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Keeping the Inference in the Adverse Inference Instruction: Why Federal Courts Cannot—and Should Not—Give the Instruction Based on the Spoliator’s Negligence

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KEEPING THE INFRINGEMENT IN THE ADVERSE INFRINGEMENT INSTRUCTION: WHY FEDERAL COURTS CANNOT—AND SHOULD NOT—GIVE THE INSTRUCTION BASED ON THE SPOLIATOR’S NEGLIGENCE

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ABSTRACT

The adverse inference instruction is one tool that a judge has to combat spoliation, the destruction of evidence. The instruction allows a jury to infer that a party destroyed evidence because that evidence was harmful to the party’s case. Traditionally, courts would give the instruction only when the spoliator acted with bad faith. Since the 1990s, however, some federal courts and many scholars have argued that a spoliator’s negligent destruction of evidence should suffice to allow courts to give an adverse inference instruction. As a result of this shift, the circuits are now split on the level of mental culpability required to for a district court to give an adverse inference instruction. The growing trend—both in the courts and among scholars—is for allowing negligence to support an adverse inference instruction.

This Article offers the desperately needed counterargument to this trend. The shift toward allowing negligent spoliation to support the instruction is misguided because it ignores both the limits of the powers of federal courts and the logic and purposes of the adverse inference instruction. Federal courts have authority to give the instruction under their inherent power and Federal Rule of Civil Procedure 37(b). First, federal courts’ inherent power to give the instruction is limited to the power that Article III grants to federal courts: the inherent power that English and state courts had at the time of ratification. Those courts were limited to giving the instruction to juries in cases in which the spoliator destroyed evidence with bad faith, and thus federal courts face the same limitation on their power to give the instruction. Second, Rule 37(b) gives federal courts the power to give the instruction, but Rule 37(b)’s grant of authority extends only to bad-faith spoliation because Rule 37(b) is premised on the power that federal courts had at the time the Federal Rules of Civil Procedure were adopted.

In addition to these constitutional and legislative limits on the power of federal courts that prohibit federal courts from giving an adverse inference instruction when the spoliator acts with less than bad faith, the logic and purposes of the instruction also indicate that this is the correct approach to the instruction. The adverse inference instruction is premised on the connection that can be made between the destruction of evidence and the fact that the evidence was harmful to the party who destroyed it. Bad faith is the key to make this connection. Without a finding of the spoliator’s deliberate decision to destroy evidence because it was damaging to the spoliator’s case, the inference is too tenuous, and a jury cannot safely conclude that the evidence

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was actually harmful to the spoliator’s case. Furthermore, this bad-faith requirement best serves the punitive, deterrent, and remedial rationales of the instruction. The requirement ensures that only those spoliators who truly deserve this severe sanction receive it, provides effective deterrence within the broader purposes of the judicial system, and affords a remedy to those who suffer from bad-faith spoliation without giving an unfair advantage to the victims of negligent spoliation.

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INTRODUCTION

With the ever-increasing caseload of federal courts, spoliation—the destruction of evidence—has become a more common problem. Courts have many tools to combat spoliation, ranging from dismissing a case and default judgment to fines. Among these tools that judges use is the adverse inference instruction.

The adverse inference instruction is attracting more attention in the digital age than it previously did. The most contentious debates over the instruction focus on the level of mental culpability with which a spoliator must act for a court to give the adverse inference instruction. Traditionally, courts gave an adverse inference instruction only when the spoliator acted with

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2 See Dan H. Willoughby, Jr., Rose Hunter Jones, & Gregory R. Antine, Symposium, Sanctions for E-Discovery Violations: By the Numbers, 60 DUKE L.J. 789, 811 (2010) (“Our analysis indicates that although the annual number of e-discovery sanction cases is generally increasing, there has been a significant increase in both motions and awards since 2004. Motions for sanctions have been filed in all types of cases and all types of courts. The sanctions imposed against parties in many cases are severe, including dismissals, adverse jury instructions, and significant monetary awards.”).
4 This Article focuses on an adverse inference instruction in civil litigation. Issues of adverse inferences in criminal cases are another matter entirely. See, e.g., Ted Sampsell-Jones, Making Defendants Speak, 93 MINN. L. REV. 1327 (2009) (discussing the Fifth Amendment’s privilege against self-incrimination and arguing that the prohibition on giving an adverse inference instruction based on a criminal defendant’s silence should be removed).
Additionally, this Article does not distinguish between types of adverse inference instructions. See Kelly P. Cambre, Spoliation of Evidence: Proposed Remedies for the Destruction of Evidence in Louisiana Civil Litigation, 39 LOY. L. REV. 601, 605 (1993) (discussing three variations of the adverse inference instruction). For purposes of this Article, these distinctions do not matter because no matter the type of adverse inference, the same analysis applies.
5 See infra Part II.
bad faith.\textsuperscript{6} Since the 1990s and particularly in the 2000s, however, some courts have altered the test, allowing a spoliator’s negligent\textsuperscript{7} destruction of evidence to support an adverse inference instruction.\textsuperscript{8} Along with these cases, many scholars also propose allowing courts to give an adverse inference instruction based on spoliator’s negligence, suggesting that the volume of evidence in electronic-discovery cases necessitates a change in the adverse inference instruction.\textsuperscript{9}

No one has pushed back against this wave of cases and law review articles pushing for a change in the adverse inference instruction to argue that federal courts cannot give the instruction based on a spoliator’s negligence.\textsuperscript{10} This Article fills that void and takes on that challenge. It argues that federal courts lack the authority—under either their inherent power or Federal Rule of Civil Procedure 37\textsuperscript{11}—to give the instruction when a spoliator only negligently destroys evidence. Furthermore, regardless of whether federal courts have the authority to give the instruction based on the spoliator’s negligence, giving the instruction based on that negligence is misguided because it weakens the inference on which the instruction is based and loses sight of the three purposes that the instruction is designed to further.\textsuperscript{12} Ultimately, this Article explains

\begin{footnotesize}
\textsuperscript{6} See infra Part II.A.
\textsuperscript{7} The term “negligence” in this Article refers to ordinary negligence, like that in tort law. When more than ordinary negligence is meant, this Article uses “gross negligence.”
\textsuperscript{8} See infra Part II.C.
\textsuperscript{9} See, e.g., Matthew S. Makara, Note, My Dog Ate My Email: Creating a Comprehensive Adverse Inference Instruction Standard for Spoliation of Electronic Evidence, 42 Suffolk U. L. Rev. 683, 708 (2009) (calling for a new standard for the adverse inference instruction based on the rise of electronically stored information relevant to cases).
\textsuperscript{10} Lauren Nichols has called for courts to require that a spoliator act with at least gross negligence before giving an adverse inference instruction. See Lauren R. Nichols, Note, Spare the Rod, Spoil the Spoliator? The Varying Degrees of Culpability Required for an Adverse Inference Instruction Regarding Spoliation of Electronic Discovery, 99 Ky. L.J. 881, 902 (2011). Her argument, however, is based on the need for uniformity, not any limits on the power of federal courts. See id.
\textsuperscript{11} Fed. R. Civ. P. 37.
\textsuperscript{12} One recent criticism of law review articles is that law review articles offer little to help courts answer legal questions. See Richard Brust, The High Bench vs. the Ivory Tower: More Law
Part I describes the adverse inference instruction. It starts by describing what the inference is. It then discusses the history of the adverse inference instruction. Finally, Part I concludes by setting forth the authority under which courts give the instruction and the tests they use for determining when the instruction should be given. Next, Part II highlights the current circuit split over the mental culpability required for courts to give an adverse inference instruction.

Part III then explains why federal courts cannot and should not give the instruction based on a spoliator’s negligent destruction of evidence. Section A demonstrates why federal courts do not have the inherent power to give an adverse inference instruction based on negligence. It first traces the history of the inherent power of English courts, particularly as related to the adverse inference instruction, showing how that power was limited to cases of bad-faith spoliation. It then shows how the Constitution granted to federal courts in Article III only those judicial powers held by English courts and state courts that were modeled on their English predecessors.

Reviews Give Professors Places to Publish, But Judges Stick Up Their Noses at Elite and Useless Articles, 98 Feb. A.B.A. J. 50, 52 (2012) (quoting Chief Justice Roberts as telling the Fourth Circuit Judicial Conference, “I’m sure [the law review article] was of great interest to the academic who wrote it, but it isn’t of much use to the bar.”). This Article is not susceptible to this attack because this Article tackles an issue of great relevance to courts and litigators and offers a clear, straightforward argument about why federal courts cannot—and should not—give an adverse inference instruction based on a spoliator’s negligent destruction of evidence.
This Section concludes by making two observations about this Article’s approach to inherent power: first, that the ability to give the instruction is itself a particular inherent power of the courts, rather than part of a broader power; and second, the inherent power that rests on the original meaning of the Constitution is compatible with the common view that inherent powers are those necessary to a court fulfilling its duties.

Next, Section B of Part III discusses how Federal Rule of Civil Procedure 37 limits federal courts’ authority to give an adverse inference instruction. This Section begins by tracing the history of Rule 37 since its adoption in 1938. It then explores how this history shapes the power that Rule 37 grants to federal courts to give an adverse inference instruction, concluding that Rule 37 permits federal courts to give an adverse inference instruction only when a spoliator acts with bad faith.

Section C argues that, as a logical matter, federal courts should never give an adverse inference instruction based on a spoliator’s negligence, regardless of whether federal courts have the authority to base the instruction on that negligence. It explains how a spoliator’s bad faith provides the critical connection to suggest that the destroyed evidence was harmful to the spoliator’s case. Section C then explains how negligent, as well as grossly negligent and intentional, destruction of evidence fails to provide this essential nexus.

Finally, Section D explains why not giving an adverse inference instruction based on the spoliator’s negligent destruction of evidence serves the three purposes of the instruction: to punish, deter, and remedy. It explains how the punitive goal is best served by allowing the instruction to be given only when a spoliator acts in bad faith because only such bad behavior deserves such a harsh punishment. It next shows how the instruction deters bad-faith spoliation without sacrificing other important goals of litigation, goals that are not achieved when courts
give the instruction based on lesser levels of culpability. And finally, Section D demonstrates how giving the instruction for less than bad-faith spoliation does more than provide a remedy and instead gives the nonspoliating party an unfair advantage.\footnote{This Article leaves aside the argument that courts cannot give an adverse inference instruction based on negligent spoliation because negligent spoliation does not exist. According to Black’s Law Dictionary, spoliation is the “intentional destruction, mutilation, alteration, or concealment of evidence,” BLACK’S LAW DICTIONARY 1531 (9th ed. 2009). Rather, this Article assumes arguendo that negligent spoliation actually exists and shows why that level of mental culpability does not permit a federal court to give an adverse inference instruction.}

I. THE ADVERSE INFEERENCE INSTRUCTION

This Part provides a basic overview of the adverse inference instruction—what it does, its history, its purposes, and the bases for giving the sanction and tests for when it should be given. This overview sets the framework and background for explaining why federal courts cannot and should not give an adverse inference instruction based on a spoliator’s negligence.

A. What the Adverse Inference Instruction Does

When a court gives an adverse inference instruction, the court tells the jury that it may infer that evidence that was destroyed was harmful to the party that destroyed the evidence.\footnote{See, e.g., Stevenson v. Union Pac. RR Co., 354 F.3d 739, 746 (8th Cir. 2004) (“At the close of trial, over Union Pacific's renewed objection and as a sanction for the destruction of records, the district court instructed the jury, ‘[y]ou may, but are not required to, assume that the contents of the voice tape and track inspection records would have been adverse, or detrimental, to the defendant.’”). Note that the instruction uses “may,” which means that it is a permissive instruction.} The instruction is rooted in “that favourite maxim of the law, omnia presumunt contra spoliatorem,”\footnote{West v. Goodyear Tire & Rubber Co., 167 F.3d 776, 779 (2d Cir. 1999) (quoting 1 Sir T. Willes Chithey, et al, Smith’s Leading Cases 404 (13th ed. 1929)).} which translates “all things are presumed against the spoliator.” It is “founded on the ‘common sense’ principle that a party is more likely to destroy evidence that is harmful to his
or her position than evidence that is beneficial to his or her case.”

