. *Id.*

89. See JACK ALEXANDER, FINANCIAL PLANNING & ANALYSIS AND PERFORMANCE MANAGEMENT 3 (2018) ("Our definition and application of [financial planning and analysis] is very broad and inclusive. It includes all activities that assess, plan, improve, and monitor critical business activities and initiatives.").

relationship with the *complexity* of the enterprise, implying that scale is one manifestation of complexity. With greater scale, all equal, there will be greater complexity caused by, for example, more participants, more counterparties, more commercial or geographic settings, and more legal and enforcement regimes to contend with.

### 3. *Evading Controls*

Whatever its scale, in addition to managing the scheme and evaluating its success, getting corporate cash to pay bribes could be challenging because the firm has controls meant partly to ensure it spends corporate resources only for lawful purposes.<sup>90</sup> Although the universe of potential improper payments is constrained only by the illicit ambitions and imaginations of the company's employees and agents, one thing its internal controls are expressly intended to prevent is bribery.<sup>91</sup> In that light, a third purpose of criminal recordkeeping is to *evade controls*.

In this third purpose, an analytical distinction in criminal business records emerges.<sup>92</sup> The purposes of managing and scaling criminal activity imply the need to create *true* records that accurately reflect current reality and memorialize past transactions so that prudent business decisions can be made based upon them. In contrast, the purpose of evading controls implies the need to create *false* records that deceive technological or human elements of a firm's control systems.<sup>93</sup> In some cases, the need for false

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90. ROSE HIGHTOWER, INTERNAL CONTROLS POLICIES AND PROCEDURES 41 (2008) ("Reconciliations are performed between the source documentation and the general ledger and/or between contracts and the processed transaction in order to . . . [v]alidate that only legitimate and authorized activity is processed.").

91. Karen E. Woody, *No Smoke and No Fire: The Rise of Internal Controls Absent Anti-Bribery Violations in FCPA Enforcement*, 38 CARDOZO L. REV. 1727, 1735–37 (2017) (identifying bribery prevention as a purpose of internal-controls mandates).

92. For a more focused discussion on this distinction, see *infra* Section II.B.

93. Rod J. Rosenstein, Deputy Att'y Gen., U.S. Dep't of Just., Remarks at the 34th International Conference on the Foreign Corrupt Practices Act (Nov. 29, 2017), <https://www.justice.gov/opa/speech/deputy-attorney-general-rostenstein-delivers-remarks-34th-international-conference-foreign> [<https://perma.cc/V7WN-ERLT>] ("Criminals try to evade law enforcement. But they also need to evade internal controls and compliance programs, if those internal controls and programs exist. Honest companies pose a meaningful deterrent to corruption.").

records might extend to deceiving outside monitors, such as auditors,<sup>94</sup> third parties (like financial institutions),<sup>95</sup> or public regulators.<sup>96</sup>

To simplify the prior example, assume that the sales executive is the only person in her firm engaged in a bribery-based sales strategy. She requires cash to pay the bribes.<sup>97</sup> There are three obvious sources for obtaining that cash: she can pay the recipient out of her own pocket, her employer can pay the recipient directly, or it can pay the recipient indirectly. As I explain, in a licit organization, the third source is the most realistic possibility, and it will require that the agent falsify business records.

First, paying out of pocket has some appeal in that it requires no evasion of internal controls: the agent has personal, unaccountable control over her own funds.<sup>98</sup> It has the downside, of course, of using personal resources to pay bribes for the employer's benefit.<sup>99</sup> Given this downside, private expenditure will happen only under narrow conditions in which the sales

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94. See, e.g., Sealed Indictment at 17–18, *United States v. Bozzo*, No. 1:23-cr-00499 (S.D.N.Y. filed Sept. 27, 2023) (alleging that a company's senior executives instructed sales representatives to convince customers to falsely sign audit-confirmation letters, thereby concealing improper accounting from an auditor).

95. See, e.g., Press Release, U.S. Dep't of Just., Company Pleads Guilty to Money Laundering Violation as Part of Scheme to Circumvent North Korean Sanctions and Deceive Banks, Agrees to Pay Forfeiture and Fine (Aug. 31, 2020), <https://www.justice.gov/opa/pr/company-pleads-guilty-money-laundering-violation-part-scheme-circumvent-north-korean> [<https://perma.cc/JCT2-4D7T>] (“[B]eginning in at least February 2017 and continuing until at least May 2018, Yang Ban [Corporation] deceived banks in the U.S. into processing transactions for North Korean customers of Yang Ban. Yang Ban and its co-conspirators utilized financial cutouts and front companies to conceal the North Korean nexus.”).

96. See, e.g., Rule 11 Plea Agreement at Exh. 2-11, *United States v. Volkswagen AG*, No. 16-cr-20394, 2017 WL 1093308 (E.D. Mich. Apr. 21, 2017) (admitting that Volkswagen used software to deceive U.S. regulators into believing that its vehicles met emissions standards).

97. Although I refer to “cash” bribes, any other thing of value could be substituted into this discussion, such as luxury travel, political-campaign expenditures, employment, or so on. See, e.g., Order Instituting Cease-and-Desist Proceedings, 3M Co., Exchange Act Release No. 98222, 2023 WL 5506913 (Aug. 25, 2023) (bringing books-and-records charges against 3M in connection with corrupt payments to foreign officials in the form of travel); see also Letter from U.S. Dep't of Just., E.D.N.Y., to Herbert S. Washer, Esq. & Anirudh Bansal, Esq., Cahill Gordon & Reindel LLP (May 24, 2018) (resolving a DOJ investigation into Credit Suisse regarding the “princelings” scandal, in which the bank provided summer internships to young family members of Chinese government officials to curry favor with the officials).

98. Of course, there might still be *external* controls to contend with, such as a bank's anti-money-laundering or sanctions-compliance controls. See, e.g., BD. OF GOVERNORS OF THE FED. RESERVE SYS., FED. DEPOSIT INS. CORP, FIN. CRIMES ENFORCEMENT NETWORK, NAT'L CREDIT UNION ADMIN. & OFF. OF COMPTROLLER OF THE CURRENCY, JOINT STATEMENT ON BANK SECRECY ACT DUE DILIGENCE REQUIREMENTS FOR CUSTOMERS WHO MAY BE CONSIDERED POLITICALLY EXPOSED PERSONS (2020), <https://www.occ.treas.gov/news-issuances/news-releases/2020/nr-ia-2020-108a.pdf> [<https://perma.cc/DA6U-L2NY>].

99. Cf. Press Release, U.S. Dep't of Just., CEO and Managing Director of US Broker-Dealer Sentenced for International Bribery Scheme (Mar. 27, 2015), <https://www.justice.gov/opa/pr/ceo-and-managing-director-us-broker-dealer-sentenced-international-bribery-scheme> [<https://perma.cc/WZG4-WB5J>] (reporting guilty pleas in conspiracy involving broker-dealer employees paying bribes to a foreign official from personal funds).

executive has adequate liquidity herself to pay and has personal incentives to do so, and when she encounters strong internal controls that make it the only feasible path.<sup>100</sup> If she wishes to take that approach, the sales executive must have personal funds sufficient to finance the scheme. Bribe recipients will seek to capture a share of any contract awarded as a result of the scheme and so, if the agent pursues a contract that is large in absolute terms, the funds needed to finance it could outstrip her personal means.<sup>101</sup> Even a successful businessperson, for instance, might struggle to pay hundreds of thousands of dollars, or more, if that is the amount needed for a successful bribe.<sup>102</sup> If she *does* have adequate liquidity, then she must also have adequate incentives before she makes private expenditures for her employer's benefit. That is, she must obtain private benefits from the scheme equal at least to what she pays out of pocket.<sup>103</sup> Those private benefits might take the form of commissions (from the ill-gotten contract),<sup>104</sup> career advancement or promotions (for a job well done),<sup>105</sup> or just retaining current employment (for meeting expectations).<sup>106</sup>

Even if those two conditions are satisfied, the sales executive will then pay out of pocket only if the employer's internal controls are strong, such that the better (or only) alternative to making the employer pay is to pay out

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100. *See id.* (reporting admissions that co-conspirators spent approximately \$1.5 million in personal funds toward bribes for the employer's benefit).

101. Susan Rose-Ackerman, "Grand" Corruption and the Ethics of Global Business, 26 J. BANKING & FIN. 1889, 1893 (2002).

102. *See supra* note 100.

103. *Cf.* Dorothy S. Lund & Natasha Sarin, *Corporate Crime and Punishment: An Empirical Study*, 100 TEX. L. REV. 285, 293 (2021) ("Quite obviously, a fine primarily affects shareholders, not necessarily the individuals who committed the crime and who may have garnered private benefits from its commission.").

104. *Cf.* Press Release, U.S. Dep't of Just., Johnson & Johnson to Pay More Than \$2.2 Billion to Resolve Criminal and Civil Investigations (Nov. 4, 2013), <https://www.justice.gov/opa/pr/johnson-johnson-pay-more-22-billion-resolve-criminal-and-civil-investigations> [<https://perma.cc/UJB3-PP3W>] ("The company also provided incentives for off-label promotion and intended use by basing sales representatives' bonuses on total sales of [a prescription drug] in their sales areas, not just sales for FDA-approved uses.").

105. Dennis W. Campbell & Ruidi Shang, *Tone at the Bottom: Measuring Corporate Misconduct Risk from the Text of Employee Reviews*, 68 MGMT. SCI. 7034, 7034 (2022) ("We argue that inside information on firm operating practices, control mechanisms, and broader organizational cultures that can contribute to misconduct are likely to be widespread among employees. Such information can include observations about various organizational features that give rise to misconduct risk, such as incentive and promotion systems . . .").

106. *See* Press Release, U.S. Dep't of Just., Wells Fargo Agrees to Pay \$3 Billion to Resolve Criminal and Civil Investigations into Sales Practices Involving the Opening of Millions of Accounts Without Customer Authorization (Feb. 21, 2020), <https://www.justice.gov/opa/pr/wells-fargo-agrees-pay-3-billion-resolve-criminal-and-civil-investigations-sales-practices> [<https://perma.cc/A5ZZ-77WP>] ("[I]n contrast to Wells Fargo's public statements and disclosures about needs-based selling, the Community Bank implemented a volume-based sales model in which employees were directed and pressured to sell large volumes of products to existing customers, often with little regard to actual customer need or expected use.").

of pocket. If internal controls are weak, then the sales executive would be expected to evade them so that she uses the employer's funds to pay for its corruptly obtained contract. Using corporate funds, after all, would be preferable to the agent because doing so would avoid private expenditure while still allowing her to obtain private benefits from engaging in corrupt acts.

These considerations suggest that under most conditions, the agent will seek to use corporate funds to pay bribes. Doing so, however, will require overcoming internal controls intended to ensure that the firm makes only authorized, lawful expenditures. Creating false records is a prime strategy for doing so, in that the false records can deceive technological and human controls into believing that an illicit payment is in fact a proper one.<sup>107</sup> For example, a request for funds for "bribe payment" would be promptly rejected by the corporate controller's department. But if the payments could be recharacterized as being made for value, such as for "consulting services," then the payment request might pass internal controls.<sup>108</sup> Of course, controls are not necessarily so easily evaded. "Consulting services" could be viewed as a euphemism for "bribe," especially if it is not obvious what the payee is to do for the firm so as to justify a (potentially large) consulting fee.<sup>109</sup> Accounting and compliance personnel thus might scrutinize such a request more than they would more modest expenditures with concrete business rationales.<sup>110</sup> The agent must thus create further false

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107. Deferred Prosecution Agreement at 49–50, *United States v. Brit. Am. Tobacco P.L.C.*, No. 1:23-cr-00118 (D.D.C. filed Apr. 25, 2023) (detailing British American Tobacco's efforts to evade controls in connection with illicit cigarette sales in North Korea).

108. See Stericycle DPA, *supra* note 84, at A-5 ("The [bribery] co-conspirators also produced false and misleading accounting documents and engaged in fake transactions with third parties to generate and conceal the funds used to make the illicit payments."); see also Matt Levine, *Bribery Won't Make You a Hero*, BLOOMBERG: OP. (Feb. 17, 2022, 12:01 PM), <https://www.bloomberg.com/opinion/articles/2022-02-17/bribery-won-t-make-you-a-hero> [<https://perma.cc/SYW8-7A55>] ("Meanwhile if you come to your bosses and say 'I paid lots of bribes' they will *absolutely also fire you and send you to prison*, but there are ways not to tell them. 'I have hired a local consultant to advise on how to navigate this country's public contracting process . . . ' [is one way.]").

109. See Stericycle DPA, *supra* note 84, at A-5 ("In each of the three jurisdictions, the co-conspirators used spreadsheets to track the bribe payments and used code words and euphemisms to refer to them: 'CP' or 'commission payment' in Brazil, 'IP' or 'incentive payment' in Mexico, and 'alfajores' or 'IP' in Argentina."); see also Complaint at 14, *SEC v. Jennings*, No. 1:11-cv-00144 (D.D.C. Jan. 26, 2011) ("Innospec used various euphemisms to refer to the bribery scheme, including 'the Indonesian Way,' 'the Lead Defense Fund,' and 'TEL optimization.'").

110. See, e.g., *Anti-Bribery and Anti-Corruption*, PFIZER, <https://www.pfizer.com/about/responsibility/compliance/anti-bribery-and-anti-corruption> [<https://perma.cc/8YMR-D3RE>] ("Our global [anti-bribery/anti-corruption] policy prohibits all forms of bribery (whether direct or indirect), corruption, and improper payments, and establishes comprehensive risk-based controls and requirements for certain types of transactions involving healthcare professionals and government officials, as well as other historically higher-risk transactions and engagements."); AB INBEV, ANHEUSER-BUSCH INBEV

records to overcome that additional scrutiny, such as documents establishing the firm's consulting needs, detailed statements of work that the purported consultant will perform, and so on.<sup>111</sup>

But this approach presents two problems. First, the recipient of a bribe, fearing personal exposure, might be unwilling to receive such well-documented payments directly from the firm.<sup>112</sup> Second, the bespoke deception just described is costly to produce and is not easily scaled. Each incremental bribe is likely to increase suspicion and thus require greater effort to evade controls. If the agent's scheme requires paying multiple bribes to multiple recipients, those transaction costs would render the kind of deception just described infeasible at scale.

Instead, the agent might pursue an aggregate approach in which the employer makes indirect expenditures.<sup>113</sup> For example, the sales executive might contract with a single person to serve as an intermediary.<sup>114</sup> In that indirect approach, the agent would engage in an elaborate documentary deception to obtain a large payment or cash flow to the intermediary. The intermediary in turn would make individual payments to bribe recipients. Although this latter approach avoids the escalating transaction costs of repeated control evasions, it embeds its own costs. The intermediary will presumably require some payment for providing the service, after all.<sup>115</sup>

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GLOBAL ANTI-CORRUPTION POLICY § 1.4 (2019), [https://www.ab-inbev.com/content/dam/universal/template/ab-inbev/Better%20World/Our%20Policies/AB-InBev\\_Global\\_Anti-Corruption\\_Policy\\_2019.pdf](https://www.ab-inbev.com/content/dam/universal/template/ab-inbev/Better%20World/Our%20Policies/AB-InBev_Global_Anti-Corruption_Policy_2019.pdf) [<https://perma.cc/A7X6-393X>] (“AB InBev is also committed to achieving compliance with all Anti-Corruption Laws. To ensure compliance and to implement risk-based controls, Zones or subsidiaries may also adopt local policies or procedures different from this Policy upon approval by the Global Ethics & Compliance team.”).

111. Cf. PUB. CO. ACCT. OVERSIGHT BD., AS 2401: CONSIDERATION OF FRAUD IN A FINANCIAL STATEMENT AUDIT (2023) [hereinafter AS 2401] (“Misappropriation of assets may be accompanied by false or misleading records or documents, possibly created by circumventing controls.”).

112. Direct payments from the bribing firm to the bribe recipient tend to be more incriminating for both. See, e.g., Indictment at 22–23, *United States v. Low Taek Jho*, No. 1:18-cr-00538 (E.D.N.Y. filed Oct. 3, 2018) (reproducing electronic chats arranging for bribe payments from Goldman Sachs to the prime minister of Malaysia).

113. See Deferred Prosecution Agreement at A-7 to -8, *United States v. Och-Ziff Cap. Mgmt. Grp. LLC*, No. 1:16-cr-00516 (E.D.N.Y. filed May 13, 2021) (“Och-Ziff entered into a consulting agreement to pay [an] intermediary a ‘finder’s fee’ of \$3.75 million . . . all or a portion of the fee would be paid to foreign officials in return for influencing the [Libyan Investment Authority] to make a \$300 million investment . . .”).

114. In the Detroit school-supply scandal, for instance, an assistant superintendent recruited school principals to join a false-invoicing scheme and served as an intermediary in paying kickbacks from a vendor to the school principals. See Tresa Baldas, *DPS Official Admits Cheating Special Ed Kids Out of Supplies*, DETROIT FREE PRESS (May 5, 2016, 12:20 PM), <https://www.freep.com/story/news/local/michigan/detroit/2016/05/03/dps-guilty-kickback-scheme/83873114> [<https://perma.cc/4NDC-PMHB>].

115. See Deferred Prosecution Agreement at A-6, *United States v. Tysers Ins. Brokers Ltd.*, No. 1:23-cr-20414 (S.D. Fla. filed Mar. 6, 2024) (providing that in an indirect-bribery scheme, a brokerage

More, because the scheme is unlawful, the agent has no legal recourse against theft by the intermediary—although she might be protected if she has the ability to retaliate against expropriation and the intermediary knows that.<sup>116</sup>

Whatever approach the agent takes, this discussion illustrates that achieving illicit ends could require the falsification of records so as to evade controls meant to prevent those ends. Recordkeeping thus enables illicit activity: unless anti-crime controls can be evaded through false documentation, the corrupt scheme will not work.

#### 4. *Concealing Criminal Activity*

As Section I.B explains, participants in both lawful and unlawful activities that exhibit complexity and continuity use records to manage and scale their business. They diverge, however, in their needs to evade controls and to conceal their activities. Controls are in part intended to permit lawful activity, and lawful activity is not subject to punishment.<sup>117</sup> Criminal conduct is distinguishable from lawful business activity in large part because it could lead to detection, prosecution, and sanction. Those engaged in illicit activity that requires the use of records thus engage in falsification not only to evade *ex ante* controls but also to avoid *ex post* detection.<sup>118</sup> When the sales executive creates false business records, for example, she might do so with a view not only of deceiving those who directly enforce controls but also of deceiving those who subsequently review the transactions, such as auditors.<sup>119</sup> To illustrate, if she seeks for her employer to pay bribes directly to a “consultant,” the agent concerned about potential

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firm paid \$20.3 million in commissions to an intermediary, who in turn paid out only \$2.8 million to bribe recipients).

116. Alejandro Portes & William Haller, *The Informal Economy*, in THE HANDBOOK OF ECONOMIC SOCIOLOGY 403, 407 (Neil J. Smelser & Richard Swedberg eds., 2d ed. 2005) (observing that unless private (and often violent) enforcement mechanisms exist, participants in illegal transactions lack the protection of contract and other laws).

117. COMM. OF SPONSORING ORGS. OF THE TREADWAY COMM'N, INTERNAL CONTROL - INTEGRATED FRAMEWORK: EXECUTIVE SUMMARY 3 (2013) (listing “compliance” as one of three objectives of the COSO internal-control framework).

118. Jonathan Black, Mattias Nilsson, Roberto Pinheiro & Maximiliano da Silva, *Information Production, Misconduct Effort, and the Duration of Financial Misrepresentation* 6 (Fed. Rsrv. Bank of Cleveland, Working Paper No. 16-13R, 2018) (“By exerting costly effort to better conceal the fraud, the manipulators can lower the likelihood of an information producer generating a bad signal and, therefore, prolong the duration of the misconduct.”).

119. See Superseding Indictment at 17, *United States v. DiMaria*, No. 1:17-cr-20898 (S.D. Fla. Sept. 26, 2018) (“[I]mmediately after [a co-conspirator emailed a document reflecting an accounting fraud], [the leader of the fraud] wrote [to the co-conspirator] that he was concerned that [the external auditor] might see certain information on the spreadsheet: ‘People really have to start using their brains, sometimes I really wonder. Ok why not just write ‘Hey [external auditor] – This entry is cushion, please propose an adjusting entry’ I really expect this stuff to be managed better.’”).

detection will go to efforts to create false documentation that will not only fool the firm's vendor-approval processes but that also, when reviewed by external auditors, will appear to reflect for-value payment for lawful services.<sup>120</sup>

### *B. Rational Criminal Recordkeeping*

Business recordkeeping implies both production and retention costs. Production costs are expenditures or opportunity costs incurred in creating business records or making them scrutable to managers. A retailer, for example, will spend considerable resources to collect information about each sales transaction and will spend additional resources on staffing and technology needed to aggregate sales data into forms useful for decision-making.<sup>121</sup> Retention costs are expenditures or opportunity costs incurred in retaining old records (which might be useful for future businesses purposes, including historical analysis), such as expenditures on maintaining electronic databases or physical document repositories.<sup>122</sup> These sorts of direct costs are also present in the case of illicit activity.

Record production and retention in the illicit context, however, also impose indirect costs around detection and sanction. Producing a criminal business record increases risks of detection and sanction over the alternative of not producing the record.<sup>123</sup> A record that never existed, as a general matter, will not expose illicit activity or be used in its prosecution.<sup>124</sup> More, retaining a criminal business record—presumably, again, for some future business purpose or historical analysis—suggests higher detection and

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120. Cf. Shy Information, *supra* note 84, at 5 (“At [Shy]’s direction, [Flowers] provided [Shy] with fraudulent invoices from [Flowers]’ business, ‘Always Together Travel,’ in order to conceal and make [Shy]’s kickback payments to [Flowers] appear legitimate.”).

121. See Ian Bogost, *You Should Worry About the Data Retailers Collect About You*, THE ATLANTIC (Sept. 13, 2023), <https://www.theatlantic.com/technology/archive/2023/09/retailers-consumer-tracking-data-personalized-ads-influence/675181> [<https://perma.cc/85BF-W88Y>].

122. Caroline Higgins & Matt McCartney, *How to Reduce Operating Costs by Limiting Off-Site Storage Use*, EY (May 8, 2023), [https://www.ey.com/en\\_us/forensic-integrity-services/reduce-operating-costs-by-limiting-off-site-storage-use](https://www.ey.com/en_us/forensic-integrity-services/reduce-operating-costs-by-limiting-off-site-storage-use) [<https://perma.cc/L8WD-KYFV>] (“The average cost for storing physical records with a third-party storage vendor is \$5 to \$15 per box, per month, and many companies retain hundreds of thousands of boxes. While paper records may be out of sight and out of mind, paper records storage costs may be getting out of hand.”).

123. See KAPLAN, *supra* note 22, at xviii (“As history [the pre-*Roe* abortion service] Jane presents a challenge. The group deliberately kept few records. What we were doing was illegal—details about individual women, highly confidential. . . . We did not take minutes at meetings, nor did we write about what we were doing.”).

124. That is not to say that the non-existence of records will always protect illicit actors from prosecution. Firms sometimes bear affirmative recordkeeping requirements. Bank Secrecy Act regulations, for instance, require financial institutions to keep records related to certain suspicious transactions. See 12 C.F.R. §§ 21.11, 163.180 (2024).

sanction risks than destroying the record before it can be captured by law enforcement or disclosed by an informant.<sup>125</sup>

It is that second set of qualitatively distinct production and retention costs that prompt the question why actors create and keep records that could incriminate them and, eventually, lead to their imprisonment. Could such decisions be boundedly rational in the sense that they are undertaken by persons balancing the rewards of crime against the expected costs of punishment? The case for rational criminal decision-making<sup>126</sup> has been challenged by advances in behavioral economics and the sociology of crime.<sup>127</sup> But the actors mentioned above—corporate criminals,<sup>128</sup> drug dealers,<sup>129</sup> abortion-rights outlaws<sup>130</sup>—could be expected, as least they can, to act in accord with a bounded rational-choice model when balancing their needs to achieve illicit ends while avoiding detection and sanction.<sup>131</sup> They are, after all, managing business enterprises. Although business is not always the site of cold rationality, it is a setting in which clear-headed benefit-cost analysis is apt to feature more in decision-making than in other quarters of life.<sup>132</sup>

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125. See Lawrence Solum & Stephen Marzen, *Truth and Uncertainty: Legal Control of the Destruction of Evidence*, 36 EMORY L.J. 1085, 1108–18 (1987) (explaining the efforts of federal and state law to counter the informational loss caused by defendants destroying evidence).

126. See generally Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968).

127. See Thomas A. Loughran, *Behavioral Criminology and Public Policy*, 18 CRIMINOLOGY & PUB. POL'Y 737 (2019) (reviewing behavioralist contributions to rational-choice theory in the criminology context); Greg Pogarsky, Sean Patrick Roche & Justin T. Pickett, *Offender Decision-Making in Criminology: Contributions from Behavioral Economics*, 1 ANN. REV. CRIMINOLOGY 379, 394 (2018) (explaining why “[s]everal aspects of criminological theory merit further attention in light of recent behavioral economics research”).

128. Raymond Paternoster & Sally Simpson, *Sanction Threats and Appeals to Morality: Testing a Rational Choice Model of Corporate Crime*, 30 LAW & SOC'Y REV. 549, 553 (1996) (providing a rational choice model of corporate crime “premised on two assumptions: (1) that decisions to offend are made on a balancing of both the costs and benefits of offending and (2) that what are important are the decisionmaker’s perceived or subjective expectations of reward and cost”).

129. Patrick Radden Keefe, *Cocaine Incorporated*, N.Y. TIMES MAG. (June 15, 2012), <https://www.nytimes.com/2012/06/17/magazine/how-a-mexican-drug-cartel-makes-its-billions.html> [<https://perma.cc/U2BU-KYGX>] (“A close study of the Sinaloa cartel, based on thousands of pages of trial records and dozens of interviews with convicted drug traffickers and current and former officials in Mexico and the United States, reveals an operation that is global (it is active in more than a dozen countries) yet also very nimble and, above all, staggeringly complex.”).

130. See KAPLAN, *supra* note 22, at xviii.

131. But see Levitt & Venkatesh, *supra* note 25, at 758 (“[W]e conclude that even in this gang—one of the most economically sophisticated and successful gangs—the decision making of members is difficult (but not impossible) to reconcile with that of optimizing economic agents. Certainly, economic considerations play an important role in the decisions of members and the activities of the gang. However, we find that social/nonpecuniary factors are likely to play an important role as well.”).

132. See J. Robert Baum & Stefan Wally, *Strategic Decision Speed and Firm Performance*, 24 STRATEGIC MGMT. J. 1107, 1109 (2003) (“[For the] managerial decision-maker, the deliberate rational

Under a theory of rational criminal recordkeeping, those engaged in illicit business will balance their needs for recordkeeping (its benefits) versus the risks that it creates (its costs). Part of that balancing is mitigating detection risk. Examples of risk mitigation include physically hiding records or keeping them with professionals like attorneys or accountants (where they might be subject to colorable claims of privilege, or they might otherwise be less likely to be searched by authorities).<sup>133</sup> Mitigation might also include committing records to memory (although this approach grows harder the longer running or more complex activities get to be)<sup>134</sup> or making records inscrutable through ciphers, coded language, or encryption.<sup>135</sup> Finally, just as records-destruction policies and practices serve legitimate purposes in licit businesses (such as by reducing the costs of storing/maintaining documents when they are no longer needed), those engaged in criminal recordkeeping might mitigate risk by regularly destroying records that are no longer strictly needed.<sup>136</sup>

In thinking about rational criminal recordkeeping, consider a model in which a vector of expected benefits from producing and retaining criminal business records is strictly preferred to a vector of expected costs from doing so.<sup>137</sup> Direct production and retention costs are likely to be quite small for illicit activity, especially in light of illicit actors' motivation to exercise economy in how many business records they produce and to avoid retaining them. Direct production and retention costs are also borne in connection

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decision-making process involves five intertwined cognitive stages: (1) give attention to a problem or opportunity; (2) collect information; (3) develop an array of options; (4) value the options using expected costs and benefits; and finally (5) select the option with the greatest utility." (citation omitted)).

133. Perhaps the most famous known instance of hiding criminal business records with attorneys is the Panama Papers scandal. In that case, law firm Mossack Fonseca maintained records for a diverse set of clients evidencing tax evasion, bribery, money laundering, and other illicit activity. *See The Panama Papers: Exposing the Rogue Offshore Finance Industry*, INT'L CONSORTIUM OF INVESTIGATIVE JOURNALISTS, [hereinafter *Panama Papers*] <https://www.icij.org/investigations/panama-papers/> [<https://perma.cc/FV9W-HPJW>]. The voluminous records were not proactively captured by law enforcement but were instead brought to light after someone leaked them to journalists. *Id.*

134. *See* Cowan, *supra* note 56.