“When a jury is given an adverse inference instruction, the jury is permitted, but not required, to assume that the destroyed evidence would have been unfavorable to the party responsible for its destruction.”

B. A Brief History of the Adverse Inference Instruction

Sanctioning litigants for destroying evidence “has deep historic roots.” The adverse inference instruction can be traced back at least to England in 1722. In the famous case of Armory v. Delamirie, a goldsmith stole a jewel from the chimney sweep’s boy who had found the jewel. The boy took it to the goldsmith for appraisal. When the boy returned, the boy demanded the jewel instead of money that the goldsmith offered, but the goldsmith refused to give the jewel back. After the boy sued, the court instructed the jury to presume that the jewel

16 Nichols, supra note 10, at 885 (quoting Nation-Wide Check Corp., Inc. v. Forest Hills Distributors, Inc., 692 F.2d 214, 218 (1st Cir. 1982)).

An adverse inference instruction is often thought of in the context of when one party has destroyed evidence, but the instruction is also available when a party has control of evidence but refuses to produce it. See, e.g., Creative Res. Group of New Jersey, Inc. v. Creative Res. Group, Inc., 212 F.R.D. 94, 105 (E.D.N.Y. 2002) (“The legal standard for the imposition of an adverse inference instruction is essentially the same whether the party controlling the evidence destroyed it or simply failed to produce it.”).

No good study on the effect of the adverse inference instruction appears to exist. Still, given the weight that a trial judge’s words carry, see Quercia v. United States, 289 U.S. 466, 470 (1933) (“The influence of the trial judge on the jury ‘is necessarily and properly of great weight’ and ‘his lightest word or intimation is received with deference, and may prove controlling,’ (quoting Starr v. United States, 153 U.S. 614, 626 (1894)), courts believe that the instruction carries significant weight with the jury, see Zubulake v. UBS Warburg LLC, 220 F.R.D. 212, 219–20 (S.D.N.Y. 2003) (“When a jury is instructed that it may infer that the party who destroyed potentially relevant evidence did so out of a realization that the [evidence was] unfavorable, the party suffering this instruction will be hard-pressed to prevail on the merits.” (internal quotation marks omitted)).

20 Id.
21 Id.
22 Id.
was of the “finest” quality, drawing the inference against the goldsmith, based on the goldsmith’s intentional decision not to produce the jewel.\(^23\)

The earliest American cases that gave the adverse inference instruction likewise based the instruction on the spoliator’s intentional act. Most notably, the Supreme Court required “bad faith, or gross prevarication” to sustain a spoliation inference.\(^24\) In \textit{The Pizarro},\(^25\) the Supreme Court reviewed the prize proceedings after the \textit{Pizarro} was captured by a private armed schooner.\(^26\) Those on board the \textit{Pizarro} destroyed documents that identified the ship and its contents, apparently because they believed the schooner giving chase was Carthaginian privateer.\(^27\) The owners of the cargo on the \textit{Pizarro} sought the return of their goods.\(^28\) Writing for the Court, Justice Story held that the instruction was not warranted on the facts of this case because nothing in the record indicated that the documents were destroyed with a desire to hide the truth.\(^29\) Justice Story unequivocally stated that the spoliation inference required “bad faith, or gross prevarication;”\(^30\) he rejected the idea that an “accident” could support the inference.\(^31\)

\(^23\) \textit{Id.} The bad-faith act of the goldsmith in \textit{Armory} was noted by the Second Circuit in \textit{Shapiro, Bernstein & Co. v. Remington Records, Inc.}, 265 F.2d 263 (2d Cir. 1959), an opinion authored by then-Judge Warren Burger. Albeit \textit{Shapiro} was in the context of copyright violations and the measure of damages, the court relied on the “willful[]” act of the goldsmith in \textit{Armory} to justify its conclusion. \textit{Id.} at 271 (quoting 1 Smith’s Leading Cas. (pt. 1) 589 (6th American ed. 1866)).

\(^24\) \textit{The Pizarro}, 15 U.S. (2 Wheat) 227, 240 (1817). Although \textit{The Pizarro} never uses the phrase “averse inference instruction,” the spoliation inference is the same thing as the adverse inference instruction.


\(^26\) \textit{Id.} at 228.

\(^27\) \textit{Id.}

\(^28\) \textit{Id.} at 229–30.

\(^29\) \textit{Id.} at 241.

\(^30\) \textit{Id.} at 240.

\(^31\) \textit{Id.} For another example of a nineteenth century case requiring an intentional suppression of evidence to warrant an adverse inference instruction, see \textit{Sims v. Rockwell}, 31 N.E. 484 (1892). In that case, the spoliation inference was proper because the defendant and her husband “deliberately attempted to suppress the evidence.” \textit{Id.} at 485. Their efforts reflected “a belief . . . that the testimony, if given truly, would be valuable to the plaintiff, and damaging to herself.” \textit{Id.}
Armory continues to shape how American courts think about the adverse inference instruction. For instance, then-Judge Stephen Breyer relied on Armory as persuasive about the purposes of the instruction in Nation-Wide Check Corp., Inc. v. Forest Hills Distributors, Inc.\textsuperscript{32} Then-Judge Breyer explained that Armory provided “a clear sign that the inference was designed to serve a prophylactic and punitive purpose and not simply to reflect relevance.”\textsuperscript{33} Similarly, the Sixth Circuit cited Armory as the basis for the adverse inference instruction in Welsh v. United States.\textsuperscript{34} In that case, the Sixth Circuit noted that the adverse inference instruction is a “generally accepted principle of law that finds its roots in the 18th century case [of Armory]” and that Armory’s “venerable principle . . . remains good law.”\textsuperscript{35} The Second Circuit likewise agreed that Armory is the basis of the adverse inference instruction in Kronisch v. United States.\textsuperscript{36}

Legal scholars have also traced the adverse inference instruction back to Armory.\textsuperscript{37} In fact, the only disagreement with this historical account appears to be that tracing the adverse

\textsuperscript{32} Nation-Wide Check Corp., Inc. v. Forest Hills Distributors, Inc., 692 F.2d 214, 218 (1st Cir. 1982).
\textsuperscript{33} Id.
\textsuperscript{34} Welsh v. United States, 844 F.2d 1239, 1246 (6th Cir. 1988), overruled by Adkins v. Wolever, 554 F.3d 650 (6th Cir. 2004). Adkins overruled Welsh and held that federal spoliation law applied to state-law claims litigated in federal court. Adkins, 554 F.3d at 651. Adkins in no way, however, undermined the Welsh’s historical account of the development of the adverse inference instruction.
\textsuperscript{35} Welsh, 844 F.2d at 1246.
\textsuperscript{36} Kronisch v. United States, 150 F.3d 112, 126 n.11 (2d Cir. 1998) (“The principle that an adverse inference may be drawn against a party responsible for the loss or destruction of evidence is often associated with the famous common-law case of Armory v. Delamirie.”); see also Deering, Milliken & Co. v. Gilbert, 269 F.2d 191, 193 (2d Cir. 1959) (referring to “the ancient but venerable doctrine of Armory v. Delamirie”).
\textsuperscript{37} For examples of scholars that trace the adverse inference instruction to Armory, see Margaret M. Koessel & Tracey L. Turnbull, Spoliation of Evidence: Sanctions and Remedies for Destruction of Evidence in Civil Litigation 62 (2006); Paul Robert Eckert, Note, Utilizing the Doctrine of Adverse Inferences When Foreign Illegality Prohibits Discovery: A Proposed Alternative, 37 WM. & MARY L. REV. 749, 777 (1996); Sean R. Levine, Student Work, Spoliation of Evidence in West Virginia: Do Too Many Torts Spoilate the Broth?, 104 W.V. L. REV. 419, 424 (2002); Makara, supra note 9, at 686 & n. 28; Nichols, supra note 10, at
inference instruction back to Armory in 1722 does not go far enough. Some scholars instead contend that the instruction can be traced back another 105 years to Rex v. Arundel\(^\text{38}\) in 1617.\(^\text{39}\) Whether Armory or Arundel is the genesis of the instruction is an intriguing legal-history question but is beside the point here; either way, the instruction bears a long and well-grounded history to support its use in American courts.

Today, courts have two bases for giving an adverse inference instruction.\(^\text{40}\) First, courts can give an adverse inference instruction based on their inherent power “to fashion an appropriate sanction for conduct which abuses the judicial process.”\(^\text{41}\) Second, Federal Rule of Civil Procedure 37 gives federal district courts the power to grant an adverse inference

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\(^{38}\) Rex v. Arundel, 1 Hob. 109, 80 Eng. Rep. 258 (1617).


\(^{41}\) Stevenson v. Union Pac. RR. Co., 354 F.3d 739, 745 (8th Cir. 2004) (quoting Chambers v. NASCO, Inc., 501 U.S. 32, 44–45 (1991)) (upholding the district court’s decision to give an adverse inference instruction under its inherent power); see also id. at 750 (noting that “imposing an adverse inference instruction is supported either by the court’s inherent power or Rule 37 of the Federal Rules of Civil Procedure”); Hodge v. Wal-Mart Stores, Inc., 360 F.3d 446, 449 (4th Cir. 2004) (“The imposition of a sanction (e.g., an adverse inference) for the spoliation of evidence is an inherent power of federal courts . . . .”); Shepherd v. Am. Broad. Cos., 62 F.3d 1469, 1474 (D.C. Cir. 1995) (“When rules alone do not provide courts with sufficient authority to protect their integrity and prevent abuses of the judicial process, the inherent power fills the gap.”); id. at 1475 (holding that sanctions under a court’s inherent power can “include . . . drawing adverse evidentiary inferences”).
instruction. Specifically, Rule 37(b)(2)(A)(i) permits a court to “direct[] that the matters embraced in the order or other designated facts be taken as established for purposes of the action, as the prevailing party claims.”42 Although courts now differ about the mental culpability required for an adverse inference instruction to be given,43 courts and scholars generally agree about the long history and function of the instruction at trial.

C. The Purposes of the Adverse Inference Instruction

The adverse inference instruction serves three goals: to punish, deter, and remedy.44 These goals are as old as the instruction itself.45 The instruction punishes the spoliator by permitting the jury to conclude that the evidence that the spoliator destroyed was harmful to the spoliator’s case, thereby denying the spoliator any benefit that he might receive from that evidence not being presented at trial.46 Next, the instruction deters spoliation by serving as a warning of the consequences of failing to preserve evidence.47 Finally, the instruction remedies the spoliation by giving the nonspoliating party the benefit of the evidence that could not be presented at trial.48

43 See infra Part II.
45 Nation-Wide Check Corp., Inc. v. Forest Hills Distributors, Inc., 692 F.2d 214, 218 (1st Cir. 1982) (citing Armory for the idea that the instruction serves “a prophylactic and punitive purpose” in addition to securing justice for the nonspoliating party).
48 See, e.g., Kronisch v. United States, 150 F.3d 112, 126 (2d Cir. 1998) (noting that “an adverse inference should serve the function, insofar as possible, of restoring the prejudiced party to the same position he would have been in absent the wrongful destruction of evidence by the opposing party”).
D. The Bases and Tests for Giving an Adverse Inference Instruction

A court’s inherent power and Rule 37(b) allow a federal district court to grant an adverse inference instruction.\textsuperscript{49} Courts have thus developed varying formulations of tests for deciding whether to give an adverse inference instruction, but these tests focus on the same issues, and generally make no distinction between either basis for giving the instruction.