135. *Lawful Access*, OFF. OF LEGAL POL'Y, U.S. DEP'T OF JUST. (Nov. 18, 2022), <https://www.justice.gov/olp/lawful-access> [<https://perma.cc/78V7-UUAD>] ("[T]he rapidly growing use of warrant-proof encryption in everyday devices and software means that criminals—including drug dealers, child predators, and terrorists—use encryption to shield their illicit activities from authorities.").

136. *See* Jeremiah S. Wikler, *Document Retention Policy Checklist*, REUTERS: PRAC. L.: J (Apr. 2023), <https://www.reuters.com/practical-law-the-journal/litigation/document-retention-policy-checklist-2023-04-03> [<https://perma.cc/HL6U-5QFV>] ("A company can reduce the costs of storing records and other information that are outdated or no longer serve a legitimate business purpose by implementing a document retention policy."). For purposes of this Article's theory, however, efforts to conceal, hide, or make illegible records will be treated as a form of destruction, and indeed, criminal law sometimes treats such acts as being as prohibited as their literal destruction.

137.  $K_{P,R} < B_{P,R}$ .

with entirely lawful business operations and transactions.<sup>138</sup> Thus, in light of this theory's focus on *criminal* business records, for simplicity, direct production and retention costs will be assumed away. Additional assumptions include that a single illicit actor makes all decisions, even though in criminal enterprises with multiple participants such decisions might be collective or individually taken by multiple actors.<sup>139</sup> Further, the concept of detection is assumed to include both cases in which law enforcement becoming aware of records first alerts it to a criminal enterprise (such as when an informant discloses records to police) and when law enforcement is aware of a criminal enterprise and later captures the records (such as in connection with a search).<sup>140</sup> In either case, the presence of records increases law enforcement's ability to understand what illicit activity occurred and to then prosecute and sanction participants. In other words, this model is one of rational criminal *recordkeeping* and not of rational criminal *activity*.<sup>141</sup>

The criminal actor's assessment of the expected vector of production and retention costs is the product of  $\vec{S}$ , the vector of potential sanctions for illicit activity, and  $\Pr(G|V)$ , the probability that there will be sanction conditional on the government's detection of the illicit activity,  $V$ .<sup>142</sup> The sanction binary,  $G$ , implies that even if the government detects an illicit act, it might go unpunished because, for example, the government decides not to prosecute due to inadequate evidence,<sup>143</sup> the defendants secure acquittals or

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138. See, e.g., Higgins & McCartney, *supra* note 122; see also SEC. & EXCH. COMM'N, *supra* note 61 (reporting estimated costs of preparing public-company annual reports).

139. For example, Levitt & Venkatesh report that decision-making in a drug-selling gang occurred both at a top-level council and at the local "franchise" level. Levitt & Venkatesh, *supra* note 25, at 761–62.

140. But the Fourth Amendment would require officers, upon discovering evidence of a crime other than the one provided for in a search warrant, to obtain a new, properly scoped search warrant. See, e.g., *United States v. Carey*, 172 F.3d 1268, 1270 (10th Cir. 1999); accord *People v. Hughes*, 958 N.W.2d 98, 104 (Mich. 2020).

141. For models of rational criminal activity, see Becker, *supra* note 126, and Paternoster & Simpson, *supra* note 128.

142.  $\overline{K_{P,R}} = \vec{S} \cdot (\Pr(G|V))$ .

143. See U.S. Dep't of Just., Just. Manual § 9-27.220 (2024) (providing that whether "the admissible evidence will probably be sufficient to obtain and sustain a conviction" is a threshold requirement for federal prosecution).

dismissals,<sup>144</sup> or they evade arrest.<sup>145</sup> When the sanction binary is zero, criminal recordkeeping is costless. If there is sanction, then courts (or prosecutors, in the case of non- or deferred-prosecution agreements)<sup>146</sup> may impose a range of sanctions, including imprisonment, probation, fines, restitution, and forfeiture.<sup>147</sup> Those sanctions will impose a corresponding range of expected production and retention costs, including the disutility of going to prison, paying penalties, giving back ill-gotten gains, and so on.

As discussed further, the model assumes that sanction of illicit acts is not barred by a statute of limitations or other affirmative defense.<sup>148</sup> The detection probability for an illicit act, due to the production or retention of criminal business records, is the product of the weighted sum of prospective eventualities and a function of production and retention factors.<sup>149</sup> The prospective eventualities,  $X$ , refer to events external to production or retention that interact with the production and retention factors to catalyze detection. Imagine, for instance, that incriminating records stored safely with one's lawyer are leaked to the press.<sup>150</sup> Or imagine that police execute a search warrant expecting to find evidence of relatively minor offenses but instead find records reflecting far worse.<sup>151</sup> Or imagine that a hacker gains

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144. John Gramlich, *Fewer Than 1% of Federal Criminal Defendants Were Acquitted in 2022*, PEW RSCH. CTR. (June 14, 2023), <https://www.pewresearch.org/short-reads/2023/06/14/fewer-than-1-of-defendants-in-federal-criminal-cases-were-acquitted-in-2022> [<https://perma.cc/3Y9M-LMTD>] (reporting that 8.2% of federal criminal defendants whose cases resolved in 2022 ended in dismissal and another 0.4% of those cases ended in acquittal).

145. Laura Sullivan, *Money to Run, but No Skills to Hide*, NPR (May 25, 2009, 12:49 AM), <https://www.npr.org/templates/story/story.php?storyId=104362181> [<https://perma.cc/RM8K-KUAH>] (“Men like [former financial advisor Marcus] Schrenker are called ‘executive fugitives.’ They’re leaders of industry and finance toppled by the economic crisis and, often, their own greed. Facing financial ruin and even worse—prison—they decide to make a run for it.”).

146. See generally David M. Uhlmann, *Deferred Prosecution and Non-Prosecution Agreements and the Erosion of Corporate Criminal Liability*, 72 MD. L. REV. 1295 (2013) (identifying problems around corporate criminal settlements between firms and prosecutors).

147. 18 U.S.C. § 3551 (authorizing sentences of imprisonment, probation, and fines); 18 U.S.C. § 3554 (authorizing orders of criminal forfeiture); and 18 U.S.C. § 3556 (authorizing orders of criminal restitution).

148. See 21 AM. JUR. 2D *Criminal Law* § 177 (2024) (“An affirmative defense is defined as a matter which, assuming the charge against the accused to be true, constitutes a defense to it; an ‘affirmative defense’ does not directly challenge any element of the offense.”).

149.  $Pr(V) = \sum_{i=1}^n X_i \cdot f(P, R)$ .

150. See *Panama Papers*, *supra* note 133; see also *Indictment, United States v. Owens*, No. 1:18-cr-00693 (S.D.N.Y. Sept. 27, 2018) (charging four people with tax fraud and other offenses following the Panama Papers leak).

151. See *supra* note 140 and accompanying text.

access to electronically stored records and demands a ransom, else she will publish them<sup>152</sup> or provide them to law enforcement.<sup>153</sup>

In general, the retention factor would be expected to have the greatest effect on detection chances: the longer a record exists, or the more copies of it produced, the more opportunities for law enforcement to capture it or for an informant to disclose it. The production factor itself, however, can increase the risk of detection even absent the retention factor. Imagine, for example, someone who creates records reflecting illicit activity is seen by another person or a camera doing so. Although it was not the creator's intent to expose the record's existence or contents, the very act of production under those observed circumstances increases the chances of detection and, hence, sanction.<sup>154</sup> Indeed, the creator of the record could later privately destroy it, in circumstances in which it was not subsequently seen or copied by anyone, yet some detection risk would remain even after almost eliminating that retention factor. The record is still retained, albeit perhaps fleetingly, in the observer's memory or in camera footage. But destruction might *reduce* the chances of detection; doing so might even *significantly* reduce those chances. The external observer of the record's creation, for instance, might not realize the significance of what he saw, or he might not care to inform law enforcement. In that case, the destruction described would, practically speaking, eliminate the retention factor and thus prevent the record from falling into law enforcement's hands.

In that light, the production factor is the influence that the initial act of producing a criminal business record has on expected cost. The production factor for a record created in light of an illicit act is a composite factor,  $P$ , determined by the sum of all records produced,  $U$ , for the given illicit act, subject to a statute-of-limitation-expiration condition (which can be viewed as standing for affirmative defenses generally) for the illicit act.<sup>155</sup>

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152. See William Turton, *Hackers Swap Extortion Tactics as Police Bring the Heat*, BLOOMBERG (June 14, 2023, 11:00 AM), <https://www.bloomberg.com/news/newsletters/2023-06-14/hackers-swap-extortion-tactics-as-police-bring-the-heat>, <https://www.bloomberg.com/news/newsletters/2023-06-14/hackers-swap-extortion-tactics-as-police-bring-the-heat> [https://perma.cc/365K-24K9].

153. See Dan Goodin, *Ransomware Group Reports Victim It Breached to SEC Regulators*, ARS TECHNICA (Nov. 16, 2023, 6:03 PM), <https://arstechnica.com/security/2023/11/ransomware-group-reports-victim-it-breached-to-sec-regulators> [https://perma.cc/V2G2-BM3T] (“One of the world’s most active ransomware groups has taken an unusual—if not unprecedented—tactic to pressure one of its victims to pay up: reporting the victim to the US Securities and Exchange Commission.”).

154. This problem is shared by other actors, like attorneys, who might be tempted to review or create confidential documents in public places and in so doing, unintentionally expose sensitive information. See, e.g., Kenneth P. Vogel, *Isn't That the Trump Lawyer?': A Reporter's Accidental Scoop*, N.Y. TIMES (Sept. 19, 2017), <https://www.nytimes.com/2017/09/19/us/politics/isnt-that-the-trump-lawyer-a-reporters-accidental-scoop.html> [https://perma.cc/6B7P-887C].

155.  $P = [\delta_{act}(t < \tau_{act}) \cdot \sum_{i=1}^n U_i]$ .

Similarly, the retention factor is the influence that the temporal retention of a record has on expected cost. The retention factor for a given record created in light of an illicit act is a composite factor,  $R$ , determined by the sum of capture risk,  $C$  (the risk that law enforcement captures the records, such as through a search), informant risk,  $M$  (the risk that a co-conspirator discloses records to the authorities),<sup>156</sup> or an apparent co-conspirator is in fact an undercover agent),<sup>157</sup> and destruction risk,  $D$ , and where each risk term is subject to a statute-of-limitations condition.<sup>158</sup>

Although the nature of capture and informant risks are intuitive, the nature of destruction risk recommends further explanation. “Destruction risk” refers to consequences for unlawful handling of evidence once it is produced, including literal destruction, and other acts like concealment.<sup>159</sup> The act of destruction increases overall production and retention costs because it itself could violate laws barring mishandling of criminal evidence.<sup>160</sup> If such acts do effect separate criminal offenses, then those involved in the destruction would bear residual detection and sanction risks derivative of the retention costs they sought to mitigate. Criminalization of the destruction of criminal business records thus increases *ex ante* retention costs. Further, even if destruction of records is not its own distinct criminal

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156. See Neal Kumar Katyal, *Conspiracy Theory*, 112 YALE L.J. 1307, 1363 (2003) (“Conspiracy law encourages group members to focus on their individual goals instead of their collective ones by highlighting how each may pay the price for disloyalty by someone else through flipping arrangements.”).

157. U.S. Dep’t of Just., *Undercover and Sensitive Operations Unit, Attorney General’s Guidelines on FBI Undercover Operations, November 13, 1992* (Mar. 8, 2017), <https://www.justice.gov/archives/ag/undercover-and-sensitive-operations-unit-attorney-generals-guidelines-fbi-undercover-operations> [<https://perma.cc/WQ3S-Z544>] (noting that that “use of the undercover technique, including proprietary business entities, is essential to the detection, prevention, and prosecution of white collar crimes, public corruption, terrorism, organized crime, offenses involving controlled substances, and other priority areas of investigation”).

158.  $R = [\delta_c(t < \tau_{act}) \cdot f_c(C(t))] + [\delta_m(t < \tau_{act}) \cdot f_m(M(t))] + [\delta_d(t < \tau_d) \cdot f_d(D(t))]$ . Note that the time limitation in capture or informant risk,  $\tau_{act}$ , differs from the time limitation in destruction risk,  $\tau_d$ . This point implies the possibility of an initial illicit act continuing to impose a derivative risk even after its statute of limitations has expired.

159. In one case illustrating this risk, a single-member criminal enterprise operated a Ponzi scheme whose business records were stored on the schemer’s computer. *United States v. Stauffer*, 695 F. App’x 916, 917–18 (6th Cir. 2017). When the schemer was ordered to surrender the computer to law enforcement, he ran software to delete the records and make them irretrievable by law enforcement. *Id.* at 922. But in doing so, he left digital evidence of the evidence destruction. *Id.* Coupled with the evidence the government already had, however, once convicted, the schemer’s act of destruction served to increase his sentence. *Id.* Of course, perhaps the most famous case of criminal prosecution of record destruction was that of Enron’s accounting firm Arthur Andersen. Although its conviction for illegal document destruction was ultimately reversed by the Supreme Court, the firm died between conviction and its eventual victory on appeal. See generally Kathleen F. Brickey, *Andersen’s Fall from Grace*, 81 WASH. U. L.Q. 917 (2003).

160. See *infra* Section IV.A.2 for further discussion on that point.

offense, if it is known to prosecutors, it could supply separate evidence to support adverse inferences by the factfinder.<sup>161</sup>

## II. THE NATURE OF CRIMINAL BUSINESS RECORDS

The last Part considered why illicit actors create and keep records and how they might rationally do so in light of the costs. This Part deepens the theory, and opens it to Part IV's policy interventions, by considering two intrinsic characteristics of criminal business records: their status as evidence of crime and the trueness or falsity of their contents.

### A. *Business Records as Evidence of Crime*

Differences in lawful and non-lawful business records are driven by the latter's potential to evidence criminal activity.<sup>162</sup> That potential makes criminal business records both useful and dangerous to illicit actors. Thinking about criminal recordkeeping in evidentiary terms thus helps define the nature of those records and inform how policymakers and law enforcement can intervene to address illicit activity.