The most common test for determining whether an adverse inference instruction is appropriate requires the nonspoliating party to prove three elements.\textsuperscript{50} First, the party who destroyed the evidence must have had a duty to preserve that evidence at the time it was destroyed.\textsuperscript{51} Second, the evidence must have been relevant to the litigation.\textsuperscript{52} And third, the party must have destroyed the evidence with a “culpable state of mind.”\textsuperscript{53} This formulation of the test is often attributed to the Second Circuit in \textit{Byrnie v. Town of Cromwell}\textsuperscript{54} in 2001.\textsuperscript{55} In \textit{Residential Funding Corp. v. DeGeorge Financial Corp.},\textsuperscript{56} the Second Circuit neatly tightened \textit{Byrne}’s test into a three-prong framework,\textsuperscript{57} and later Judge Scheindlin discussed this standard in more detail in \textit{Zubulake v. UBS Warburg LLC}.	extsuperscript{58} Since \textit{Zubulake}, this three-element


\textsuperscript{50} Beaven \textit{v. U.S. Dep’t of Justice}, 622 F.3d 540, 553 (6th Cir. 2010) (quoting \textit{Residential Funding Corp. v. DeGeorge Fin. Corp.}, 306 F.3d 99, 107 (2d Cir. 2002)).

\textsuperscript{51} Id.

\textsuperscript{52} Id. This factor is listed third in the Sixth Circuit’ opinion, but it is listed second here so that the focus is on the third and final factor—whether the evidence was “destroyed with a culpable state of mind,” \textit{id.} (internal quotation marks omitted)—because that is the key factor in this Article.

\textsuperscript{53} \textit{Id.} (internal quotation marks omitted).

\textsuperscript{54} \textit{Byrnie v. Town of Cromwell}, 243 F.3d 93 (2d Cir. 2001).


\textsuperscript{56} \textit{Residential Funding Corp. v. DeGeorge Fin. Corp.}, 306 F.3d 99 (2d Cir. 2002).

\textsuperscript{57} \textit{Id.} at 107.

formulation has been adopted by other courts, including the Sixth Circuit⁵⁹ and the Tenth Circuit,⁶⁰ as well as in various district courts.⁶¹

Despite their different formulations, other tests focus on the same issues when determining whether to give an adverse inference instruction. For instance, in Powell v. Town of Sharpsburg,⁶² the Eastern District of North Carolina interpreted Fourth Circuit precedent as requiring “that the party knew the evidence was relevant to some issue at trial and that his willful conduct resulted in its loss or destruction” for an adverse inference instruction to be given.⁶³ Despite this different formulation, the court in Powell still focused on the relevance of the destroyed evidence,⁶⁴ whether the spoliator knew of the litigation and thus had a duty to preserve the evidence,⁶⁵ and the spoliator’s mental culpability.⁶⁶

Another formulation of the test came from the Third Circuit in Schmid v. Milwaukee Electric Tool Corp.⁶⁷ In that case, the Third Circuit’s three factors for determining whether the

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⁵⁹ See Beaven v. U.S. Dep’t of Justice, 622 F.3d 540, 553 (6th Cir. 2010).
⁶⁰ See Jandreau v. Nicholson, 492 F.3d 1372, 1375 (10th Cir. 2007).
⁶³ Id. at 817 (quoting Buckley v. Mukasey, 538 F.3d 306, 323 (4th Cir. 2008)) (internal quotation marks omitted).
⁶⁴ Id. at 817–18 (finding that work orders from the defendant-employer in a Title VII case were relevant to the plaintiff’s racial discrimination claim).
⁶⁵ Id. at 818–20 (finding that the defendant-employer was aware of the litigation when the work orders were destroyed and rejecting the defendant-employer’s claim that the documents were destroyed in compliance with a document-retention policy).
⁶⁶ Id. at 820–21 (finding that the defendant-employer “willful[ly]” destroyed the work orders).
⁶⁷ Schmid v. Milwaukee Elec. Tool Corp., 13 F.3d 76 (3d Cir. 1994). In Schmid, the court was reviewing the district court’s decision to exclude all evidence of an observations of a defective electric saw as a sanction for spoliating evidence—the plaintiff’s expert disassembled the saw during his analysis, and when the defendant’s expert reassembled the saw, the saw worked properly so the defendant’s expert had not chance to evaluate the saw that caused the plaintiff’s
spoliation sanction was appropriate were the “degree of fault” by the spoliator, the “prejudice suffered by the opposing party,” and whether a lesser sanction could “avoid substantial unfairness” to the nonspoliating party while deterring future spoliation.68

Federal courts consider the mental culpability of the spoliator regardless of the test they use69 and regardless of whether the court is giving the instruction under either its inherent power or Rule 37(b).70 The question of whether negligence is enough to support an adverse inference instruction goes to the mental-culpability element of any test. Some circuits have held that negligence is enough, while other circuits have come to the opposite conclusion.71 Part II explores the different conclusions that the circuit courts have reached on this question.

II. THE CIRCUIT SPLIT OVER THE MENTAL CULPABILITY REQUIRED TO SUPPORT THE ADVERSE INFEERENCE INSTRUCTION

Near the end of the twentieth century, a split among federal courts began to emerge over what level of mental culpability was required to allow a court to grant an adverse inference instruction. The spectrum of mental culpability ranges from intentional acts to negligence.72

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68 Id.

69 Compare, e.g., Beaven v. U.S. Dep’t of Justice, 622 F.3d 540, 553 (6th Cir. 2010) (asking whether the evidence was “destroyed with a culpable state of mind” (internal quotation marks omitted) with e.g., Powell, 591 F. Supp. 2d at 820–21 (asking whether the spoliator’s destruction of the evidence was “willful”).

70 Compare e.g., Stevenson v. Union Pac. RR. Co., 354 F.3d 739, 746–50 (8th Cir. 2004) (evaluating the spoliator’s mental culpability after the district court gave an adverse inference instruction under its inherent power) with e.g., In re NTL, Inc. Sec. Litig., 244 F.R.D. 179, 197–99 (S.D.N.Y. 2007) (determining whether the spoliator had sufficient mental culpability when deciding whether to give an adverse inference instruction under Rule 37).

71 See infra Part II.

Some courts continue to require culpability greater than simple negligence;\(^\text{73}\) however, other courts have permitted simple negligence to suffice as a basis for giving the instruction.\(^\text{74}\) This split has been recognized in both judicial decisions\(^\text{75}\) and legal scholarship.\(^\text{76}\) The shift by some courts to allow negligent spoliation to serve as the basis of an adverse inference instruction has been identified as a result of the rise of cases involving spoliation of electronically stored information.\(^\text{77}\)

A. **Circuits that Require Bad Faith**

On one end of the spectrum, some courts require that the spoliator act with bad faith to satisfy the mental-culpability element of the adverse inference instruction test. The Fifth Circuit

\(^{73}\) See infra notes 78–110.

\(^{74}\) See infra notes 129–144.

\(^{75}\) See, e.g., United States v. Laurent, 607 F.3d 895, 902 (1st Cir. 2010) (“But the case law is not uniform in the [mental] culpability needed for the instruction . . . .”).

\(^{76}\) See, e.g., Crist, supra note 17, at 47–48 & n. 219 (2006) (noting that “[c]ourts . . . are divided as to the requisite level of required [mental] culpability” for giving the instruction and citing cases since 1991 from various courts showing this division); Ben Ferrell, Note, *Spoliation in the Digital Age: Proposing a New Standard of Culpability in Massachusetts for an Adverse Inference Instruction*, 14*SUFFOLK J. TRIAL & APP. ADVOC.* 110, 117–20 (2009) (recognizing that “a circuit split has developed as to the level of culpability required by the spoliating party to warrant an adverse inference instruction”); Nichols, supra note 10, at 886 (observing that “jurisdictions are divided as to the degree of culpability required to issue an adverse inference instruction”).

\(^{77}\) See, e.g., Nichols, supra note 10, at 898 (noting how technological advances have complicated the debate over the mental culpability required for giving an adverse inference instruction). This connection makes good sense, as many of the cases deciding that negligence is enough to support the instruction came in cases involving electronic discovery. See, e.g., Residential Funding Corp. v. DeGeorge Fin. Corp., 306 F.3d 99, 108 (2d Cir. 2002) (recognizing that negligence is a sufficiently culpable mental state to allow a court to give an adverse inference instruction).

For an analysis of reported decisions by federal courts prior to January 1, 2010 sanctioning parties for spoliating electronically stored information, see Willoughby, Jones, & Antine, supra note 2, at 811–14. This study found most cases involved intentional conduct by the spoliator. *Id.* Furthermore, the study found that courts were relatively evenly divided on using Rule 37 or inherent power as the basis for giving the adverse inference instruction. *Id.* For a discussion of judges’ views of sanctions for electronic-discovery cases, see Panel Discussion, *Sanctions in Electronic Discovery Cases: A View From the Judges*, 78 FORDHAM L. REV. 1 (2009).
mandates “bad conduct” to support an adverse inference instruction and specifically has said that “[m]ere negligence is not enough” to warrant the instruction.\footnote{Vick v. Texas Emp’t Comm’n, 514 F.2d 734, 737 (5th Cir. 1975) (internal quotation marks omitted); see also Condrey v. Suntrust Bank of Georgia, 431 F.3d 191, 203 (5th Cir. 2005) (noting that “bad faith” or “bad conduct” is necessary for a court to give an adverse inference instruction (internal quotation marks omitted)).} For example, in \textit{Vick v. Texas Employment Commission},\footnote{Vick v. Texas Emp’t Comm’n, 514 F.2d 734 (5th Cir. 1975).} Vick sued the Texas Employment Commission for sex discrimination under Title VII of the Civil Rights Act of 1964,\footnote{Civil Rights Act of 1964 § 703, 42 U.S.C. § 2000e-2 (2000).} alleging that the commission unfairly discriminated against her by declaring that she was unavailable for work and ineligible for unemployment benefits during her last trimester and thus did not refer her to any jobs.\footnote{\textit{Vick}, 514 F.2d at 735–36.} Before trial, the commission had destroyed its records on Vick.\footnote{\textit{Id.} at 737.} Vick sought an adverse inference instruction, which the district court refused to give.\footnote{\textit{Id.}} The Fifth Circuit held that the instruction was not warranted because “the records were destroyed under routine procedures without bad faith and well in advance of Vick’s service of interrogatories.”\footnote{\textit{Id.} (emphasis added).}

Similarly, the Eighth Circuit requires bad faith for a court to give an adverse inference instruction. This circuit “requires ‘a finding of intentional destruction indicating a desire to suppress the truth’” for a court to give an adverse inference instruction.\footnote{Greyhound Lines, Inc. v. Wade, 485 F.3d 1032, 1035 (8th Cir. 2007) (quoting \textit{Stevenson v. Union Pac. RR Co.}, 354 F.3d 739, 746 (8th Cir. 2004)).} In \textit{Stevenson v. Union Pacific Railroad Co.},\footnote{\textit{Stevenson v. Union Pac. RR Co.}, 354 F.3d 739 (8th Cir. 2004).} Stevenson sued after a Union Pacific train crashed into his car, severely injuring him and killing his wife.\footnote{\textit{Id.} at 742–43.} Stevenson sought sanctions against Union Pacific, alleging that Union Pacific destroyed a recording between the train crew and dispatch at the time of the crash.\footnote{\textit{Id.} (emphasis added).}

\footnote{\textit{Vick v. Texas Emp’t Comm’n}, 514 F.2d 734, 737 (5th Cir. 1975); \textit{Condrey v. Suntrust Bank of Georgia}, 431 F.3d 191, 203 (5th Cir. 2005).}
crash and the track-maintenance records.\textsuperscript{88} Union Pacific argued that the documents were destroyed as part of its document-retention policy, but the district court disagreed and decided to give an adverse inference sanction.\textsuperscript{89} In evaluating whether the district court abused its discretion by giving the instruction, the court explicitly noted that it had never upheld an adverse inference instruction without a finding of bad faith.\textsuperscript{90} The district court had held that Union Pacific’s document-retention policy itself “was not unreasonable or instituted in bad faith,” but that not preserving the evidence of this crash was bad faith because it knew litigation would arise.\textsuperscript{91} The Eighth Circuit affirmed the adverse inference sanction, holding the record contained evidence to support the district court’s finding of bad faith.\textsuperscript{92}