Although evidentiary law makes no such distinction, it is analytically useful to separate criminal business records from other evidence that might happen to be created in connection with illicit activity. This distinction follows because business records are *instrumental* to the management of criminal activity, whereas other evidence is the *by-product* of criminal activity. That is, illicit actors intentionally create business records because they are necessary for carrying out the enterprise.<sup>163</sup> This necessity generates the tension between the need for criminal business records and the production and retention costs they impose.<sup>164</sup>

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161. Dale A. Nance, *Adverse Inferences About Adverse Inferences: Restructuring Juridical Roles for Responding to Evidence Tampering by Parties to Litigation*, 90 B.U. L. REV. 1089, 1138–39 (2010) (noting that courts have the ability to give adverse-inference instructions when criminal defendants tamper with evidence but urging the exercise of caution before they use that remedy).

162. See, for example, the business-records exception to the rule against hearsay. FED. R. EVID. 803(6) (excepting regularly kept business records from the hearsay rule).

163. See *supra* Section II.B. This analytical distinction also suggests that tools or wares of the illicit trade are instrumental evidence, although they are beyond the scope of this Article because unlike records, they are not *informationally* instrumental. Evidence in this subcategory might include illegal drugs, which both evidence an intent to illegally distribute drugs and the reality of illegal possession of them. Beyond evidencing that fact, they are also the wares a drug-selling gang will market. Another example would include unlicensed locksmith tools: they would offer evidence that a person is a burglar because they also facilitate burglary. *Cf. Yates v. United States*, 574 U.S. 528, 549 (2015) (holding that illicitly caught fish are not “records” within the meaning of statutes prohibiting the mishandling of evidentiary records).

164. See *Yates*, 574 U.S. at 549.

Other evidence, however, tends to be created as a consequence of acts that further the enterprise. Although actors might intentionally avoid generating non-records evidence and might seek to destroy it in some circumstances,<sup>165</sup> they do not intentionally create it. That is to say, actually engaging in acts that directly advance criminal ends might lead to the creation of evidence—such as video footage,<sup>166</sup> transaction records,<sup>167</sup> copies of communications,<sup>168</sup> and so on—memorializing those acts. For their part, criminal business records have criminogenic effects that offset the costs they create in detection/sanction terms. But because other evidence has no such practical use, rational illicit actors will seek to avoid generating that kind of evidence at all.<sup>169</sup> Avoidance strategies might include, for example, communicating in ways that are unlikely to be intercepted or deciphered,<sup>170</sup> or obscuring faces around surveillance cameras.<sup>171</sup>

Part IV considers policy interventions around criminal business records and the public interests in deterring, detecting, and sanctioning illicit activity.<sup>172</sup> Distinguishing between criminal business records and other

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165. *See id.*

166. *See* BUREAU OF JUST. ASSISTANCE, U.S. DEP'T OF JUST., VIDEO EVIDENCE: A LAW ENFORCEMENT GUIDE TO RESOURCES AND BEST PRACTICES, at i (2014), [https://bja.ojp.gov/sites/g/files/xyckuh186/files/media/document/video\\_evidence\\_guide\\_to\\_resources\\_and\\_best\\_practices2.pdf](https://bja.ojp.gov/sites/g/files/xyckuh186/files/media/document/video_evidence_guide_to_resources_and_best_practices2.pdf) [<https://perma.cc/7JV4-NFJD>] (“Video evidence can come from a multitude of different devices, with differing systems, formats, players, and technology, yet an agency’s ability to properly secure, catalog, store, and maintain its evidentiary value and integrity is critical to a professional police organization.”).

167. *See, e.g.*, Nate Raymond, *US Says Prostitution Ring Counted Politicians, Tech Execs, Lawyers as Clients*, REUTERS (Nov. 9, 2023, 1:06 AM), <https://www.reuters.com/world/us/us-says-prostitution-ring-counted-politicians-tech-execs-lawyers-clients-2023-11-08> [<https://perma.cc/S9WX-XQ2Q>] (reporting on the prosecution of an illegal-prostitution ring in which law enforcement found transactional records while executing search warrants).

168. *See, e.g.*, Ben Penn, *WhatsApp, Signal Chats Targeted in DOJ Corporate Crackdown*, BLOOMBERG L. (Sept. 27, 2022, 4:01 PM), <https://news.bloomberglaw.com/daily-labor-report/doj-targets-whatsapp-signal-chats-to-prosecute-more-executives> [<https://perma.cc/G9GP-S39G>] (“DOJ wants companies to curb employees’ business-related chats on encrypted apps like WhatsApp and Telegram that are increasingly hindering federal white collar criminal probes.”).

169. *See* Mikael Priks, *The Effects of Surveillance Cameras on Crime: Evidence from the Stockholm Subway*, 125 ECON. J. F289, F289 (2015) (“In a standard economics model, criminals receive utility from committing a crime and disutility from getting caught, which depends on the monitoring technology as well as the extent to which criminals care about this cost.”).

170. *See* Ed Caesar, *Crooks’ Mistaken Bet on Encrypted Phones*, NEW YORKER (Apr. 17, 2023), <https://www.newyorker.com/magazine/2023/04/24/crooks-mistaken-bet-on-encrypted-phones> [<https://perma.cc/MW2R-ZMQS>] (“Crooks have always wanted to talk without being heard, and cops have always wanted to listen without being seen. Since the exposure of the wiretap, criminals have tried to stay one step ahead of eavesdroppers.”).

171. *See* Priks, *supra* note 169, at F289–90 (“Criminals who commit planned crimes, such as professional pickpockets and robbers, are likely to be observant to signs displaying surveillance cameras not only because they tend to be cautious but also because the cameras constitute a large threat *ex post* when victims report a felony.”).

172. *See infra* Part IV.

forms of criminal evidence permits such interventions because the former are *intentional* on the part of illicit actors and are *instrumental* to their enterprise. Thus, interventions by legislatures, sentencing commissions, or prosecutors that harness criminal business records' intentionality hold promise because they could undermine the usefulness of such records. That undermining would in turn deter the foundation, or slow the growth, of criminal enterprises.<sup>173</sup>

### B. True and False Criminal Business Records

There is also an analytical distinction between true and false criminal business records. True records accurately reflect that illicit acts have occurred,<sup>174</sup> whereas false records conceal that reality. These analytic distinctions relate back to the four purposes of criminal recordkeeping in that true records support the first two purposes (management and scale) whereas false records support the latter two (evasion and concealment).

Only true records are useful in managing the illicit operation. The criminal manager requires a realistic view of the organization's operations, obligations, and condition.<sup>175</sup> False records, on the other hand, are not meant to aid management but rather to deceive third parties, such as tax authorities, auditors, investors, or creditors.<sup>176</sup> All equal, false records tend to have

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173. There are, of course, interventions related to "other evidence" that could help deter and detect illicit activity. For example, employees who know that their employer records all communications might be thwarted from engaging in on-the-job conspiracies if they cannot communicate face-to-face and instead need to communicate via other (recorded) channels. See Gary Gensler, Chair, Sec. & Exch. Comm'n, "Partners of Honest Business and Prosecutors of Dishonesty": Remarks Before the 2023 Securities Enforcement Forum (Oct. 25, 2023) ("At a fundamental level, failures in recordkeeping—like those involving off-channel communications—obstruct such market integrity. . . . Our actions uncovered not only the widespread use of personal devices and non-official channels to discuss business, but a complete failure of financial firms to maintain or preserve those off-channel communications."). That other category of evidence, and policy interventions around it, are beyond this Article's scope, however.

174. Cf. HEATHER MACNEIL, TRUSTING RECORDS: LEGAL, HISTORICAL AND DIPLOMATIC PERSPECTIVES, at xi (2000) ("Record trustworthiness thus has two qualitative dimensions: reliability and authenticity. Reliability means that the record is capable of standing for the facts to which it attests, while authenticity means that the record is what it claims to be.").

175. See Levitt & Venkatesh, *supra* note 25, at 764–65. ("[I]t is worth noting that [a copy of a drug-selling gang's financial records] served two purposes: (1) a tool for managing the day-to-day operations of the gang, much as a CEO relies on management information systems (MIS) data in a firm, and (2) a means of tracking operations for reporting to higher levels in the gang hierarchy. The first purpose suggests that the intention of the data keepers was to accurately capture the gang's finances, although their ability to do so effectively may be subject to question.").

176. See *supra* notes 94–96 and accompanying text; see also Nate Raymond, *Investment Adviser Imprisoned for Fraud Tied to Kickbacks, Horse Racing*, REUTERS (Feb. 13, 2015, 4:11 PM), <https://www.reuters.com/article/idUSKBN0LH2FC> [<https://perma.cc/S3ZZ-4M9P>] ("A septuagenarian investment adviser was sentenced . . . for defrauding clients by funneling money to a New York horse

comparatively higher production costs than true records. That is because false records can prove knowing or intentional mental states. Why else, after all, would the actor create false records but that she recognizes her actions to be wrongful?<sup>177</sup>

Indeed, white-collar offending can be hard to prove, making the capture or disclosure of false records (and what they reveal about actors' mental states) particularly fruitful for law enforcement.<sup>178</sup> For example, if a chief financial officer (CFO) is accused of accounting fraud, she might counter that her decisions, albeit in retrospect incorrect, were the result of mere negligence or even good-faith attempts to apply accounting rules.<sup>179</sup> But if, however, law enforcement finds that the CFO kept a spreadsheet reconciling incorrect to correct accounting, then she cannot credibly deny having at least knowledge of the improper accounting.<sup>180</sup> And for law enforcement, it is all the better if the actor titles a record in a way that makes its illicit purpose clear, such as "cushion.xls" for a spreadsheet used to reconcile cookie-jar accounting.<sup>181</sup> The need to reconcile false records to true offers another reason why false records imply comparatively higher production costs. When criminal managers must keep "two sets of books"—one to apprise them accurately about the enterprise and another to deceive outsiders—they produce a greater quantity of records. More records, more risk.<sup>182</sup>

In contrast, true criminal business records have comparatively higher retention costs. That is because true records will plainly expose past illicit

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rating firm and small, thinly traded companies in exchange for secret kickbacks. . . . Tagliaferri . . . also created false documents to conceal his fraud, prosecutors said."); Press Release, U.S. Att'y's Off., S. Dist. Iowa, Five Indicted in Des Moines Property Flipping Investigation (Aug. 15, 2014), <https://www.justice.gov/usao-sdia/pr/five-indicted-des-moines-property-flipping-investigation> [<https://perma.cc/M2FQ-D3ZS>] (alleging that real-estate conspirators created false documents to deceive lenders).

177. See *United States v. Koss*, 506 F.2d 1103, 1114 (2d Cir. 1974) (holding that "evidence of [a defendant's] knowing submission of false documents would . . . have been admissible to show [his] consciousness of guilt").

178. MIRIAM H. BAER, MYTHS AND MISUNDERSTANDINGS IN WHITE-COLLAR CRIME 15 (2023) ("White-collar crimes may be hard to prove (at least when it comes to demonstrating someone's knowledge or intent to deceive others), but they aren't *impossible* to prove, and aggressive prosecutors who know that have every incentive in the world to ferret out information and make a name for themselves . . .").

179. See, e.g., Mike Magner & Jeff Birdsong, *Firms Can Fight IRS and DOJ Overreach with Records of Good Faith*, BLOOMBERG TAX (Oct. 3, 2023, 3:45 AM), <https://news.bloombergtax.com/tax-insights-and-commentary/firms-can-fight-irs-and-doj-overreach-with-records-of-good-faith> [<https://perma.cc/7T86-FHNV>].

180. See Bankrate NPA, *supra* note 19; ORIOL AMAT, DETECTING ACCOUNTING FRAUD BEFORE IT'S TOO LATE 6 (2019) ("Another variant of manipulation is the *big bath* . . . . In many cases the big bath allows generating excessive provisions, called *cookie jar*, that can be reverted in future years and, as a result, increase the profits of the years in which they are reverted.").

181. See AMAT, *supra* note 180, at 6.

182. See *supra* Section I.B (modeling the production factor as a sum of all records produced).

activity if they are captured by law enforcement or disclosed by an informant. But the illicit activity reflected in false records—especially those not reconciled to true records—is naturally disguised.<sup>183</sup> They are, after all, designed to conceal criminality and deceive outsiders. Unlike true records, false records standing alone will be less likely to expose.

### III. CRIMINAL RECORDKEEPING IN THREE SETTINGS

A criminal enterprise can be understood to occur *within* an organization, or it can be understood to *be* the organization. That is, illicit activity can occur and be managed within an organization whose purpose and operations are otherwise lawful. Or, illicit activity can be the entirety of an organization's purpose and operations. This Part considers Part I's theory in light of three organizational settings in which criminal recordkeeping occurs: illicit activity in illicit organizations, illicit activity in licit organizations, and licit activity (done illicitly) in licit organizations. As the next three sections explain and the following chart summarizes, the qualitative distinctions between these settings in turn influence the comparative production and retention costs borne by illicit actors. These distinctions in turn inform Part IV's discussion on public-policy interventions around criminal business records.

Recordkeeping Setting		Production Costs	Retention Costs
<i>Organization</i>	<i>Activity</i>		
Illicit	Illicit	High	Low
Licit	Illicit	High	High
Licit	Licit	Low	High

#### A. *Illicit Organization, Illicit Activity*

Illicit organizations provide perhaps the most familiar setting for criminal recordkeeping. Their distinguishing feature is that they have no

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183. See generally Evan Bell, *Concealing and Disguising Criminal Property*, 12 J. MONEY LAUNDERING CONTROL 268 (2009).

lawful purpose: their very existence is criminal.<sup>184</sup> Given that status, every act carrying out their business is illicit.<sup>185</sup>

Illicitness is a descriptive, not a normative, status. No doubt this setting encompasses a broad range of organizations that could be considered to engage in entirely anti-social, immoral, or normatively disfavored activity. Examples would include drug dealing,<sup>186</sup> human trafficking,<sup>187</sup> terrorism,<sup>188</sup> scamming,<sup>189</sup> and hacking,<sup>190</sup> and other kinds of illegal conduct done by groups. But it might also include organizations engaged in unlawful activity that could still be understood as pro-social, moral, or normatively favored.<sup>191</sup> Examples could include groups that supply cannabis to those with a medical need in jurisdictions that restrict it,<sup>192</sup> or groups that facilitate access to safe abortions that are illegal under local law.<sup>193</sup> For this Article,

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184. This point is most stark in light of the federal Racketeering Influenced and Corrupt Organization Act, which criminalizes participation in an enterprise involved in broadly defined “racketeering activity.” 18 U.S.C. § 1962; cf. Gerard E. Lynch, *RICO: The Crime of Being a Criminal, Parts I and II*, 87 COLUM. L. REV. 661, 703 (1987) (“Finally, because it is necessary, in a RICO prosecution, to demonstrate the existence of the enterprise as an association of some permanence, it becomes a provable element of the offense to demonstrate that [the enterprise] actually exists as a more or less formal institution.”).

185. See Lynch, *supra* note 184, at 703.

186. See Levitt & Venkatesh, *supra* note 25.

187. Vanessa Bouché, *An Empirical Analysis of the Intersection of Organized Crime and Human Trafficking in the United States*, NAT’L CRIM. JUST. REFERENCE SERV. (Apr. 28, 2017), <https://www.ojp.gov/pdffiles1/nij/grants/250955.pdf> [<https://perma.cc/Q79F-BTWA>].

188. See *Foreign Terrorist Organizations*, U.S. DEP’T OF STATE, <https://www.state.gov/foreign-terrorist-organizations/> [<https://perma.cc/3BWY-WWFT>] (listing designated foreign terrorist organizations) (“FTO designations play a critical role in our fight against terrorism and are an effective means of curtailing support for terrorist activities and pressuring groups to get out of the *terrorism business*.” (emphasis added)).

189. E.g., Press Release, U.S. Att’y’s Off., N. Dist. Okla., Ten Members of International Cyber Fraud Ring Indicted for “Refund Fraud” Scheme Targeting Online Retailers (Nov. 9, 2023), <https://www.justice.gov/usao-ndok/pr/ten-members-international-cyber-fraud-ring-indicted-refund-fraud-scheme-targeting> [<https://perma.cc/A4QT-3WCP>].

190. E.g., Lorenzo Franceschi-Bicchierai, *How the Mafia Is Pivoting to Cybercrime*, VICE (Sept. 22, 2021), <https://www.vice.com/en/article/epne4j/how-the-mafia-is-pivoting-to-cybercrime> [<https://perma.cc/PZ4A-2C2K>] (“The authorities said that the organized crime groups employed hackers who were using phishing, social engineering attacks, and SIM swapping, as well as sending malware to victims with the goal of taking over their bank accounts and stealing their money.”).

191. William Baumol typologized entrepreneurial activity as being either productive, unproductive, or destructive, which can further overlay with the licit or illicit nature of the activity. See generally William J. Baumol, *Entrepreneurship: Productive, Unproductive, and Destructive*, 98 J. POL. ECON. 893 (1990).

192. See Rebecca Lindstrom & Lindsey Basye, *Underground Network Brings Medical Marijuana to Georgia Residents, and It’s Legal*, 11ALIVE (Sept. 9, 2018, 6:53 PM), <https://www.11alive.com/article/news/investigations/underground-network-brings-medical-marijuana-to-georgia-residents-and-its-legal/85-592059409> [<https://perma.cc/A5SB-3DUP>] (reporting on an organization bringing medical cannabis to Georgia, where it could be possessed and used but not grown or otherwise acquired in-state).

193. See KAPLAN, *supra* note 22 (recounting the work and organization of the Jane Collective, an underground abortion service in pre-*Roe* Chicago, Illinois).

illicitness means a status to be understood strictly as something that risks detection and sanction.<sup>194</sup>

Of the three organizational settings I theorize, illicit organizations bear comparatively the highest production costs. That is because the illicit status of the organization implies that anything it does embraces its criminal purpose.<sup>195</sup> Creating records, whether true or false, evidences that the criminal enterprise is ongoing. In other words, record production is particularly costly for illicit organizations in light of inferences that follow from record production as being in furtherance of crime. Yet, although those not involved in illicit organizations might believe that any record production in that setting is irrational in light of the risk it creates,<sup>196</sup> savvy criminal managers understand that their organizations must engage in recordkeeping.<sup>197</sup>

Compared with their high production costs (relative to the other two settings), illicit organizations' retention costs are low. That is because they are subject to fewer, if any, internal controls that would prevent typical efforts to mitigate retention costs and thus their attendant risk.<sup>198</sup> There is no need, for instance, for illicit organizations to maintain internal controls that have the purpose of preventing members of the organization from engaging in illicit activity (although they might require controls that prevent members from expropriating from the organization or its owners).<sup>199</sup> Absent internal controls, retention-cost mitigations might include records kept only in physical form (to prevent electronic replication or transfer), concealed in

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194. See A.P. SIMESTER & ANDREAS VON HIRSCH, *CRIMES, HARMS, AND WRONGS: ON THE PRINCIPLES OF CRIMINALISATION* 4 (2011) (“[In one] view, the primary task when ascertaining the scope of criminalisation is to identify when conduct is morally wrongful. At the other end of the spectrum, some writers see the criminal law as just another state regulatory tool, one that happens to involve fines and imprisonment rather than injunctions and damages.”).

195. For example, actions undertaken in connection with a criminal conspiracy might be lawful on their own. But in their full context, they constitute overt acts in furtherance of the conspiracy. See *United States v. Crippen*, 627 F.3d 1056, 1065 (8th Cir. 2010).

196. This popular notion is often referred to as the “Stringer Bell Rule,” in honor of a business-minded leader of a fictional drug-selling gang who chastises a subordinate for taking minutes, per Robert’s Rules of Order, in a business meeting. *The Wire: Straight and True* (HBO television broadcast Oct. 17, 2004) (“[I]s you taking notes on a criminal f—ing conspiracy? F— is you thinking man?”); see also Matthew Pratt Guterl, *Race Wars*, 47 *REVS. AM. HIST.* 452, 454 (2019) (“The most effective criminal conspiracies, following the so-called Stringer Bell rule, do not take notes or keep records.”).

197. See *supra* Section I.B.

198. See Anuar Nawawi & Ahmad Saiful Azlin Puteh Salin, *Internal Control and Employees’ Occupational Fraud on Expenditure Claims*, 25 *J. FIN. CRIME* 891 (2018).

199. See generally Henry A. Thompson, *Cosa Nostra Courts* 9 (George Mason Univ. Working Paper in Econ. No. 21-42, 2022), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3977333](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3977333) [<https://perma.cc/FJ8L-673K>] (documenting and theorizing internal-enforcement and dispute-resolution systems within La Cosa Nostra).

hidden locations, encrypted or written in ciphers,<sup>200</sup> or in the control of a senior manager or a trusted third party.<sup>201</sup>

Illicit organizations also enjoy comparatively low retention costs because such costs are incurred only to the extent that records *exist*, which criminal managers have considerable control over.<sup>202</sup> Once an illicit organization's records are no longer strictly required, they can be destroyed. If management has succeeded in ensuring that records are not captured by law enforcement or disclosed by informants (such as by producing few copies and closely controlling them), or avoids creating evidence of the destruction itself, then destruction eliminates the retention factor associated with a given act.<sup>203</sup>

Of course, illicit organizations might still bear those retention costs that they are unable to mitigate, particularly in the context of interacting with external licit actors and their controls. For instance, money laundering—whether as its own activity or secondary to some broader criminal purpose—is apt to require interaction with financial institutions and other legal market actors that must refuse to knowingly facilitate money laundering.<sup>204</sup> Thus, a successful interaction with them requires the creation of false records to overcome their anti-money-laundering controls. To obtain banking services, for example, a money launderer might create false documents to make cash appear to be from a lawful source.<sup>205</sup> The bank, of course, would retain those documents and so, once given to that third party, the illicit actor would lose the ability to destroy them or otherwise manage the retention risks associated with them.<sup>206</sup>

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200. ANTONIO NICASO & MARCEL DANESI, *THE DARK MAFIA: ORGANIZED CRIME IN THE AGE OF THE INTERNET* 74 (2023) (“The use of cryptography, for instance, has been adopted by members of criminal organizations to communicate with each other in secret code so that they can avoid the decipherment of message interceptions and even eavesdropping on the part of the authorities.”).

201. The Mossack Fonseca law firm was a particularly popular trusted third party to custody criminal business records, at least until those records were exposed in the Panama Papers leak. *See supra* note 133.

202. *See supra* Section I.B.

203. *See supra* Section I.B.

204. *What is Money Laundering?*, FIN. CRIMES ENF’T NETWORK, <https://www.fincen.gov/what-money-laundering> [<https://perma.cc/NR3P-4A4G>] (“With few exceptions, criminals are motivated by one thing—profit. Greed drives the criminal, and the end result is that illegally-gained money must be introduced into the nation’s legitimate financial systems.”).

205. *Id.* (“Money laundering involves disguising financial assets so they can be used without detection of the illegal activity that produced them.”).

206. Michael Kilchling, *Finance-Oriented Strategies of Organized Crime Control*, in *THE OXFORD HANDBOOK OF ORGANIZED CRIME*, *supra* note 17, at 655, 660 (noting that the European Union requires that financial records be maintained for five years so that “[o]nce a suspicion occurs, all data that has been ‘non-suspiciously’ stored has to be transferred from the private record-keepers (which are the legal owners of the data) to state authorities”).

A final consideration for criminal business records in illicit organizations is the reality that given the organization's lack of lawful purpose, *any* business record it produces will be prima facie evidence of criminal activity.<sup>207</sup> This point implies that illicit organizations face pressure not to produce records, which could in turn serve the socially desirable result of staunching organizational scaling that could have occurred with more complete managerial records.<sup>208</sup> It also implies that in many cases, managers of illicit organizations might receive less accurate information because they cannot freely acquire some services—such as accounting or technology services—that allow licit organizations to enjoy both quantity *and* quality in their production of business records.<sup>209</sup> And to the extent that illicit organizations must destroy records to mitigate retention costs, their managers lose the benefit of being able to accurately and completely analyze the organization's historical performance and identify strategies to improve future performance.<sup>210</sup> Just as having high-quality and complete information promotes efficient decision-making, comparatively lower-quality record production in illicit organizations degrades the quality of managerial decision-making.<sup>211</sup>

#### *B. Licit Organization, Illicit Activity*

The prior setting—illicit activity in an illicit organization—evokes organized street crime. The next setting—illicit activity in a licit organization—is more commonly associated with white-collar crime.<sup>212</sup> This setting is distinguished from illicit organizations in several ways. First, because the organization's purpose is lawful, and indeed its operations are socially encouraged, it can freely scale its size and, as a result, its complexity.<sup>213</sup> Unlike illicit organizations, a licit organization's business

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207. See *supra* note 184 and accompanying text.

208. See *supra* Section I.A.2.

209. See PAM PRIOR, YOUR FIRST CFO: THE ACCOUNTING CURE FOR SMALL BUSINESS OWNERS 16 (2018) (“As a business leader, you need to operate from a place where you fully trust that the complexities of accounting and bookkeeping are capably managed by your experts, and that the system is set up so that you extract *only* and *exactly* the information you need to run your business.”).

210. See *supra* note 72 and accompanying text.

211. Srinivasan Raghunathan, *Impact of Information Quality and Decision-Maker Quality on Decision Quality: A Theoretical Model and Simulation Analysis*, 26 DECISION SUPPORT SYS. 275, 276 (1999) (“Simultaneous improvement in information quality and decision-maker quality prevents the degradation of decision quality.”).

212. See Friedrichs, *supra* note 18.

213. Cf. Scott Shane, *Why Encouraging More People to Become Entrepreneurs is Bad Public Policy*, 33 SMALL BUS. ECON. 141 (2009) (observing that because larger firms contribute the most to economic growth and its related social goals, public policy should promote only high-growth firms rather than business startups).

records are not prima facie evidence of criminality, and thus it faces few constraints in producing and retaining large quantities of records; indeed, it is free to invest in technologies that make doing more feasible and less expensive.<sup>214</sup>

Illicit activity in licit organizations occurs in information-rich environments favorable to the production and retention of business records. More, licit organizations invest in services and technologies, and impose controls, to ensure that business records are complete and accurate in light of the organization's managerial needs and compliance obligations.<sup>215</sup> Within this informational environment, record production is costly for those involved in illicit activity. That is because other members of the organization are presumably not engaged in illicit activity and might object if they discover records revealing it.<sup>216</sup> Those involved in illicit activity must falsify records to avert such objections, as well as to evade controls designed to ensure that the organization engages in only lawful activity.<sup>217</sup> Such falsification is itself costly, and it also might not be successful, in which case that record production will ultimately expose the illicit actors.<sup>218</sup> Obtaining corporate funds for bribe payments, for example, might require

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214. New software-as-a-service offerings and cloud computing have made capturing, storing, and analyzing large amounts of data practical and affordable to even the smallest licit businesses. See SALESFORCE, SMALL AND MEDIUM BUSINESS TRENDS REPORT (5th ed. 2021), [https://www.salesforce.com/content/dam/web/en\\_gb/www/pdf/2021-smb-trends-uk.pdf](https://www.salesforce.com/content/dam/web/en_gb/www/pdf/2021-smb-trends-uk.pdf) [<https://perma.cc/HQL8-KK8T>]. In the criminal context, however, accessing the benefit of such technologies would markedly increase retention costs, given that it would entrust a criminal organization's records to a third party that might be required to respond to law-enforcement requests. See, e.g., *Law Enforcement Information Requests*, AMAZON <https://www.amazon.com/gp/help/customer/display.html?nodeId=GYS DRGWQ2C2CRYEF> [<https://perma.cc/H7J8-ZMDJ>] (noting that "Amazon does not disclose customer information in response to government demands unless we're required to do so to comply with a legally valid and binding order" and reporting request statistics for Amazon Web Services, the company's cloud-computing platform); see also Miriam H. Baer, *Law Enforcement's Lochner*, 105 MINN. L. REV. 1667 (2021) (observing that although under current doctrine the government may obtain records from third parties relatively easily through administrative or grand-jury subpoena, the Supreme Court's Fourth Amendment jurisprudence might be transitioning to more robust protections for records custodied by third parties).

215. See PROTIVITI, THE EVOLUTION OF SOX: TECH ADOPTION AND COST FOCUS AMID BUSINESS CHANGES, CYBER AND ESG MANDATES 5 (2023), <https://www.protiviti.com/sites/default/files/2023-09/2023-sox-compliance-survey-protiviti.pdf> [<https://perma.cc/ES2Q-HCUW>] (reporting average internal-control costs among public companies of \$723 thousand to \$1.36 million, excluding external audit-related fees).

216. Although it is possible that an employee unaligned with an internal scheme might join or otherwise support it, or ignore red flags that illicit conduct is happening, participants in illicit activity will understand that it takes only one person to blow the whistle on the misconduct. This possibility would be expected to achieve some deterrent effect. See Philip G. Berger & Heemin Lee, *Did the Dodd-Frank Whistleblower Provision Deter Accounting Fraud?*, 60 J. ACCT. RSCH. 1337 (2022) (finding an inverse causal relationship between whistleblower programs and accounting fraud).