The Seventh Circuit is also on this end of the spectrum, requiring “bad faith” for a court to give an adverse inference instruction.\textsuperscript{93} \textit{Faas v. Sears, Roebuck & Co.}\textsuperscript{94} demonstrates this standard. In that case, Faas sued Sears for age discrimination under the Age Discrimination in Employment Act (ADEA),\textsuperscript{95} claiming that she was terminated from her job as a store manager because of her age.\textsuperscript{96} Faas wanted an adverse inference instruction because Sears destroyed

\begin{itemize}
\item \textsuperscript{88} Id. at 743.
\item \textsuperscript{89} Id.
\item \textsuperscript{90} Id. at 746–47. The court did observe, however, that it had approved of lesser sanctions, such as the exclusion of evidence, without a finding of bad faith by the spoliator. \textit{Id.} (citing Dillan v. Nissan Motor Co., Ltd., 986 F.2d 263, 267 (8th Cir. 1993)).
\item \textsuperscript{91} Id. at 747. The court did, however, hold that giving the adverse inference instruction for prelitigation destruction of documents was an abuse of discretion because that destruction was not in bad faith. \textit{Id.} at 747–48
\item \textsuperscript{92} Id. The court acknowledged that the case “test[ed] the limits of what [the court was] willing to uphold as a bad faith determination.” \textit{Id.}
\item \textsuperscript{93} S.C. Johnson & Son, Inc. v. Louisville & Nashville RR Co., 695 F.2d 253, 258 (7th Cir. 1982); \textit{see also} Faas v. Sears, Roebuck & Co., 532 F.3d 633, 644 (7th Cir. 2008) (holding that to give an adverse inference instruction, a court must find that the spoliator “intentionally destroyed the documents in bad faith”).
\item \textsuperscript{94} Faas v. Sears, Roebuck & Co., 532 F.3d 633 (7th Cir. 2008).
\item \textsuperscript{96} \textit{Faas}, 532 F.3d at 635–40.
\end{itemize}
confidential records evaluating her performance and chances for advancement within the company. The court held that the district court properly refused to give the instruction because Faas presented no evidence to suggest that the documents were destroyed with any bad faith rather than in compliance with Sears’s established document-retention policy.

The Tenth Circuit has adopted this view that “bad faith” is required as well. In Turner v. Public Service Co., Turner sued under Title VII, alleging that she was not hired because of her sex. Notes from Turner’s interviews for the job were lost, and she moved for an adverse inference instruction. The court held that the record contained sufficient evidence for the district court to have found that the notes were not lost because of bad faith. Thus, the district court properly refused to give an adverse inference instruction.

Finally, the Eleventh Circuit is also on this end of the spectrum, insisting that a spoliator act with “bad faith” for a court to give an adverse inference instruction. For example, in Bashir v. Amtrak, Bashir sued Amtrak after his eleven-year-old son was killed by an Amtrak train when the train struck the boy at a railroad crossing. Bashir sought an adverse inference instruction.

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97 Id. at 639.
98 Id. at 644–45.
99 Turner v. Public Serv. Co. of Colorado, 563 F.3d 1136, 1149 (10th Cir. 2009) (“[I]f the aggrieved party seeks an adverse inference to remedy the spoliation, it must also prove bad faith.”); see also Aramburu v. Boeing Co., 112 F.3d 1398, 1407 (10th Cir. 1997) (“The adverse inference must be predicated on the bad faith of the party destroying the records.”).
100 Turner v. Public Serv. Co. of Colorado, 563 F.3d 1136 (10th Cir. 2009).
101 Id. at 1140.
102 Id. at 1148–49.
103 Id. at 1150.
104 Id.
105 Mann v. Taser Int’l, Inc., 588 F.3d 1291, 1310 (11th Cir. 2009) (“While this circuit does not require a showing of malice in order to find bad faith, mere negligence in losing or destroying records is not sufficient to draw an adverse inference.”).
106 Bashir v. Amtrak, 119 F.3d 929 (11th Cir. 1997).
107 Id. at 930.
instruction based on the destruction of evidence of the train’s speed at the time of the accident.\textsuperscript{108}

The court held that the record had “no probative evidence in this case to indicate [Amtrak] purposely lost or destroyed the relevant portion of the speed tape.”\textsuperscript{109} Therefore, an adverse inference was not appropriate.\textsuperscript{110}

\textbf{B. Circuits that Require Less than Bad Faith but More than Negligence}

The Fourth Circuit used to fall on the bad-faith end of the spectrum, but that circuit is now in the middle of the spectrum. In \textit{Vodusek v. Bayliner Marine Corp.},\textsuperscript{111} the court said, “While a finding of bad faith suffices to permit such an inference, it is not always necessary.”\textsuperscript{112} The court explicitly rejected negligence being enough to support the adverse inference instruction, holding that “willful conduct” was required.\textsuperscript{113} In \textit{Hodge v. Wal-Mart Stores, Inc.},\textsuperscript{114} the Fourth Circuit reaffirmed that negligence was not sufficient to justify the instruction.\textsuperscript{115} Yet between \textit{Vodusek} and \textit{Hodge}, the Fourth Circuit decided \textit{Silvestri v. General Motors Corp.}\textsuperscript{116} There, the court upheld the dismissal of the plaintiff’s case—a more severe sanction than an adverse inference instruction—based on conduct that was “at least negligent and may have been

\textsuperscript{108} \textit{Id.} at 931.
\textsuperscript{109} \textit{Id.}
\textsuperscript{110} \textit{Id.}
\textsuperscript{111} \textit{Vodusek v. Bayliner Marine Corp.}, 71 F.3d 148 (4th Cir. 1995).
\textsuperscript{112} \textit{Id.} at 156.
\textsuperscript{113} \textit{Id.}
\textsuperscript{114} \textit{Hodge v. Wal-Mart Stores, Inc.}, 360 F.3d 446 (4th Cir. 2004).
\textsuperscript{115} \textit{Id.} at 450 (quoting \textit{Vodusek}, 71 F.3d at 156).
\textsuperscript{116} \textit{Silvestri v. General Motors Corp.}, 271 F.3d 583 (4th Cir. 2001).
deliberate” by the plaintiff’s attorney. The Fourth Circuit ultimately clarified its position in *Buckley v. Mukasy*. In *Buckley*, the plaintiff sued the Drug Enforcement Agency (DEA) on a variety of employment-discrimination claims, and she sought an adverse inference instruction after the DEA did not preserve emails related to her claims. The Fourth Circuit reversed the district court’s decision not to give the instruction because the district court looked to see only whether the DEA acted with bad faith, but did not consider whether the DEA acted intentionally, willfully, or deliberately. Thus, the Fourth Circuit falls between the ends of this spectrum—it requires less than bad faith but more than negligence.

The Third Circuit similarly falls in the middle of the spectrum. It requires that evidence be “destroyed intentionally” for a court to give the adverse inference instruction, demanding more than negligence but less than bad faith. *Gumbs v. International Harvester, Inc.* was a products liability case in which Gumbs sued International Harvester, alleging that a defective part of the rear axle caused him to lose control of his truck going down a hill and crash. The plaintiff’s expert examined the axle but discarded parts after taking pictures of them and making

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117 Id. at 592–94.
118 Buckley v. Mukasy, 538 F.3d 306 (4th Cir. 2008).
119 Id. at 308.
120 Id. at 315–16.
121 Id. at 323.
122 Brewer v. Quaker State Oil Refining Co., 72 F.3d 326, 334 (3d Cir. 1995). Despite the court’s holding in *Brewer*, some district courts in the Third Circuit have focused on balancing the degree of fault and prejudice, thereby allowing negligent spoliation in some cases. *See infra* note 156 and accompanying text. This has led some courts to leave the Third Circuit out of the group of circuits that require an intentional act to support an adverse inference instruction. *See Rimkus Consulting Grp., Inc. v. Cammarata*, 688 F. Supp. 2d 598, 614 (S.D. Tex. 2010).
124 Id. at 90–91.
his notes.125 International Harvester asked for an adverse inference instruction, but the district court refused to give it.126 The Third Circuit held that the district court was correct because nothing in the record allowed International Harvester to satisfy its burden of showing that the evidence was “willfully” destroyed.127 The Third Circuit therefore joins the Fourth Circuit in the middle of this spectrum. It does not require a spoliator to have acted with bad faith but it demands more than mere negligence from the spoliator.

C. Circuits that Permit Negligence to Support the Instruction

On the opposite end of the spectrum from the Fifth, Seventh, Eighth, Tenth, and Eleventh Circuits are the Second, Sixth, and Ninth Circuits.128 The Second Circuit held in Byrnie that a spoliator could act “negligently” and satisfy the mental-culpability requirement for giving an adverse inference requirement.129 The court reaffirmed this rule in Residential Funding Corp. v. DeGeorge Financial Corp. the next year, allowing an adverse inference to be given for any level of fault from “negligence to intentionality.”130 These decisions adopted the reasoning of the

[125 Id. at 96.
126 Id. at 96–97.
127 Id.

Circuits that allow negligence to support an adverse inference instruction also allow gross negligence to support the instruction. See, e.g., Beaven v. U.S. Dep’t of Justice, 622 F.3d 540, 555 (6th Cir. 2010) (citing Residential Funding Corp. v. DeGeorge Fin. Corp., 306 F.3d 99, 108 (2d Cir. 2002)). This Article focuses primarily on the divide between the traditional standard requiring a bad-faith act by the spoliator and the new shift toward allowing a spoliator’s negligence to support the instruction. This Article discusses gross negligence in Part IV to explain why gross negligence, although not as problematic as simple negligence, still is not great enough mental culpability to support giving the instruction.

129 Byrnie v. Town of Cromwell, 243 F.3d 93, 109 (2d Cir. 2001).
130 Residential Funding Corp., 306 F.3d at 108 (quoting Reilly v. Natwest Mkts. Grp., Inc., 181 F.3d 253, 267 (2d Cir. 1999)).
Southern District of New York from 1991 in *Turner v. Hudson Transit Lines, Inc.* In that case, the court reasoned that the instruction “should be available even for the negligent destruction of documents if that is necessary to further the remedial purpose of the inference.” In *Byrnie*, the plaintiff sued the town’s school district for age discrimination under the ADEA after he was not hired as a part-time teacher. He sought an adverse inference instruction because the records of the hiring process and interviews had been destroyed. The school district claimed the records were destroyed as part of its normal document-retention policy, but the court held that the documents were intentionally destroyed despite the school district being required to keep them pursuant to federal regulations. Ironically, despite first clearly announcing in *Byrnie* that negligent spoliation would suffice to support the culpable-state-of-mind requirement for giving an adverse inference instruction, the court found that the culpable state of mind was satisfied by a greater level of fault in that case.

The Sixth Circuit relied on the Second Circuit’s decision in *Residential Funding Corp.* to hold, “[T]he culpable state of mind factor is satisfied by a showing that the evidence was destroyed knowingly, even if without intent to [breach a duty to preserve it], or negligently.” In *Beaven v. U.S. Department of Justice*, employees of the Bureau of Prisons sued various government officials for violations of the Federal Tort Claims Act and the Privacy Act. The

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132 Id. at 75.
133 Byrnie, 243 F.3d at 98.
134 Id. at 108.
135 Id. at 108–09.
136 See id.
138 Beaven v. U.S. Dep’t of Justice, 622 F.3d 540 (6th Cir. 2010).
plaintiffs moved for an adverse inference instruction based on the defendants’ destruction of a folder that was the key piece of evidence in the case. The court upheld the district court’s decision to give the instruction because the defendants destroyed the folder while they knew that litigation was ongoing and that the folder was a critical part of the case.

The Ninth Circuit also takes this position on the sufficiency of negligence to support an adverse inference instruction. In *Glover v. BIC Corp.*, the Ninth Circuit held that “bad faith is not a prerequisite” for giving an adverse inference instruction. In that case, Glover filed a productive liability suit against BIC Corp. after her husband died in a fire that was allegedly caused by a lighter made by BIC Corp. BIC Corp. sought an adverse inference instruction after Glover’s expert took apart the lighter and denied BIC Corp.’s expert the opportunity to do his own inspection. The district court refused to give the instruction because BIC Corp. did not prove that Glover's expert acted in bad faith. On appeal, the Ninth Circuit did not hold that the instruction should have been given, but rather only that “bad faith is not a prerequisite” for a court to give an adverse inference instruction. The case was remanded for the district court to hold a new trial and “to rewrite this instruction to make it clear that bad faith is only one avenue

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141 *Beaven*, 622 F.3d at 553–54. The folder contained the employees’ private information that was left out for prison inmates to see, in violation of Bureau of Prison regulations. *Id.* at 544–46.
142 *Id.* at 554.

The facts suggest that the spoliator acted with more than negligence here, and the Sixth Circuit did not state which level of mental culpability existed based on these facts. The Sixth Circuit simply cited the Second Circuit’s decision in *Residential Funding Corp.* for the standard for when an adverse inference instruction can be given, and then applied that standard to the facts of the case. Perhaps the Sixth Circuit opened the door to negligence supporting the instruction without realizing what it was doing.

143 *Glover v. BIC Corp.*, 6 F.3d 1318 (9th Cir. 1993).
144 *Id.* at 1329 (internal quotation marks omitted).
145 *Id.* at 1321.
146 *Id.* at 1322.
147 See *id.* at 1329.
148 *Id.* (internal quotation marks omitted).
to the presumption, but not the only one.”\(^{149}\) The Ninth Circuit did not explicitly state that a spoliator’s negligence was sufficient to support an adverse inference instruction, but that is how courts and scholars have interpreted the Ninth Circuit’s decision.\(^{150}\) Despite the ambiguity in \textit{Glover}, subsequent cases in the Ninth Circuit indicate that \textit{Glover} does stand for the proposition that negligence is enough to support the adverse inference instruction.\(^{151}\)

\section*{D. District Courts’ Approach to the Instruction}

In addition to the Second, Sixth, and Ninth Circuits, a number of district courts have also held that negligence is enough to support an adverse inference instruction. For district courts in the Second,\(^{152}\) Sixth,\(^{153}\) and Ninth Circuits,\(^{154}\) that they would allow negligent spoliation to give

\(^{149}\) Id.


rise to the instruction is no surprise, for their circuits explicitly allow the instruction in those instances. Yet some district courts in circuits that still require more than negligence have also shifted along the spectrum and permit negligence to support the instruction. For example, the Southern District of Georgia allowed the spoliator’s negligence to support an adverse inference instruction, despite the Eleventh Circuit’s holdings that negligence was insufficient to satisfy the mental-culpability requirement.\textsuperscript{155} In the Third and Fourth Circuits, which sit somewhere in the middle of the spectrum, district courts have treated a spoliator’s negligence as sufficient to support an adverse inference instruction. In the Third Circuit, the District of New Jersey, for instance, has held that “negligent destruction of relevant evidence can be sufficient to give rise to the spoliation inference.”\textsuperscript{156} And in the Fourth Circuit, the Western District of North Carolina treated a spoliator’s negligence as capable of sustaining the instruction, despite the Fourth

\textsuperscript{153} See, e.g., Potts v. Martin & Bayley, Inc., 2010 WL 3001639 at *9 (W.D. Ky. July 27, 2010) (noting that “ordinary negligence may suffice to warrant an adverse inference instruction” (internal quotation mark omitted)); BancorpSouth Bank, Inc. v. Herter, 643 F. Supp. 2d 1041, 1061 (W.D. Tenn. 2009) (observing that in some cases ordinary negligence may support an adverse inference instruction); Forest Labs., Inc. v. Caraco Pharm. Labs., Inc., 2009 WL 998402 at *5 (E.D. Mich. April 14, 2009) (recognizing that ordinary negligence may be sufficient mental culpability to warrant an adverse inference instruction). Notably, district courts in the Sixth Circuit started giving adverse inference instructions based on the spoliator’s negligence before\textit{Beaven} was decided. Now that the Sixth Circuit has approved of giving an adverse inference instruction based on the spoliator’s negligence, these cases do not pose the same issues for district courts ignoring the circuit court.


\textsuperscript{155} See Brown v. Chertoff, 563 F. Supp. 2d 1372, 1381 (S.D. Ga. 2008) (evaluating whether an adverse inference instruction was appropriate based on the spoliator’s negligence rather than rejecting giving the instruction based on that level of fault).

Circuit’s decision in *Hodge*, in which the court held that negligence was insufficient to support the instruction.\(^{157}\)

This division represents a fundamental disagreement over when an adverse instruction may be given. Courts are trending toward allowing negligence to support the instruction. This trend, however, is a mistake. Parts III and IV explain why courts cannot and should not give an adverse inference instruction based on negligence.

### III. Why Federal Courts Cannot Give an Adverse Inference Instruction Based on a Spoliator’s Negligence

This Part demonstrates why federal courts cannot give an adverse inference instruction based on a spoliator’s negligence. Section A explains why federal courts lack the inherent power to give the instruction when a spoliator acts only negligently. Section B then explains why Federal Rule of Civil Procedure 37(b) also demands more than negligent spoliation for a court to give an adverse inference instruction.

#### A. Federal Courts’ Inherent Power Requires More Than Negligent Spoliation for Courts to Give and Adverse Inference Instruction

Many courts give an adverse inference instruction based on their inherent power.\(^{158}\) Federal courts have certain inherent powers that are “necessary to the exercise of all other[ powers].”\(^{159}\) These inherent powers are “governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and

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\(^{157}\) See Teague v. Target Corp., 2007 WL 1041191 (W.D.N.C. April 4, 2007) (noting that a “culpable state of mind” could include “ordinary negligence” (internal quotation marks omitted)).

\(^{158}\) See, *e.g.*, supra note 41; Willoughby, Jr., Jones, & Antine, *supra* note 76, at 813–14 (noting the frequency with which courts justify an adverse inference instruction based on inherent power).

\(^{159}\) Chambers v. NASCO, Inc. 501 U.S. 32, 43 (1991) (quoting United States v. Hudson, 11 U.S. (7 Cranch) 32, 34 (1812)); *see also* Hudson, 11 U.S. (7 Cranch) at 34 (“Certain implied powers must necessarily result to our Courts of justice from the nature of their institution.”).
expeditious disposition of cases.” 160 That federal courts have this inherent power can hardly be debated; yet, the limits on this power deserve special scrutiny.

Somewhat surprisingly, courts have not carefully considered the extent of their inherent power to impose an adverse inference sanction. Rather, courts merely recite the legal rule that the instruction may be given pursuant to their inherent power, without going any further to explain from where that power comes. 161 Even more surprisingly, the courts that have shifted to allowing a spoliator’s negligence to support the adverse inference instruction have not even taken a moment to discuss any limits on their inherent power to give the instruction. 162 Yet examining these limits is important because these limits inform when federal courts have the authority to give an adverse inference instruction based on their inherent power as Article III courts.

The history of the ratification of the Constitution shows that the judicial power vested in federal courts by Article III is limited to the power—including the inherent power—that English courts and the state courts modeled on them had at the time of ratification. Next, evaluating the inherent power of English courts and state courts reveals that the power to issue the instruction

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161 See, e.g., Hodge v. Wal-Mart Stores, Inc., 360 F.3d 446, 449 (4th Cir. 2004) (“The imposition of a sanction (e.g., an adverse inference) for the spoliation of evidence is an inherent power of federal courts . . . .”); Stevenson v. Union Pac. RR Co., 354 F.3d 739, 745 (8th Cir. 2004) (“The district court imposed sanctions for this conduct under its inherent power by giving an adverse inference instruction . . . .”); E.E.O.C. v. LA Weight Loss, 509 F. Supp. 2d 527, 538 (D. Md. 2007) (“If spoliation has occurred, a court may impose an adverse-inference instruction pursuant to its inherent authority . . . .”).
162 See, e.g., Kounelis v. Sherrer, 529 F. Supp. 2d 503, 519 (D.N.J. 2008) (“Spoliation occurs when a party has intentionally or negligently breached its duty to preserve potentially discoverable evidence. To provide redress to the party harmed by spoliation, as well as to punish the spoliator, a court may impose appropriate sanctions pursuant to the Federal Rules of Civil Procedure and the court's inherent powers. Sanctions for spoliation include: dismissal of a claim or granting judgment in favor of a prejudiced party; suppression of evidence; an adverse inference, referred to as the spoliation inference; fines; and attorneys' fees and costs.” (internal quotation marks and citations omitted)).
existed only for bad-faith spoliation. From these two premises flows the conclusion that federal courts’ inherent authority to give an adverse inference instruction is limited to the inherent authority that English courts and state courts had to give an adverse inference instruction—namely, when the spoliator acted with bad faith.

1. The Constitution’s Grant of the “Judicial Power” in Article III. This Section considers what inherent power the judicial power of Article III vests in the federal courts in the United States.

At the time the Framers met in Philadelphia in 1787, state courts in the United States, like courts in England, enjoyed some inherent power. Against this backdrop, the Framers drafted the Constitution and Article III. Article III vested the “judicial power” in the “one supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish.”164

This constitutional grant of power reflected the Framers’ deliberate choice about what power the federal courts would have; indeed, the Framers carefully decided how Article III would be drafted.165 Nevertheless, the Constitutional Convention left little detail about exactly what it believed the “judicial power” meant.166 The delegates first agreed to have a national

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163 At the time of the Constitutional Convention, the United States had no federal courts because the Articles of Confederation did not provide for a national judiciary. See ARTICLES OF CONFEDERATION (U.S. 1777)
164 U.S. CONST. art. III, § 1.
judiciary on June 4, a position from which the Convention never wavered. In their debates at the Convention, the Framers were clear “that the Judiciary ought to be separate from the Legislative [power.]” But nothing else in the Convention debates offers a clear picture of what exactly was entailed in the judicial power. In fact, the Framers never actually discussed what this power included; rather, the Framers all seemed to share an implicit understanding of what the judicial power was.

To get a sense of what the Framers thought the judicial power included, contemporary writings from the time of ratification, most notably the Federalist Papers, offer some insight. These writings never explicitly defined what the “judicial power” meant, but they did indicate the role that the judiciary would have in the federal government. Although the judiciary was thought to be “the weakest of the three branches” because it had “neither force nor will,” the judiciary was still intended to be “complete[ly] independent[al]” from the other branches. Its power is firmly rooted in and granted by the Constitution. In this sense, the judicial power is

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167 1 Madison, supra note 165, at 56.
168 2 Madison, supra note 165, at 406.
169 These ratification-era writings do not provide a definite answer, but they offer more insight than some scholars have suggested. See, e.g., Amy Coney Barrett, Procedural Common Law, 94 Va. L. Rev. 813, 855 (2008) (stating that “the debates surrounding the Constitution’s drafting and ratification are relatively unhelpful in determining whether Article III courts possess inherent authority to regulate litigation before them”).
170 The Federalist No. 78, at 464, 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961); see also N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 58 (1982) (Brennan, J., plurality opinion) (“The Federal Judiciary was therefore designed by the Framers to stand independent of the Executive and Legislature—to maintain the checks and balances of the constitutional structure, and also to guarantee that the process of adjudication itself remained impartial.”); Chandler v. Judicial Council of the Tenth Circuit, 398 U.S. 74, 84 (1970) (“There can, of course, be no disagreement among us as to the imperative need for total and absolute independence of judges in deciding cases or in any phase of the decisional function.”); Stephen B. Burbank, The Architecture of Judicial Independence, 72 S. Cal. L. Rev. 315, 341 (1999) (“It was also [the Framers’] view that judicial independence was instrumental to the resolution of ordinary cases according to law.”).
171 Id. at 466.
similar to the executive and legislative power—all governed by the Constitution and carefully balanced to check each other.\textsuperscript{172}