217. See *supra* Section I.A.3 for further discussion on this point.

218. See *supra* Section I.A.3 for further discussion on this point.

falsifying invoices or preparing sham contracts to evade controls.<sup>219</sup> If personnel reviewing such invoices grow suspicious, the scheme could be exposed.<sup>220</sup>

In other instances, those participating in illicit activity might need to produce a “second set of books” outside the organization’s usual recordkeeping practices to satisfy the activity’s managerial needs. The second set of books would reflect the true condition of the illicit activity and thus be useful for managing it, whereas the official “first set of books” would be falsified so as to conceal the illicit activity from those not in on the scheme.<sup>221</sup> As Section II.B notes, producing two sets of books—one true and one false—evidences the recordkeeper’s wrongful intent.

Retention is also costly in a licit organization. That is for a few reasons. To the extent that their assistance is needed, non-participants will generally be unwilling, or unreliable, in helping destroy records.<sup>222</sup> Even absent objections from non-participants, a licit organization’s internal policies or external mandates might make destroying records infeasible. Record-retention policies or technologies, for example, might ensure that indelible copies exist such that illicit actors lack the ability to reduce their retention costs once a record has been produced.<sup>223</sup>

More, organizations are vicariously liable for criminal activity committed by their employees and agents on the job, provided those actors intended a modicum of organizational benefit.<sup>224</sup> Criminal enforcement policies, however, promise vicariously-liable-but-generally-lawful organizations significant mitigation if they cooperate in government investigations and prosecutions.<sup>225</sup> Assessment of such cooperation turns on whether the organization has helped identify culpable individuals, including through costly document reviews and productions and internal

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219. For examples, see *supra* notes 83–84, 114, 120 and *infra* note 221.

220. Cf. Deborah L. Murphy & Samuel L. Tibbs, *Internal Controls and the Cost of Fraud: An Empirical Investigation*, 3 J. CORP. TREASURY MGMT. 127 (2010) (finding that ineffective internal controls that permit financial misconduct might lead to reductions in shareholder wealth).

221. See, e.g., *United States v. Evans*, 216 F. App’x 268, 272 (3d Cir. 2007) (“As head of the Mounted Unit, Evans was in a position where his signature on an invoice led to the commission of a crime that was difficult to detect, as the signature allowed a second set of records to be kept.”).

222. See *supra* note 216 and accompanying text.

223. For example, following the September 11 terrorist attacks, Congress amended the Bank Secrecy Act to impose heightened record-retention requirements for depository institutions following its finding that “adequate records maintained by insured depository institutions have a high degree of usefulness in criminal, tax, and regulatory investigations or proceedings.” Pub. L. No. 108-458, 115 Stat. 328 (2001) (codified as amended at 12 U.S.C. § 1829b(a)(1)(A)).

224. See *N.Y. Cent. & Hudson River R.R. Co. v. United States*, 212 U.S. 481, 493 (1909).

225. See U.S. Dep’t of Just., *Just. Manual* § 9-28.700 (2023) (“Cooperation is a mitigating factor, by which a corporation—just like any other subject of a criminal investigation—can gain credit in a case that otherwise is appropriate for indictment and prosecution.”).

investigations.<sup>226</sup> Thus, retention costs in the licit setting are high not only because illicit actors are unable to destroy them but also because they are in the possession of an organization that, for its own benefit, will eagerly provide them to the government.<sup>227</sup>

### C. Licit Organization, Licit Activity (Done Illicitly)

In the prior setting—illicit activity in a licit organization—activity that is categorically unlawful occurs within an otherwise lawful organization. It is inherently illicit, for instance, to pay bribes to obtain business,<sup>228</sup> or to illegally dump hazardous waste into a river.<sup>229</sup> But even lawful business activity—such as engaging in financial accounting and preparing financial statements for investor consumption, or marketing approved pharmaceuticals to physicians or consumers—can be done illicitly. Financial accounting and financial-statement preparation, for example, can be done in ways that violate generally accepted accounting principles (GAAP),<sup>230</sup> or that deceive investors despite technically complying with GAAP.<sup>231</sup> A CFO, for example, might manipulate a firm’s revenue or expenses so as to deceive investors about the company’s performance and condition.<sup>232</sup> Or sales representatives for a pharmaceutical company might

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226. Merrick B. Garland, Att’y Gen., U.S. Dep’t of Just., Remarks to the ABA Institute on White Collar Crime (Mar. 3, 2022), <https://www.justice.gov/opa/speech/attorney-general-merrick-bgarland-delivers-remarks-aba-institute-white-collar-crime> [<https://perma.cc/PS32-TFP9>] (“[T]o be eligible for any cooperation credit, companies must provide the Justice Department with all non-privileged information about individuals involved in or responsible for the misconduct at issue. This means all individuals, regardless of their position, status, or seniority, and regardless of whether a company deems their involvement as ‘substantial.’”).

227. *See id.*

228. *See, e.g.*, Foreign Corrupt Practices Act of 1977, 15 U.S.C. § 78dd–1 to –3 (prohibiting bribes of foreign officials); 18 U.S.C. § 201 (prohibiting bribery of or payment of gratuities to federal officials); 18 U.S.C. §§ 1341, 1346 (prohibiting a “scheme or artifice to deprive another of the intangible right of honest services”); 42 U.S.C. § 1320a–7b (prohibiting kickbacks in connection with federal healthcare programs); *see also* Ryan J. Rohlfen, *Recent Developments in Foreign and Domestic Criminal Commercial Bribery Laws*, 2012 U. CHI. LEGAL F. 151 (surveying commercial-bribery laws in the United States and other nations).

229. 33 U.S.C. § 1319(c).

230. Anastasia A. Zakolyukina, *How Common Are Intentional GAAP Violations? Estimates From a Dynamic Model*, 56 J. ACCT. RSCH. 5 (2018).

231. *See United States v. Ebbers*, 458 F.3d 110, 126 (2d Cir. 2006) (“GAAP itself recognizes that technical compliance with particular GAAP rules may lead to misleading financial statements, and imposes an overall requirement that the statements as a whole accurately reflect the financial status of the company.”).

232. *See supra* note 180.

make false claims about the products they market, causing drugs to be prescribed in ways leading to addiction and other social harm.<sup>233</sup>

In production- and retention-cost terms, licit activity done illicitly tends to have low production costs but high retention costs. The retention costs are high for the same reasons retention costs are high for illicit activity in licit organizations. There again, records in licit organizations might not be destructible, and the organization will be motivated to cooperate with law enforcement.<sup>234</sup>

Production costs are comparatively lower, however, because the underlying activity is lawful and so can be undertaken openly. To the extent that business records must be falsified to conceal illicitness or to evade controls, the falsification is of a more marginal nature. For example, the fact that an agent obtained corporate funds for bribe payments must be entirely concealed. But a CFO who engages in the fraudulent practice of creating cookie-jar reserves, for example, must merely falsify an estimate to justify higher-than-needed reserves.<sup>235</sup> The act of taking reserves need not be hidden because it is often required by GAAP.<sup>236</sup> In another example, a pharmaceutical sales representative who illicitly off-label markets does not need to conceal that she engaged in marketing her assigned products within her assigned territory: that underlying activity is lawful and done openly.<sup>237</sup> Rather, she need only conceal—perhaps by falsifying the call reports she completes after meeting with physicians—that she engaged in illicit marketing.<sup>238</sup>

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233. See Rebecca Haffajee & Michelle M. Mello, *Drug Companies' Liability for the Opioid Epidemic*, 377 NEW ENG. J. MED. 2301 (2017); see also Letter from U.S. Att'y, Dist. of N.J., on Plea Agreement with Purdue Pharma L.P., at 1–2 (Oct. 20, 2020) (providing that Purdue Pharma plead guilty to, among other things, misbranding OxyContin as being less addictive and subject to abuse than competing opioids).

234. See *supra* note 226 and accompanying text.

235. See *supra* note 180.

236. CODIFICATION OF ACCT. STANDARDS & PROCS., 450-20-25 (FIN. ACCT. STANDARDS BD. 2024) (requiring that an “estimated loss from a loss contingency . . . be accrued by a charge to income if [certain] conditions are met”).

237. There is even a trade association for those working in the pharmaceutical sales industry or seeking to enter the industry. National Association of Pharmaceutical Sales Rep Information, NAT'L ASS'N PHARM. SALES REPRESENTATIVES, <https://www.napsronline.org/info/> [<https://perma.cc/MP4Z-HY7B>].

238. Aaron S. Kesselheim, Michelle M. Mello & David M. Studdert, *Strategies and Practices in Off-Label Marketing of Pharmaceuticals: A Retrospective Analysis of Whistleblower Complaints*, 8 PLOS MED. e1000431, 5 (2011) (“A third of [whistleblower] complaints included reports of direct orders to conceal, such as ‘cleaning’ internal reports and memoranda of all mentions of off-label marketing . . .”).

#### IV. POLICY AND COMPLIANCE IMPLICATIONS OF CRIMINAL RECORDKEEPING

Complex, continuous criminal enterprises must engage in recordkeeping. Yet they must also mitigate the production and retention costs. This tension opens a range of potential policy interventions. As this Part explains, these interventions will differ slightly between the first setting (the illicit organization)<sup>239</sup> and the second two (the licit organization).<sup>240</sup> In doing so, it derives two principles from this Article's theory of criminal recordkeeping: make production harder and less attractive but make retention easier and more attractive.

##### A. *Criminal Business Records and Criminal Law*

The public interest in criminal recordkeeping is contradictory: to prevent the production of such records, but also to encourage their retention. This contradiction is reconcilable. The public interest is first to prevent crime from happening but is then to detect, prosecute, and appropriately sanction it when it does occur.<sup>241</sup> Because recordkeeping can be criminogenic, staunching it in the criminal context will, whether entirely or at the margin, inhibit the management of complex, long-lived illicit activity.<sup>242</sup> As a result, such activity will not occur at all, or will occur at a comparatively smaller scale.<sup>243</sup>

Policy and law, of course, are not entirely successful at preventing crime. But interventions to prevent the production of criminal business records could stop some illicit activity, at the margin, from occurring.<sup>244</sup> Complex, long-lived illicit activity nevertheless will persist as a social problem, and its managers will use recordkeeping to make that problem worse. If the primary public interest in preventing crime fails, then secondary interests in detection, prosecution, and sanction come into focus. In that case, policy

239. See *supra* Section III.A.

240. See *supra* Sections III.B–C.

241. See generally Richard S. Frase, *Punishment Purposes*, 58 STAN. L. REV. 67 (2005).

242. See *supra* Parts I and II.

243. In some cases, however, non-production pressure could prompt particularly sophisticated organizations to adapt in ways that both permit complex, continuous operations and avoid producing detection-enabling records. For example, La Cosa Nostra—an organized-crime federation with operations in the United States and origins in Sicily—avoids creating written records and so adapts its governance and dispute-resolution processes to account for the incompleteness and ambiguities of oral policy and contracts. See Henry A. Thompson, *The Industrial Organization of the Mafia*, J.L. & ECON. (forthcoming) (manuscript at 11–14), <https://static1.squarespace.com/static/6165b74a4cd40d5293c28c99/U/64f4d32bb39eb535603b2b68/1693766443547/Thompson-IO+of+the+mafia%2809%3A23%29.pdf> [<https://perma.cc/2G74-W8LZ>].

244. See NAT'L RSCH. COUNCIL, IMPROVING EVALUATION OF ANTICRIME PROGRAMS (2005).

and law should intervene to encourage the retention of criminal business records because their retention increases the likelihood of detection and sanction.<sup>245</sup>

Federal and state criminal law already partly serve this twin policy of preventing production while encouraging retention, which this section outlines. As it notes, however, these laws have gaps in coverage, particularly in their focus on *false* records and their inattention to criminogenic *true* ones. More, they rely solely on shaping behavior punitively by imposing criminal liability.<sup>246</sup> Although such a “stick” approach might have some of its intended effect, this section proposes also offering “carrots”—in the form of mitigations for retaining records—to participants in criminal enterprises.<sup>247</sup>

### 1. Preventing the Production of Criminal Business Records

Criminal prohibition is an obvious, and partly existing, means for preventing the production of criminal business records.<sup>248</sup> Admittedly, its deterrent effect will be limited in many cases because actors willing to commit offenses that records are meant to facilitate will perhaps accept incremental liability from violating a records-prohibition statute.<sup>249</sup> In such cases, those in for a pound would also be in for a penny. That is especially true if expected penalties for violating a records prohibition are lower than the expected penalties for the records-enabled violations, and if a records offense’s sentence is expected to concur with sentences for other offenses.<sup>250</sup>

But there are also several reasons to expect such prohibitions to have *some* deterrent effect. First, a legislature or sentencing commission could adopt a policy under which records production in connection with the

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245. See *supra* Section I.B.

246. Hope Corman & Naci Mocan, *Carrots, Sticks, and Broken Windows*, 48 J.L. & ECON. 235, 237 (2005) (finding that “[a]lthough carrots and sticks both explain crime fluctuations in NYC, the impact of sticks”—“arrests, size of the police force, and prison population”—were “stronger than the impact of carrots during the 1990s”).

247. Gerrit De Geest & Giuseppe Dari-Mattiacci, *The Rise of Carrots and the Decline of Sticks*, 80 U. CHI. L. REV. 341, 361 (2013) (“Carrots incentivize by effectively rewarding while sticks incentivize only by threatening.”).

248. See *infra* notes 256–59 and accompanying text.

249. Cf. Keith N. Hylton, *A Positive Theory of Strict Liability*, 4 REV. L. & ECON. 153, 160 (2008) (“[I]n a model of unilateral causation of harm, with discrete care choices, actors will take reasonable care as long as the incremental liability for failing to take care exceeds the cost of taking care.”).

250. See Richard S. Frase, *Principles and Procedures for Sentencing of Multiple Current Offenses*, in SENTENCING MULTIPLE CRIMES 189, 189 (Jesper Ryberg, Julian V. Roberts & Jan W. de Keijser eds., 2018) (“[W]hen multiple crimes are sentenced at one time or close together in time (. . . *simultaneous* offenses) they are often sentenced much less harshly than when the same crimes are sentenced over a longer period of time (. . . *sequential* offenses).”).

commission or concealment of *another* criminal act is a sentencing aggravator.<sup>251</sup> By imposing incremental sanction (and not just incremental liability), additional deterrence might be achieved.<sup>252</sup> Second, in some circumstances in which law enforcement is aware of both prohibited record production *and* other criminal acts, the record production might be a more readily provable offense.<sup>253</sup> In that case, the record prohibition might deter because it is more likely to lead to punishment (even if it carries a lesser expected penalty than the offense it enabled).<sup>254</sup> And third, the founders of a complex, long-lived criminal enterprise might not have originally intended it to reach such scale. In that case, it is possible that the expected penalty for records violations is set to a level above the expected penalty for the actors' at-first modest criminal ambitions.<sup>255</sup> All in, to the extent that criminal law can deter, in some cases records-production prohibition could contribute to deterrence or even inhibit a criminal enterprise from getting off the ground.

This Article opens with indictments against Donald Trump under two interrelated New York penal statutes, first adopted in 1909, criminalizing certain business-records misconduct.<sup>256</sup> Given that at least six other states have statutes that are textually aligned with the New York statutes, they are a good place to start in thinking about how to structure statutory prohibitions on the production of criminal business records.<sup>257</sup> The New York statute

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251. Julian V. Roberts, *Punishing, More or Less: Exploring Aggravation and Mitigation at Sentencing*, in *MITIGATION AND AGGRAVATION AT SENTENCING* 1, 1 (Julian V. Roberts ed., 2011) (“At sentencing, courts must weigh a wide range of offence and offender-related factors in order to determine the severity of the sentence. Some [sentencing] factors influence the sentence by affecting the seriousness of the crime, others because they reflect a higher or lower level of culpability on the part of the offender.”).

252. *But see* Cheryl Marie Webster & Anthony N. Doob, *Searching for Sasquatch: Deterrence of Crime Through Sentence Severity*, in *THE OXFORD HANDBOOK OF SENTENCING AND CORRECTIONS* 173, 191 (Joan Petersilia & Kevin R. Reitz eds., 2012) (noting that there is a dearth of empirical evidence to support that increased sentence severity increases marginal deterrence).

253. Erin Murphy, *Manufacturing Crime: Process, Pretext, and Criminal Justice*, 97 *GEO. L.J.* 1435, 1445 (2009) (“Compared to primary violations, process crimes can be far easier to prove. They rarely rely upon civilian witnesses or complex evidentiary structures and often present a series of straightforward elements . . .”).

254. *See id.*

255. *See* *United States v. Wallach*, 935 F.2d 445, 470 (2d Cir. 1991) (“The law of conspiracy serves two independent values: (1) it protects society from the dangers of concerted criminal activity, and (2) it serves a preventive function by *stopping criminal conduct in its early stages of growth before it has a full opportunity to bloom.*” (emphasis added) (citing *United States v. Feola*, 420 U.S. 671, 693–94 (1975))).

256. *See supra* Introduction.

257. Visual inspections of the business-records-falsification statutes for Alabama, Alaska, Delaware, Hawaii, Kentucky, and Oregon show that their statutes closely follow the New York misdemeanor statute in structure, scope, and wording. *See* ALA. CODE § 13A-9-45 (2024); ALASKA STAT. § 11.46.630 (2024); DEL. CODE ANN. tit. 11, § 871 (2024); HAW. REV. STAT. § 708-872 (2024); KY. REV. STAT. ANN. § 517.050 (West 2024); OR. REV. STAT. § 165.080 (2024).

prohibiting falsifying business records in the second degree (the misdemeanor statute) provides as follows:

A person is guilty of falsifying business records in the second degree when, with intent to defraud, he:

1. Makes or causes a false entry in the business records of an enterprise; or
2. Alters, erases, obliterates, deletes, removes or destroys a true entry in the business records of an enterprise; or
3. Omits to make a true entry in the business records of an enterprise in violation of a duty to do so which he knows to be imposed upon him by law or by the nature of his position; or
4. Prevents the making of a true entry or causes the omission thereof in the business records of an enterprise.

Falsifying business records in the second degree is a class A misdemeanor.<sup>258</sup>

And the statute prohibiting falsifying business records in the first degree (the felony statute) provides an additional element:

A person is guilty of falsifying business records in the first degree when he commits the crime of falsifying business records in the second degree, and when his intent to defraud includes an intent *to commit another crime or to aid or conceal the commission thereof*.

Falsifying business records in the first degree is a class E felony.<sup>259</sup>

As a statute prohibiting the production of criminal business records, the misdemeanor statute, contains two significant gaps: its coverage excludes both true records and “honest” crimes.

First, the statute criminalizes only the production of false or deceptive records. That is, its subsection (1) prohibits directly creating a false business record, and its other three subsections prohibit acts that render a business record, on the whole, false or deceptive.<sup>260</sup> This focus on falsity or deception is consistent with the text’s “intent to defraud” element. As an anti-fraud statute, there would be no point to prohibit true and complete records because they would lack the tendency to deceive third parties, such as

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258. N.Y. PENAL LAW § 175.05 (McKinney 2024).

259. N.Y. PENAL LAW § 175.10 (McKinney 2024) (emphasis added).

260. See N.Y. PENAL LAW § 175.05 (McKinney 2024).

contractual counterparties or financial institutions.<sup>261</sup> False records created for fraudulent purposes facilitate crime and so are a worthy object for anti-production intervention. But, in its focus as an anti-fraud statute, New York law is inadequate for preventing the production of *true* records that also facilitate criminal activity.<sup>262</sup>

Second, *fraudulent intent* is an element of both the misdemeanor and felony statutes. The felony statute, for instance, requires two mental states, both to defraud and to commit or conceal the commission of another crime. That fraudulent-intent element would mean no liability for business records kept to commit or conceal an offense not involving fraudulent intent.<sup>263</sup> Such a statute might not cover, for example, the keeping of a ledger documenting illicit drug sales that are honest commercial exchanges in that, despite their illegality, the parties transact voluntarily, value for value.<sup>264</sup> By turning on fraud, the New York statutes are inadequate to the job of preventing the production of criminal business records (true or false) that enable criminal activity.

Despite its coverage gaps, however, there is much to recommend in New York's statutes. If nothing else, the experience and stability offered by their body of case law,<sup>265</sup> as well as their similarity to statutes in other states, recommend their basic structure be maintained. That structure, in turn, requires reform to prohibit more comprehensively the production of criminal business records. In that spirit, I propose that the two statutes be replaced with the following, both in New York and other states:

A person is guilty of falsifying producing criminal business records in the second degree when, with intent to defraud or commit another crime or to aid or conceal the commission thereof, he:

1. Makes or causes a true<sup>266</sup> or false entry in the business records of an enterprise; or

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261. See *supra* note 176 and accompanying text.

262. See *supra* Section II.B; cf. N.Y. PENAL LAW § 175.05 (McKinney 2024).

263. *People v. Reyes*, 894 N.Y.S.2d 43, 44–45 (N.Y. App. Div. 2010).

264. See generally *Levitt & Venkatesh*, *supra* note 25.

265. As of April 25, 2024, Westlaw's "Citing References" feature reported 311 judicial decisions citing New York Penal Law §§ 175.05 or 175.10. For the other state statutes that are textually aligned with New York law, those counts were as follows: Alabama (2); Alaska (14), Delaware (10); Hawaii (1); Kentucky (33); and Oregon (14).

266. Although creating false or deceptive records has no legitimate business purpose, creating *true* business records in connection with unlawful activity currently cannot itself be the subject of criminal liability. The proposal, however, brings true records within scope. The proposed statutory text, limits record-production liability (whether for true or false records) to production done "with intent to defraud or commit another crime or to aid or conceal the commission thereof."

2. Alters, erases, obliterates, deletes, removes or destroys a true or false<sup>267</sup> entry in the business records of an enterprise; or
3. Omits to make a true entry in the business records of an enterprise in violation of a duty to do so which he knows to be imposed upon him by law or by the nature of his position; or
4. Prevents the making of a true entry or causes the omission thereof in the business records of an enterprise.

~~Falsifying~~ Producing criminal business records in the second degree in which any intended fraud or other crime is a felony is a class E felony. A misdemeanor. Any other production of criminal business records is a class A misdemeanor.<sup>268</sup>

This new statute maintains the basic form of existing New York law, but it closes two coverage gaps. First, it treats fraudulent intent as one means for violating the statute, not as an element.<sup>269</sup> In so doing, it extends coverage to include “another crime or to aid or conceal the commission thereof.”<sup>270</sup> And second, by expanding the statute to include criminal intent generally, the proposed revision would prohibit the production of true records meant to enable illicit activity.<sup>271</sup>

## 2. *Promoting the Retention of Criminal Business Records*

The mirror policy of prohibiting records’ production is prohibiting their destruction.<sup>272</sup> Retained records impose retention costs on participants in criminal enterprises.<sup>273</sup> At the margin, those costs discourage production of records (because once created, destroying them would give rise to separate liability), which in turn inhibits criminal activity.<sup>274</sup> It also discourages the

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267. See Section II.B for an explanation of the inclusion of “false” entries in the prohibition on “obliterate[ing], delet[ing], remov[ing] or destroy[ing]” records.

268. The second paragraph of the proposed statutory text replaces the originals’ misdemeanor/felony distinction with a leveling tied to the criminal act or acts the recordkeeping was intended to facilitate. Doing so aligns the seriousness of the records production with the offenses the statute intends to prevent.

269. See *Mathis v. United States*, 579 U.S. 500, 505–06 (2016) (distinguishing the means to commit a crime from its elements).

270. See *supra* note 266 and accompanying text.

271. See *supra* note 266 and accompanying text.

272. See *supra* note 267 and accompanying text.

273. See *supra* note 267 and accompanying text; see also Section I.B.

274. See *supra* Section IV.A.1.

destruction of existing records (again, given the separate liability), thus allowing them at the margin to contribute to detection.<sup>275</sup>

Admittedly, such prohibitions are unlikely to have much deterrent effect unless the destruction risk is particularly high, in light of overall retention costs.<sup>276</sup> Nevertheless, anti-destruction statutes are on the federal books and, unlike the New York anti-production statutes, are adequately scoped for prohibiting destruction of criminal business records.<sup>277</sup> The proposed revised statutory language in the prior section, if adopted by states, would adequately scope their destruction prohibitions.<sup>278</sup> In the meantime, the Sarbanes-Oxley Act of 2002, the broadest federal anti-destruction statute, does that work by providing that:

Whoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States or any case filed under [the Bankruptcy Code], or in relation to or contemplation of any such matter or case, shall be fined under this title, imprisoned not more than 20 years, or both.<sup>279</sup>

Although federal obstruction-of-justice statutes traditionally require a factual nexus between the obstructive conduct and an official proceeding, the foregoing § 1519 conspicuously does not impose such a requirement.<sup>280</sup> It can be violated when no official investigation is pending, imminent, or even contemplated by the government.<sup>281</sup> In that light, although federal criminal law does not comprehensively target the *production* of criminal business records,<sup>282</sup> it does broadly prohibit the destruction of records that

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275. See Solum & Marzen, *supra* note 125, at 1141 (“In addition to the inefficiencies that would result from excessive retention, a stringent regime could generate a second form of inefficiency—chilling the production of useful documentary evidence.”).

276. See *supra* Section I.B.

277. See *infra* notes 280–83 and accompanying text.

278. See Section II.B.

279. 18 U.S.C. § 1519.

280. *Id.*

281. *United States v. Gray*, 642 F.3d 371, 377–78 (2d Cir. 2011); see also *United States v. Yielding*, 657 F.3d 688, 713 (8th Cir. 2011); *United States v. Kernell*, 667 F.3d 746, 754–55 (6th Cir. 2012); *United States v. Gonzalez*, 906 F.3d 784, 795 (9th Cir. 2018).

282. It does, however, target such production in certain circumstances. See, e.g., 15 U.S.C. § 78m(b)(5) (prohibiting “knowingly falsify[ing] any book, record, or account” in the public-company context).

could be the subject of federal investigations.<sup>283</sup> Given the expansive nature of federal criminal law, that jurisdictional nexus will be easily satisfied in the case of most complex, long-lived illicit activity.<sup>284</sup>

As suggested in the prior subsection, there is cause for skepticism around how effective criminal prohibitions on criminal-record-destruction are, or can be, in deterrence terms.<sup>285</sup> But beyond this “stick” approach to encouraging retention, a “carrot” approach of offering mitigation for record retention seems genuinely promising. That is, as a matter of statute, sentencing policy, or prosecutorial discretion, the retention of records useful to law enforcement should merit mitigation in the form of sentence reductions.<sup>286</sup>

The first focus of a “carrot” approach would be participants in illicit activity who are not leaders but who do have opportunity to copy or retain records. Interventions should increase the enterprise’s informant risk.<sup>287</sup> Although doing so could carry personal risks—especially in organizations that use violence to maintain internal discipline—participants might be motivated to retain copies that they can use to obtain future plea benefits as informants.<sup>288</sup> Of course, current policy already incents record retention in such circumstances.<sup>289</sup> For example, federal law allows the government to move for below-statutory-minimum sentences in return for a defendant’s “substantial assistance in the investigation or prosecution of another person

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283. See 18 U.S.C. § 1519; see also 18 U.S.C. § 1001(a)(1) (prohibiting the “falsifi[ca]tion, conceal[ment] or cover[ing] up by any trick, scheme, or device a material fact” from law enforcement); 18 U.S.C. § 1505 (obstruction of federal agency proceedings); 18 U.S.C. § 1510 (obstruction of federal criminal investigations, including disclosure of certain subpoenas for records); 18 U.S.C. § 1511 (obstruction of state and local criminal investigations of illegal gambling businesses); 18 U.S.C. § 1517 (obstruction of examinations of financial institutions); 18 U.S.C. § 1518 (obstruction of federal investigations of health offenses); and 18 U.S.C. § 1520 (destruction of corporate audit records).

284. See Daniel C. Richman & William J. Stuntz, *Al Capone’s Revenge: An Essay on the Political Economy of Pretextual Prosecution*, 105 COLUM. L. REV. 583, 629 (2005) (framing substantive federal criminal law “not as laws that define criminal conduct and its consequences but as a menu that defines prosecutors’ options”). See generally MIKE CHASE, HOW TO BECOME A FEDERAL CRIMINAL: AN ILLUSTRATED HANDBOOK FOR THE ASPIRING OFFENDER (2019), for a light-hearted (though all-too-serious) exploration of the breadth of substantive federal criminal law.