To the extent that the \textit{Federalist Papers} discussed what exactly the judicial power would look like, \textit{Federalist No. 81}\textsuperscript{173} offers helpful guidance. In that paper, Alexander Hamilton describes how the federal judiciary would not supplant and replace state judiciaries, but would rather be limited by the powers that the Constitution granted.\textsuperscript{174} Hamilton also looks to Great Britain and to the states as examples of the relationship between courts and legislatures.\textsuperscript{175} Furthermore, in discussing the jurisdiction of federal courts, Hamilton relies heavily on the traditional sense of court procedure and process used by state courts, which were based on English courts.\textsuperscript{176} Although nothing in the \textit{Federalist Papers} conclusively defines the judicial power, they strongly suggest that federal courts possessed the same judicial power and would take a similar shape to English courts and state courts.\textsuperscript{177}

Further supporting this conclusion is the regularity with which federal courts cite English common law as the source of their inherent authority. For example, in \textit{United States v. Hudson},\textsuperscript{178} the Supreme Court commented, without offering any definitive answer, that the implied powers of government—which necessarily included federal courts—were those

\begin{footnotes}
\item[172] \textit{The Federalist} No. 51 (James Madison), \textit{supra} note 170, at 318–19.
\item[173] \textit{The Federalist} No. 81 (Alexander Hamilton).
\item[174] See \textit{The Federalist} No. 81 (Alexander Hamilton), \textit{supra} note 170, at 481–82.
\item[175] See id. at 483.
\item[176] See id. at 487–90.
\item[177] Although Article III granted federal courts the same judicial power that English courts had, the theoretical underpinnings of that power differed. The judicial power granted by Article III was based on the people’s grant of power to the federal government, see infra notes 196–197. English judicial power, by contrast, was rooted in the Crown’s prerogative. See supra notes 201–214 and accompanying text. This theoretical difference, however, is of no matter. The inherent power of English courts that Parliament implicitly recognized, see supra note 214 and accompanying text, was the same inherent power that was part of the judicial power granted by Article III.
\item[178] United States v. Hudson, 11 U.S. (7 Cranch) 32 (1812).
\end{footnotes}
recognized by the common law of England. Also, in 1854, the Court noted how various states had relied on English common law and inherent power to adopt the *cy pres* doctrine that originated in English courts. The Supreme Court has also cited English common law as the lens through which the statute giving federal courts the power to hold people in criminal contempt must be interpreted.

The Supreme Court has also looked to English common law to guide its decisions in other areas of law as well. In the context of the authority of police officers and the Fourth

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179 *See id.* at 34 (noting that “*[c]ertain implied powers must necessarily result to our Courts of justice from the nature of their institution*” after having previously noted that the implied powers of government were recognized under the common law of England).

180 *See* Fontain v. Ravenel, 58 U.S. (17 How.) 369, 391 (1854) (affirming the judgment of the lower court and relying on the common law of England). In *Fontain*, the respondent’s lawyer explicitly cited English common law and inherent power as the basis of his argument. *See id.* at 376.


More generally, when discussing the meaning of judicial power, Justice Scalia has written that “Article III courts, as an independent and coequal Branch of Government, derive from the Constitution itself, once they have been created and their jurisdiction established, the authority to do what courts have traditionally done in order to accomplish their assigned tasks. Some elements of that inherent authority are so essential to ‘[t]he judicial Power,’ that they are indefeasible.” *Chambers v. NASCO, Inc.*, 501 U.S. 32, 58 (1991) (Scalia, J., dissenting).

182 Like these other areas, this interpretation of judicial power is at least related to, if not grounded in, originalism. Despite its drawbacks, *see* Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 862–65 (1989) (discussing the weaknesses of originalism as an approach to constitutional interpretation but preferring originalism to nonoriginalist approaches), originalism is now a common—perhaps the predominant—form of constitutional interpretation, *see*, e.g., Linda Greenhouse, *3 Defining Opinions*, N.Y. TIMES, July 13, 2008, at WK4 (observing that Justice Scalia’s majority opinion and Justice Stevens’s dissenting opinion in *Heller* “came to opposite conclusions but proceeded on the premise that original understanding of the amendment’s framers was the proper basis for the decision”).

Of course, someone who rejects originalism is likely to reject the argument in this Section. *Cf.* STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* 7–8 (2005) (discussing the tools other than originalism that can be a guide for interpreting constitutional provisions). Nevertheless, a nonoriginalist can still reach the same
Amendment, for instance, the Court emphasized the importance of English common law in *Payton v. New York.*[^183] “Given the colonists’ high regard for the common law, it is indeed unlikely that the Framers of the Fourth Amendment intended to derogate from the constable's inherent common-law authority.”[^184] Similarly, when evaluating state sovereign immunity under the Eleventh Amendment, in *Alden v. Maine,*[^185] the Court noted with favor Justice Iredell’s dissent in *Chisholm v. Georgia[^186]* when he relied on the common law to describe the extent of states’ sovereignty.[^187] These statements highlight the deference with which the Framers viewed English common law, and they provide strong support for the argument that the judicial power granted by Article III was also tied to the common law of England.

Lower courts have also looked to English common law as the source of their inherent power. For example, the Fifth Circuit has pointed to the common law of England as the basis for its inherent power to regulate lawyers who appear before the court.[^188] The Eighth Circuit has looked to English common law as the origin of courts’ inherent authority to place restrictive

[^184]: *Id.* at 609.
[^186]: Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793).
[^187]: *Alden,* 527 U.S. at 788 (quoting *Chisholm,* 2 U.S. at 435 (Iredell, J., dissenting)).
[^188]: See Howell v. State Bar, 843 F.2d 205, 206 (5th Cir. 1988) (“Since the early days of English common law, it has been widely recognized that courts possess the inherent power to regulate the conduct of attorneys who practice before them and to discipline or disbar such of those attorneys as are guilty of unprofessional conduct.”);
conditions on granting bail.\textsuperscript{189} The Third Circuit has also cited the common law of England for its authority to regulate bail.\textsuperscript{190}

Knowing that Article III granted a judicial power that included the same inherent powers as English courts and state courts, the next issue is whether federal courts’ inherent power can be expanded or contracted beyond that constitutional grant. Because courts’ reliance on their inherent power to give an adverse inference instruction based on a spoliator’s negligence is an expansion of the power as it existed at the time of ratification, this Article focuses only on whether courts’ inherent power can be expanded consistent with the Constitution.\textsuperscript{191}

Whereas efforts by Congress to limit inherent power raise separation-of-powers concerns,\textsuperscript{192} efforts by federal courts to expand their inherent power raise concerns about judicial legitimacy.\textsuperscript{193} The federal government—and therefore the federal courts—have “enumerated, delegated, and thus limited powers.”\textsuperscript{194} These powers are those explicitly granted in the

\textsuperscript{189} See United States v. Smith, 444 F.2d 61, 62 (8th Cir. 1971) (per curiam) (“[W]e think the course of the common law in England and the development of the common law and statutory law in the United States demonstrate that the courts have the inherent power to place restrictive conditions upon the granting of bail.”).

\textsuperscript{190} See Johnston v. Marsh, 227 F.2d 528, 531 (3d Cir. 1955) (citing English cases for the proposition that the court has inherent powers).

\textsuperscript{191} Other scholars have taken up the other half of this issue regarding limitations on judicial power, albeit in other contexts, and reached similar conclusions about the constitutional scope of the judicial power being immutable outside of the amendment process. See, e.g., Jennifer M. Bandy, \textit{Interpretive Freedom: A Necessary Component of Article III Judging}, 61 DUKE L.J. 651, 653 (2011) (arguing that efforts to impose a particular method of judicial decisionmaking infringe on the judicial power of Article III).

\textsuperscript{192} See, e.g., Miller v. French, 530 U.S. 327, 342–47 (2000) (discussing, in the context of the Prison Litigation Reform Act, the limits of Congress’s legislative power when its acts limited the judicial power).


The Framers specifically rejected the idea that government “possessed vast intrinsic authority,” instead adopting the view that ultimate sovereignty rested with “the People.” Indeed, the idea that the federal government is one of enumerated powers is well accepted and now beyond debate.

The inherent power vested in federal courts therefore cannot be contracted or expanded beyond that constitutional grant. Knowing that the creation of federal courts in Article III reflects the English origins of the United States, contemplating what power the Constitution grants to federal courts under Article III necessarily requires reflecting on the English history.

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195 See U.S. CONST. amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”).
196 Robert J. Pushaw, Jr., The Inherent Powers of Federal Courts and the Structural Constitution, 86 IOWA L. REV. 735, 741 (2001); see also U.S. CONST. preamble (“We the People of the United States . . . .”); The FEDERALIST No. 46, supra note 170, at 291 (James Madison) (arguing that “ultimate authority . . . resides in the people” rather than with the government).
197 See, e.g., United States v. Morrison, 529 U.S. 598, 607 (2000) (“Every law enacted by Congress must be based on one or more of its powers enumerated in the Constitution. ‘The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written.’” (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176 (1803)). The extent of these powers, however, has been long debated. See, e.g., RON CHERNOW, ALEXANDER HAMILTON 349–55 (2004) (describing the bitter debate between Alexander Hamilton and Thomas Jefferson over the scope of congressional powers and the Bank of the United States).

Applying this originalist argument as the limiting principle for the inherent power of federal courts is an idea that I will explore further in a later article. For now, this brief discussion should suffice to show the contours of this argument.

198 See Amy Coney Barrett, The Supervisory Power of the Supreme Court, 106 COLUM. L. REV. 324, 366 (2006) (“The influence of the English and colonial experience on the Founding generation means that any consideration of Founding-era attitudes must take English and colonial sources into account.”); Wilbur Larremore, Constitutional Regulation of Contempt of Court, 13 HARV. L. REV. 615, 617 (1900) (observing that “the weight of American authority is that the constitutional creation of a court implies calls into being the historical inherent power of the English courts to effectuate their own acts by contempt process”). This understanding likewise applied to state courts. See John G. Dana, Comment, Whose Line Is It Anyway: How Far Can the Alabama Legislature Go When Prescribing Rule of Evidence, Practice and Procedure?, 29 CUMB. L. REV. 427, 433 (1998–99) (“Because many understood the granting of power to the judiciary to mean that the American courts would exercise the same powers as the

The Framers’ understanding of courts and judicial power drew on the historical precedents of English and state courts, so understanding the power of these courts is essential for recognizing the limits on federal courts. After all, evaluating the limits of the inherent power of federal courts to give an adverse inference instruction must start with the origins of that power.

After the Norman Conquest in 1066, the new English monarchs were the head of the courts in England, because all power derived from the king. During the centuries after the Conquest, the power of local Anglo-Saxon courts waned, as the Royal Court of Justice became the primary court in England. English courts evolved into three distinct courts during this time: Common Pleas, the King’s Bench, and Chancery. Each of these courts served different functions, heard different types of cases, and awarded different remedies. Ultimately, between the Conquest and the Glorious Revolution in 1688, “English judges . . . served as the king’s English courts, specific enumeration of the power to make rules was thought not to be required.”

See Barrett, supra note 198, at 366 (“The influence of the English and colonial experience on the Founding generation means that any consideration of Founding-era attitudes must take English and colonial sources into account.”);

Professor Robert Pushaw offers a thorough and well-researched description of the inherent power in English courts, and this Article’s discussion of inherent power in English courts draws heavily on his work. See Pushaw, supra note 196, at 799–816. For other sources discussing the history of English courts, some of which are cited by Pushaw, see generally J.H. Baker, An Introduction to English Legal History (2d ed. 1979); H.G. Hanbury, English Courts of Law (4th ed. 1967); William Holdsworth, A History of English Law (7th ed. 1956); S.F.C. Milson, Historical Foundations of the Common Law (1969); Theodore F.T. Plucknett, A Concise History of the Common Law (5th ed. 1956); and Frederick Pollock & Frederic William Maitland, The History of English (2d ed. 1968).

See id. at 800;


See Pushaw, supra note 196, at 801–04

See id.
personal representatives in exercising his prerogative to do justice." Based on their association with the king and his prerogative and as part of the executive branch, judges possessed a “deep well of powers” that became the basis for judicial inherent power.