285. See *supra* Section IV.A.1.

286. See, e.g., 18 U.S.C. § 3553(e) (permitting prosecutors to move for sentencing below a statutory minimum for defendants who provided “substantial assistance in the investigation or prosecution of another person”).

287. See *supra* Section I.B.

288. See U.S. Dep’t of Just., Just. Manual § 9-27.420 (2018) (providing that cooperation from a co-conspirator should be weighed in light of, among other things, “the nature and value of the cooperation offered and whether the same benefit can be obtained without having to make the charge or sentence concession that would be involved in a plea agreement”).

289. See Katyal, *supra* note 156, at 1394 n.316 (“[A] system of flipping may encourage conspirators to document criminal activity and overt acts. Such documentation not only provides additional reliability in the event that the person is actually flipped, it also may be discovered independently by law enforcement and thereby increase the probability of detection of the group.”).

who has committed an offense.”<sup>290</sup> Factors that bear on whether courts grant such motions include “the significance and usefulness of the defendant’s assistance” and “the truthfulness, completeness, and reliability of any information or testimony provided by the defendant,”<sup>291</sup> each of which is enhanced by offering prosecutors documentary evidence to support the investigation and prosecution of others. Relatedly, voluntary disclosure of an offense can serve as the basis for a downward sentencing departure, provided the disclosure alerted law enforcement to offenses that would have otherwise remained undetected.<sup>292</sup>

Existing policy does not, however, specifically incent illicit actors to retain records. And it generally does not incent those least likely to provide substantial assistance or voluntarily disclose—leaders and organizers, whom authorities are most eager to prosecute<sup>293</sup> and who are subject to comparatively higher sentences<sup>294</sup>—to retain records. After all, a senior member of a criminal enterprise caught in possession of records will receive no mitigation for having not destroyed them before. Indeed, just the opposite, as the captured records will support the government’s evidentiary burden and perhaps an expanded charging scope.<sup>295</sup> More, it might also provide an evidentiary basis for sophisticated-means or other sentencing enhancements, thus increasing sanction.<sup>296</sup>

But given that such records can be of extraordinary law-enforcement value, policy should specifically motivate their retention at all hierarchical levels in a criminal enterprise.<sup>297</sup> Such a policy could be adopted in

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290. 18 U.S.C. § 3553(e).

291. U.S. SENT’G GUIDELINES MANUAL § 5K1.1 (U.S. SENT’G COMM’N 2023).

292. *Id.* § 5K2.16.

293. U.S. Dep’t of Just., Just. Manual § 9-28.010 (2023) (“[Individual] accountability deters future illegal activity, incentivizes changes in corporate behavior, ensures that the proper parties are held responsible for their actions, and promotes the public’s confidence in our justice system. Prosecutors should focus on wrongdoing by individuals from the very beginning of any investigation of corporate misconduct.”).

294. U.S. SENT’G GUIDELINES MANUAL § 3B1.1 (U.S. SENT’G COMM’N 2023) (imposing additional offense levels for organizers, leaders, managers, and supervisors of criminal activity).

295. *See* U.S. Dep’t of Just., Just. Manual § 9-27.320 (2023) (permitting federal prosecutors to bring additional charges against an already indicted defendant when such charges “[w]ill significantly enhance the strength of the government’s case against the defendant or a codefendant”).

296. *See* U.S. SENT’G GUIDELINES MANUAL § 2B1.1(10)(C) (U.S. SENT’G COMM’N 2023) (imposing additional offense levels for defendants who use “sophisticated means” to commit fraud-based offenses); *id.* § 2B1.1 application note 9(B) (defining “sophisticated means” as “especially complex or especially intricate offense conduct pertaining to the execution or concealment of an offense,” including “hiding assets or transactions, or both, through the use of fictitious entities, corporate shells, or offshore financial accounts”).

297. For example, in one federal prosecution of a racketeering conspiracy, prosecutors pointed to documents maintained by conspirators that established an intricate hierarchy and specific administrative responsibilities for members assigned to the group’s “Advisory Boa[r]d,” “Management Office,” and

statutory, sentencing-guidelines, or prosecutorial forms, but an illustration using the federal sentencing guidelines helps outline the possibilities. Consider a policy that gives a two base-offense-level downward departure to persons who voluntarily produce criminal business records to authorities. Such a policy could be highly motivating. In the most extreme example, for a defendant with zero to one criminal-history points, a two-level departure could be the difference between a life guideline sentence and twenty-seven-year guideline sentence.<sup>298</sup> Less extreme, a two-level downward departure could also be the difference between a one-year guideline and a non-custodial-sentence guideline.<sup>299</sup> Alternatively, given the overlapping utility between giving substantial assistance, making voluntary disclosure, and making voluntary record productions, perhaps when mitigation is provided for one of those things, a one-level additional reduction could be provided for *also* disclosing useful business records.

Thus far the illustration has suggested enhancements for those on whom sentencing policy already focuses its incentives. But some mitigation should also be extended to non-informants. That is because as non-informants—especially managers—evaluate their retention costs in light of the enterprise’s managerial needs, offering some mitigation could motivate marginal retention. That is, records are more likely to be retained if enforcement policy lowers their retention costs. If they are captured after having been in the possession or control of a particular non-informant, they could provide a modest, but personally meaningful, sentence reduction. More, providing non-informants some retention mitigation also partly counterbalances the fact that giving significant mitigation credit to informants increases retention costs for all non-informant participants and thus motivates them to destroy records or avoid opportunities for would-be informants to retain them.

### *B. Criminal Recordkeeping and Corporate Compliance*

The last section considered records-related interventions generally. Its points apply in all settings of complex, long-lived illicit activity.<sup>300</sup> There is

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departments of security, finance, education, and communication. Victoria Bekiempis, *Casanova’s Gang Was Taking Notes on a Criminal F–ing Conspiracy*, VULTURE (Dec. 4, 2020), <https://www.vulture.com/2020/12/casanova-gang-taking-notes-criminal-conspiracy-the-wire.html> [<https://perma.cc/H6SW-MV54>].

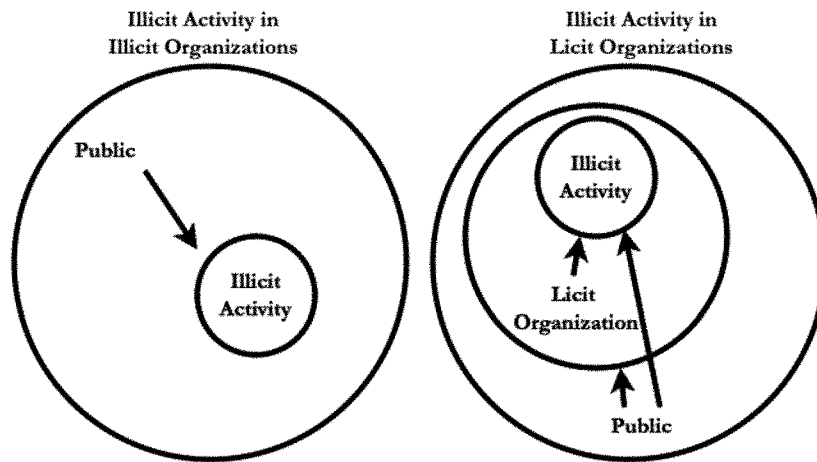
298. U.S. SENT’G GUIDELINES MANUAL ch. 5, pt. A (U.S. SENT’G COMM’N 2023) (comparing a Criminal History Category I at Offense Level 43 guideline with the same Criminal History Category I at Offense Level 41 guideline).

299. *Id.* (comparing a Criminal History Category I at Offense Level 10 guideline with the same Criminal History Category I at Offense Level 8 guideline).

300. *See supra* Section IV.A.

reason to expect, however, that such interventions are more apt to be effective in licit organizations. In their case, they can bear much of the burden of preventing the production of criminal business records, while also ensuring their retention. This last section considers these points in light of compliance policies, practices, and programs within otherwise lawful organizations.

The following diagram illustrates a key distinction between illicit activity in illicit organizations and in licit organizations.



In the former case, the organization and the activity are coterminous, meaning that interventions around recordkeeping must be exerted onto the organization/activity by the public through its agents, like legislatures, sentencing commissions, law enforcement and prosecutors, and courts. In the latter case, illicit activity occurs within an otherwise lawful organization, which has intrinsic and extrinsic motivations to exert anti-crime interventions against internal wrongdoing.

Intrinsically, internal wrongdoing could victimize the organization and undermine its purpose, whether profit or something else.<sup>301</sup> Stealing corporate funds using false records, for example, would harm the organization, and so its controls would aim to prevent the creation or successful use of such records.<sup>302</sup> Extrinsically, because the organization is vicariously liable for the misconduct of its employees and agents, public

301. Alan C. Michaels, *Fastow and Arthur Andersen: Some Reflections on Corporate Criminality, Victim Status, and Retribution*, 1 OHIO ST. J. CRIM. L. 551, 555 n.19 (2004) (collecting sources on employee wrongdoing as victimizing the corporate employer).

302. See *supra* note 90; see also AS 2401, *supra* note 111.

interventions toward the organization can motivate it to prevent the sort of internal wrongdoing that is enabled by recordkeeping.<sup>303</sup> Those interventions might include pre-announced policies that offer enforcement mitigation to firms that engage in adequate policing, such as by having an effective compliance program in place *ex ante* and self-reporting and cooperating in the investigation of internal criminal violations *ex post*.<sup>304</sup> Stealing corporate funds via false records to pay illegal bribes, for example, would expose *the organization* to external public sanction.<sup>305</sup> The organization would thus intervene itself against internal illicit activity, both to prevent and to assist in its detection and prosecution.

Of course, even as the public pressures organizations to exert internal interventions, public interventions against illicit activity still apply.<sup>306</sup> In light of those two fronts, preventing, detecting, and sanctioning recordkeeping-enabled wrongdoing in lawful organizations seems a comparatively more promising prospect than achieving similar goals around non-lawful organizations. If it must be one and not the other, the efficiency of such interventions in lawful organizations is to be preferred. That is especially so given that the licit sector is bigger than the illicit sector, and thus wrongdoing in licit organizations has the potential to cause social harm at greater scale.<sup>307</sup> More, organizations have greater knowledge about their environments and condition, and more direct control over their people, than the public has over those acting through illicit organizations like gangs, organized crime, and so forth.<sup>308</sup> In that light, lawful organizations can more efficiently prevent internal wrongdoing than government can prevent wrongdoing in society generally.<sup>309</sup>

The policies, practices, and programs organizations adopt to satisfy public enforcers' expectations, and thus to mitigate their exposure to their employees' and agents' illicit acts, will vary tremendously based on an

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303. See *supra* note 225 and accompanying text.

304. See *supra* notes 226–28 and accompanying text.

305. See *supra* note 225 and accompanying text.

306. See *supra* Section IV.A.

307. By some estimates, the informal economy (which is partly, but not entirely, illegal), “has been estimated to account for about 36 percent of gross domestic product (GDP)” and in “developed countries, it has been estimated to be about 13 percent of GDP.” Paulina Restrepo-Echavarría, *Measuring Underground Economy Can Be Done, but It Is Difficult*, FED. RSRV. BANK ST. LOUIS (Jan. 26, 2015), <https://www.stlouisfed.org/publications/regional-economist/january-2015/underground-economy> [<https://perma.cc/4TKS-5AR5>].

308. Donald C. Langevoort, *Monitoring: The Behavioral Economics of Corporate Compliance with Law*, 2002 COLUM. BUS. L. REV. 71, 81–90 (considering organizations' capacity to directly monitor employee compliance).

309. Cf. Miriam Hechler Baer, *Governing Corporate Compliance*, 50 B.C. L. REV. 949, 951–52 (2009) (“[P]ublic and private corporations are the subject of numerous statutes and regulatory regimes that directly and indirectly require them to adopt programs designed to ward off internal misconduct, and threaten highly punitive consequences for their failure to do so.”).

organization's size, industry, risk factors, geographies, culture, history, and so on.<sup>310</sup> But this Part recommends that those policies, practices, and programs first focus on preventing the production of records related to illicit internal activity. Failing that, they should ensure, or at the least encourage, retention of internal criminal recordkeeping.<sup>311</sup> For their part, public authorities must recognize that although an organization's preventing the production of criminal records directly reduces its vicarious-liability risks, its promoting the retention of such records increases those risks. That latter point would recommend, and justify, compensating mitigation—including declinations—for organizations that inform on their own illicit actors and maintain the records those actors created while engaging in misconduct.<sup>312</sup>

### CONCLUSION

Most people do not manage complex, long-lived criminal enterprises, and so they would perhaps expect that recordkeeping by those who do is ill-advised. After all, records of illicit activity would be welcome evidence in the hands of prosecutors. Yet, managers of criminal enterprises *do* create and keep records and, as this Article explains, it is rational and necessary for them to do so. Complexity and continuity simply make recordkeeping unavoidable for a criminal enterprise that wishes to manage itself, scale its operations, evade anti-crime controls, or conceal its wrongful conduct. Still, criminal managers must balance these purposes against the reality that producing and retaining business records increase their chances of detection and sanction. The trueness or falsity of given records and the organizational settings in which they appear shape that balance. This tension, in turn, points to powerful levers for deterring illicit activity in which interventions that prevent marginal records production and promote marginal records retention are apt to reduce the occurrence and scale of organizationally complex, long-lived illicit activity. They are especially likely to have that

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310. See CRIM. DIV., U.S. DEP'T OF JUST., EVALUATION OF CORPORATE COMPLIANCE PROGRAMS 1 (2023), <https://www.justice.gov/criminal/criminal-fraud/file/1562831/dl> [<https://perma.cc/QBQ5-EZS7>] (“[W]e make a reasonable, individualized determination in each case that considers various factors including, but not limited to, the company’s size, industry, geographic footprint, regulatory landscape, and other factors, both internal and external to the company’s operations, that might impact its compliance program.”).

311. See *supra* Section IV.A.

312. See CRIM. DIV., U.S. DEP'T OF JUST., 9-47.120 - CRIMINAL DIVISION CORPORATE ENFORCEMENT AND VOLUNTARY SELF-DISCLOSURE POLICY (2024), <https://www.justice.gov/criminal/criminal-fraud/page/file/937501/dl> [<https://perma.cc/V538-E96J>] (establishing a policy that “when a company has voluntarily self-disclosed misconduct to the Criminal Division, fully cooperated, and timely and appropriately remediated . . . there will be a presumption that the company will receive a declination absent aggravating circumstances involving the seriousness of the offense or the nature of the offender”).

effect in organizations that have lawful purposes and corporate interests in preventing law violations and aiding their prosecution when they do occur.