English judges enjoyed greater independence after the Glorious Revolution in 1688. After the Glorious Revolution, Parliament, not the Crown, was the sovereign in England. Despite this authority, “Parliament never enacted a comprehensive code of procedure of evidence and did not interfere with the courts’ exercise of inherent power.” By deferring to the courts, Parliament effectively recognized a sphere of power in which the courts were free to operate without interference from legislative action. The Act of Settlement of 1701 ensured that judges would enjoy independence through tenure during good behavior and fixed salaries. Despite not being theoretically free from the power of other parts of government, judges

205 Id. at 805. As an example of how judges served as the king’s personal representatives, these judges “held office during the royal pleasure, and were dismissed if they decided against the king’s wishes.” CARTER, supra note 202, at 24.
206 See Pushaw, supra note 196, at 805.
207 The Glorious Revolution was the bloodless ascension of William and Mary to the English throne, which included the couple accepting certain limitations on the power of the monarchy. See generally EDWARD VALLANCE, THE GLORIOUS REVOLUTION: 1688: BRITAIN’S FIGHT FOR LIBERTY (2008).
208 See Pushaw, supra note 196, at 814. Between the early years after the Conquest and Parliament’s ultimate establishment as the sovereign authority, sovereignty in England was vested in the Crown-in-Parliament, a system in which sovereignty was shared by the monarchy and Parliament. See John F. Manning, Textualism and the Equity of the Statute, 101 COLUM. L. REV. 1, 47–48 (2001) (discussing this framework).
209 See Pushaw, supra note 196, at 815 (citing Charles S. Cushing, The Rule-make Power, 13 A.B.A. J. 7, 7 (1927)).
210 Act of Settlement, 12 & 13 Will. III, c. 2, § 3 (1701).
211 See Pushaw, supra note 196, at 807. These protections for judicial independence are familiar in the American context. See U.S. CONST. art. III, § 1 (“The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services a Compensation, which shall not be diminished during their Continuance in Office.”)
212 The idea of a judicial power, separate from the executive, was not developed until Montesquieu’s The Spirit of the Laws in 1748. See BARON DE MONTESQUIEU, THE SPIRIT OF THE
nonetheless had an independent authority to decide cases by “applying pre-existing law to the facts in particular cases.”\textsuperscript{213} This independence meant that “certain powers that had originated in the royal prerogative came to be seen as inherent characteristics of a ‘court.’”\textsuperscript{214}

Professor Pushaw traces this acquiescence to the courts on England’s preference for respecting “long-established practices and traditions.”\textsuperscript{215} Whatever the cause of deference to the courts, this deference implicitly recognized that certain inherent powers rested with the courts. Among these powers were contempt\textsuperscript{216} and evidence.\textsuperscript{217} The adverse inference instruction, as a combination of an evidentiary, equitable, and punitive measure, fell into the inherent power that English courts had as well.

Thus, under its inherent power, the King’s Bench was able to give an adverse inference instruction against the goldsmith in \textit{Armory v. Delamirie}, despite not having any authorization from Parliament to give such an instruction.\textsuperscript{218} In \textit{Armory}, the King’s Bench did not explicitly state the goldsmith’s mental culpability on which the court based its decision. Yet a careful reading of the case strongly suggests that the goldsmith acted in bad faith. He had the jewel, was

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\textsuperscript{213} \textit{Laws} bk. XI, ch. 6, at 152 (Franz Neumann ed. & Thomas Nugent trans. 1949) (1748). England never adopted this view. \textit{See} 3 William Blackstone, Commentaries *23–24 (observing that because “the sole executive power of the laws is vested in the person of the king, it will follow that all courts of justice, which are the medium by which he administers the laws, are derived from the power of the crown”).
\textsuperscript{214} \textit{Id.} at 810.
\textsuperscript{215} \textit{Id.} Professor Pushaw’s conclusion seems reasonable. As Professor H. Jefferson Powell notes, the British tend to follow “a Burkean tradition of historical custom and political principle.” H. Jefferson Powell, \textit{The Original Understanding of Original Intent}, 98 \textit{Harv. L. Rev.} 885, 889 (1985).
\textsuperscript{216} \textit{See} Pushaw, \textit{supra} note 196, at 813 n.417 (discussing the inherent power of English courts to hold people in contempt).
\textsuperscript{217} \textit{See supra} note 209.
\textsuperscript{218} \textit{See} Armory v. Delamirie, 1 Str. 505, 93 Eng. Rep. 664 (K.B. 1722).
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asked for it back by the chimney sweep’s boy, and blatantly refused to do so. The court noted no mitigating circumstances for the goldsmith’s refusal to produce the jewel. Thus, the instruction was based on the goldsmith’s bad-faith act of refusing to produce the chimney sweep boy’s jewel.

When a defendant did not act fraudulently, however, English courts held that no adverse inference instruction was warranted and refused to give the instruction. In Clunnes v. Pezzey, a liquor merchant sued the defendant after delivering bottles of liquor and not being paid. The merchant could not prove what liquor was in the bottles and had no evidence that the defendant had acted in bad faith by drinking the liquor. The court therefore held that the merchant was presumed to have sold the cheapest liquor in his store to the defendant, and damages were calculated on that basis. The court specifically noted that if the defendant had acted fraudulently, then the adverse inference of the value of the liquor would have gone against the defendant.

As English settlements, the courts in the American colonies largely reflected their counterparts across the Atlantic. Some differences between these courts existed, most notably the greater discretion colonial judges had because the Act of Settlement of 1701 did not apply to

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219 Id.
220 See id.
222 Id.
223 Id.
224 Id.
225 Id. n.2 (citing Armory, 1 Str. 505, 93 Eng. Rep. 664); see also Butler v. Basing, 172 Eng. Rep. 278, 279 n.a (K.B. 1827) (citing Armory as the basis for the adverse inference instruction).
226 See Pushaw, supra note 196, at 816–22 (describing judicial power and courts in colonial America).
the colonies.\textsuperscript{227} Colonial judges thus enjoyed “considerable inherent authority.”\textsuperscript{228} Some colonies explicitly recognized this authority. New York, for instance, passed a statute in 1691 that allowed judges in the colony “to make, ordain and establish, all rules and orders . . . as fully and amply to all intents and purposes whatsoever, as all or any of the judges of the several courts of the King’s Bench, Common Pleas and Exchequer in England.”\textsuperscript{229} Yet as part of the colonists’ desire to remove themselves from under the oppression of the Crown eventually, they sought to limit the power of the Crown’s judicial representatives.\textsuperscript{230} These efforts to limit judicial power often came in response to particular incidents, but these efforts still never fully rejected the idea that courts have inherent power.\textsuperscript{231} Thus, the idea of inherent power existed in the states at the time of the Constitution’s ratification, providing insight as to what powers the Framers believed that courts had by their mere existence.

3. The Adverse Inference Instruction and Inherent Power Under Article III. This understanding of inherent powers of federal courts means that federal courts have the inherent power to give an adverse inference instruction only to the extent that the power existed in English and state courts at the time of the ratification of the Constitution. Such a limitation on federal courts’ inherent authority to give the instruction recognizes the boundaries set forth in the

\textsuperscript{227} See id. at 816–17.
\textsuperscript{228} Id. at 817.
\textsuperscript{229} New York Historical Society, Supreme Court of Judicature of the Province of New York 364 (1959).
\textsuperscript{230} See Pushaw, supra note 196, at 817. For an example of a source discussing general discontent with British rule, see WALTER EDGAR, SOUTH CAROLINA: A HISTORY 204–25 (1998).
\textsuperscript{231} See Pushaw, supra note 196, at 817–20 (describing, for example, how Virginia’s legislature adopted a code of judicial procedure and how other states reopened court judgments).
Constitution and comports with the earliest articulations of the instruction in American jurisprudence.\textsuperscript{232}

English courts gave the adverse inference instruction based on the spoliator’s bad-faith act.\textsuperscript{233} In the case that is most widely regarded at the creation of the instruction,\textsuperscript{234} the court based the instruction on the spoliator’s bad-faith act of suppressing evidence.\textsuperscript{235} Turning to early American jurisprudence confirms this limitation on the adverse inference instruction. \textit{The Pizarro} provides the most obvious example of a judicial decision that recognizes that the adverse inference instruction requires more than negligence from the spoliator.\textsuperscript{236} Similarly, Massachusetts’s highest court recognized the risks of allowing an adverse inference instruction without some clearly intentional act by the spoliator.\textsuperscript{237} And Missouri likewise premised the spoliation inference on the spoliator’s act that was “deliberate” and the “sole purpose” of which was to “cut[] off” the plaintiff’s ability to pursue his case.\textsuperscript{238}

English courts and early American courts all understood that the adverse inference instruction required that the spoliator destroy evidence with greater mental culpability than negligence. Thus, federal courts’ inherent power is limited to cases in which the spoliator acts with more than negligence when he destroys evidence. Federal courts have the power to base

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\textsuperscript{232} Cf. Roadway Express, Inc. v. Piper, 447 U.S. 752, 764 (1980) (“Because inherent powers are shielded from direct democratic controls, they must be exercised with restraint and discretion.”).
\textsuperscript{233} See supra notes 218–220; see also Shapiro, Bernstein & Co. v. Remington Records, Inc., 265 F.2d 263, 271 (2d Cir. 1959) (discussing \textit{Armory}).
\textsuperscript{234} See supra note 37.
\textsuperscript{235} See supra notes 218–220 and accompanying text.
\textsuperscript{237} See Commonwealth v. Webster, 59 Mass. 295, 317 (1850). Although \textit{Webster} was a criminal case, the concerns about the adverse inference instruction are equally valid in a civil case. For more on the history of the adverse inference instruction, see supra Part I.B.
\textsuperscript{238} See Pomeroy v. Benton, 77 Mo. 64, 85 (1882).
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adverse inference instruction on their inherent power, as they have done for many years, but they cannot, consistent with the Constitution’s grant of power in Article III, give an adverse inference instruction under their inherent power based on the spoliator’s negligent destruction of evidence.

4. Two Notes. Two notes must be made to this argument. The first is that this Article takes a narrow view of the adverse inference instruction as part of a court’s inherent power. The second is that even under another common view of inherent power, the limitation on federal courts’ power to give an adverse inference instruction remains the same.

First, this view of the limitation on federal courts’ power to give an adverse inference instruction based on the spoliator’s bad-faith act requires a narrow view of defining specific powers that constituted inherent powers that federal courts had at the time of ratification. To explain in more detail, the adverse inference instruction can be viewed in either of two ways: It could be viewed as simply part of a court’s power to sanction litigants and provide equitable remedies for injured parties. Alternatively, the instruction could be a specific inherent power that has remedial and punitive aspects but remains distinct from other general powers to sanction or remedy. This Article takes the latter view because when English courts and early American courts discussed the adverse inference instruction, they focused explicitly on the sanction itself, not some broader power to punish or remedy. Even if the adverse inference instruction is

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239 See, e.g., Stevenson v. Union Pac. RR Co., 354 F.3d 739, 745–46 (8th Cir. 2004) (recognizing that courts have the inherent power to give an adverse inference instruction but holding that the facts of that case did not warrant the instruction).

240 See, e.g., The Pizarro, 15 U.S. (2 Wheat) 227, 240 (1817) (discussing the spoliation inference without mentioning the inference as part of any more general power); Armory v. Delamirie, 1 Str. 505, 93 Eng. Rep. 664 (K.B. 1722) (same).
theoretically rooted in courts’ power to sanction and provide equitable relief, the instruction power has traditionally been exercised only when one party has destroyed evidence, making the instruction a narrow tool. Based on this traditional use of the instruction, regardless of whether the instruction is a separate inherent power or part of a broader inherent power, the use of an adverse inference instruction is best thought of as a specific tool that a court can use in particular instances—that is, when a spoliator acts with bad faith.

Second, this Article’s conception of federal courts’ inherent power does not necessarily conflict with a common view of inherent powers advocated by the Court and scholars: inherent powers “are those which ‘are necessary to the exercise of all other judicial functions.’” This view “is similar to the Cartesian axiom, ‘I think; therefore, I am’” because a court has inherent powers merely as a fact of existence. In addition to the Supreme Court’s justification of inherent power on this basis, many scholars also argue that the common view of inherent powers is correct. For example, Joseph J. Anclien argues that “courts may exercise inherent powers whenever such action possesses natural relation to the exercise of the judicial power.” Similarly, Jennifer M. Bandy claims that if another branch “trespasses on the judiciary’s core

241 Given the purposes of the adverse inference instruction, see Part I.C, the instruction can logically be described as a combination of a sanction power that allows courts to punish litigants who misbehave and an equitable power to provide a remedy for the opposing party who is harmed by that misbehavior.  
inherent powers, [that trespass] cannot stand.” Professor Pushaw calls these inherent powers “implied indispensable powers” because they are the powers that are so connected to the judicial function that courts cannot function without them.

This view of inherent powers may be compatible with the view articulated in this Article. Whether the views are compatible turns on the limiting factor for the justification offered by the Supreme Court and scholars such as Professor Pushaw. If the powers necessary for a court to function are the same powers that courts had at the time of ratification of the Constitution, then these two views of inherent powers have the same scope. On the other hand, if the powers necessary for a court to function can change over time, then the scope of inherent powers under these views are not necessarily the same. Given that these arguments are often grounded in

245 Bandy, supra note 191, at 653.
246 Pushaw, supra note 196, at 847 (internal quotation marks omitted).

A subpart of this debate over the extent of courts’ inherent power is whether Congress has the power to limit the courts’ inherent power. This debate has two parts. First is whether Congress can limit the inherent power of lower federal courts. Because lower federal courts are created by Congress, Congress may be able to limit the inherent powers that lower courts can exercise. See Ex parte Robinson, 86 U.S. 505, 510–11 (1873); see also Chambers, 501 U.S. at 47 (“It is true that the exercise of the inherent power of lower federal courts can be limited by statute and rule, for ‘[t]hese courts were created by act of Congress.’” (quoting Ex parte Robinson, 86 U.S. at 511)). Some scholars argue, however, that this view is wrong because it misconceives of what inherent powers are. See Pushaw, supra note 199, at 742 (arguing that some powers are so inherent to the nature of being a court exercising judicial power that Congress cannot limit them).

The second part of this debate is whether Congress has the power to limit the inherent power of the Supreme Court. Although the Supreme Court has seemingly acknowledged Congress’ power to limit the inherent power of lower courts, the Court has hesitated to make a similar acknowledgement about Congress’ authority to limit the Court’s inherent power. See Ex parte Robinson, 86 U.S. at 510 (noting that Supreme Court “derives its existence and powers from the Constitution”).

Whatever the resolution of these questions about Congress’ power, as of 2012, Congress has not attempted to limit courts’ inherent power regarding the adverse inference instruction. Thus, this debate, while relevant to federal courts’ inherent power, presently has little impact on the outcome.
history, treating these arguments as having history serving as their limiting principle—or at least informing their limiting principle—seems fair. Therefore, this powers-exist-because-courts-exist view of inherent power can be reconciled with the view of inherent power on which the argument in this Article is based and can support the conclusion that federal courts lack the power to give an adverse inference instruction based on a spoliator’s negligent destruction of evidence.

B. Rule 37(b) Allows a Federal Court to Give an Adverse Inference Instruction Only When the Spoliator Acts in Bad Faith

Rule 37(b) allows federal district courts to “direct[] that the matters embraced in the order or other designated facts be taken as established for purposes of the action, as the prevailing party claims.” Thus, it provides a second basis for federal courts to give an adverse inference instruction. A party can be sanctioned under Rule 37(b)(2) in either of two instances. First, a

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247 See, e.g., Bandy, note 191, at 671–76 (discussing the “Framers’ vision” of the judicial power); Pushaw, supra note 196, at 822–42 (discussing the original meaning of and early precedents surrounding the judicial power).


This language, on its face, provides little guidance what limits, if any, exist on this power. But rather than just simply say courts can therefore exercise the power whenever they please. Rather, Rule 37 must be understood in the context in which it was passed. As this Section explains, Rule 37 was adopted with reference to the powers that federal courts then had, which provides the relevant limitations on courts’ powers under Rule 37. Cf. ANTONIN SCALIA, A MATTER OF INTERPRETATION 45 (1997) (arguing that “original meaning” is the best approach for determining of statutes).

249 Some scholars have argued that Rule 37 has replaced courts’ inherent power and provides the exclusive remedy for discovery sanctions. See Adam Behar, Note, The Misuse of Inherent Powers When Imposing Sanctions for Discovery Abuse: The Exclusivity of Rule 37, 9 CARDOZO L. REV. 1779, 1780 (1988) (arguing that Rule 37 is the sole basis of authority for courts to impose discovery sanctions); see also Maurice Rosenberg, Sanctions to Effectuate Pretrial Discovery, 58 COLUM. L. REV. 480, 497 (1958) (claiming that the Rule 37 would provide clearer standards for courts if it was “the exclusive source of authority to enforce pretrial discovery”). Courts, however, have never accepted this view, maintaining that both Rule 37 and inherent power provide authority for giving an adverse inference instruction. See, e.g., Stevenson v. Union Pac. RR Co., 354 F.3d 739, 750 (8th Cir. 2004) (“Sanctioning the ongoing destruction of records
party can seek an order compelling discovery under Rule 37(a), and after that order is violated, seek sanctions under Rule 37(b)(2). Alternatively, if a party violates Rule 37(d), the opposing party can seek sanctions, including those listed in Rule 37(b)(2).

Just as courts give little attention to the limits on their inherent power, federal courts give similar limited attention to their power under Rule 37. Courts typically just state that Rule 37 allows a court to give an adverse inference instruction and then move to determining whether the instruction was warranted on the facts of that case. This extent of courts power under Rule 37, however, is important and deserves close scrutiny because it proscribes the circumstances under which federal courts may give an adverse inference instruction.

This Section begins by tracing the history of Rule 37. It then explains how that history shapes the power that the rule gives to federal courts to give an adverse inference instruction. Finally, it examines how federal courts have used Rule 37 and the extent to which that use fits within the authority found in Rule 37.

during litigation and discovery by imposing an adverse inference instruction is supported by either the court's inherent power or Rule 37 . . . ”). See Iain D. Johnson, Federal Courts’ Authority to Impose Sanctions for Prelitigation or Pre-Order Spoliation of Evidence, 156 F.R.D. 313, 316 (1994) (discussing how this process works). Id. at 317 (describing how this alternative method for sanctions under Rule 37(b)(2) works).

Courts are divided over whether Rule 37(b)(2) allows courts to impose sanctions unless a party has violated a court order. Compare Turner v. Hudson Transit Lines, Inc., 142 F.R.D. 68, 72 (S.D.N.Y. 1991) (holding that Rule 37(b) allows courts to sanction a party even if that party has not violated a court order) with Webb v. Dist. of Columbia, 146 F.3d 964, 973 (D.C. Cir. 1998) (noting that “authority to impose sanctions under Rule 37(b)(2) is triggered only by the violation of a production order issued by the district court”). Although this issue is related to this Article, it ultimately does not affect whether negligence is enough mental culpability for a court to give an adverse inference instruction; thus, this Article does not seek to resolve whether an order is required for a court to issue an instruction under Rule 37(b).

See supra notes 161–162 and accompanying text.

See, e.g., Stevenson v. Union Pac. RR Co., 354 F.3d 739, 746–50 (8th Cir. 2004); Turner v. Hudson Transit Lines, Inc., 142 F.R.D. 68, 72–77 (S.D.N.Y. 1991). This lack of attention is similar to the lack of attention that courts give to their inherent power.
1. History of Rule 37. In 1934, Congress passed the Rules Enabling Act, which gave the Supreme Court the power to “prescribe rules for the conduct of [judicial] business.” Under this power, the Supreme Court promulgated the Federal Rules of Civil Procedure four years later in 1938. These rules represented an effort by Congress, pushed by legal reformers, to bring greater uniformity to the federal judicial system.

Relevant to the adverse inference instruction and this Article is Rule 37. The rule was adopted as part of the original Federal Rules of Civil Procedure, at which time it included the adverse inference instruction. In shaping the original rule, the drafters sought to put the rule


The Federal Rules of Civil Procedure, of course, remain a hotbed of legal scholarship beyond Rule 37. One prominent—perhaps the most prominent—issue that has attracted widespread attention since 2007 is the standard that a complaint must meet to survive a motion to dismiss after Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007), and then Ashcroft v. Iqbal, 556 U.S. 662 (2009). See, e.g., Edward D. Cavanaugh, Making Sense of Twombly, 63 S.C. L. REV. 97, 103 (2011) (declaring that because the Court appears inclined to stick with Twombly, scholars should stop “venting” and begin to exam exactly what Twombly means for the Federal Rules of Civil Procedure); Arthur R. Miller, From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure, 60 DUKE L.J. 1, 2 (2010) (arguing that the Supreme Court has “destabilized” pleading standards under the Federal Rules of Civil Procedure by its decisions in Twombly and Iqbal). What this plethora of scholarship demonstrates is that despite being over eighty years old, the Federal Rules of Civil Procedure continue to evolve and provoke discussion. The recent wave of judicial decisions allowing Rule 37 to support an adverse inference instruction based on a spoliator’s negligent destruction of evidence is yet another example of one of these discussions.

within the context of existing Supreme Court precedent. Although the precedents—*Hovey v. Elliott* and *Hammond Packing Co. v. Arkansas*—cited by the drafters focused on more drastic, litigation-ending sanctions, their concern with having Rule 37 align with Supreme Court precedent indicates that the rule was designed to reflect the types of sanctions that courts already gave.

The Supreme Court has offered a meaningful discussion of Rule 37 on five occasions. Congress first analyzed Rule 37 just a few years after the rule’s enactment in its 1941 decision in *Sibbach v. Wilson & Co.* In that case, the Court held that Congress had the power to set procedural rules for federal courts, including Rule 37. The Court offered no further insight into

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258 See Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers, 357 U.S. 197, 209 (1958) (observing that the authors of Rule 37 were aware of the “constitutional limitations upon the power of the courts” that Supreme Court decisions prior to the Federal Rules of Civil Procedure had imposed); 8B CHARLES ALAN WRIGHT, ARTHUR R. MILLER, MARY KAY KANE, & RICHARD L. MARCUS, FEDERAL PRACTICE AND PROCEDURE § 2283 n.9 (3d ed. 2004) (quoting the 1937 advisory committee notes); Jodi Golinsky, *The Second Circuit’s Imposition of Litigation-Ending Sanctions for Failures to Comply with Discovery Orders: Should Rule 37(b)(2) Defaults and Dismissals be Determined by a Roll of the Dice?*, 62 BROOK. L. REV. 585, 591 (1996) (“The Advisory Committee, a group of lawyers and law professors selected by the Supreme Court to prepare and submit draft rules of federal procedure, wanted to bring Rule 37 within the Court's ‘doctrine’ as defined by the Rule’s early cases, *Hovey* v. *Elliott*, 167 U.S. 409 (1897)]] and *Hammond* [ Packing Co. v. Arkansas, 212 U.S. 322 (1909)].” (internal citation omitted)).

259 Hovey v. Elliott, 167 U.S. 409 (1897).


262 Id. at 11. In *Sibbach*, the Court assumed that Rule 37—and hence the adverse inference instruction—was procedural. Id. The instruction is in fact almost certainly procedural, although if someone could persuasively argue that the instruction is substantive, then Rule 37(b) could pose serious problems under the Rules Enabling Act, see Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938) (requiring federal courts sitting in diversity to apply state substantive law), and raise serious choice-of-law questions, see LEA BRILMAYER, JACK GOLDSMITH, & ERIN O’HARA O’CONNOR, CONFLICT OF LAWS: CASES AND MATERIALS 132–46, 271–73 (6th ed. 2011) (discussing the substance/procedure distinction under the First and Second Restatements of Conflicts of Laws).
the limits of the rule in *Sibbach*, but the Court did remove any doubt that Rule 37 was, in the Court’s view, a legitimate basis for federal courts to regulate litigants.\(^{263}\)

Second, in *Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers*,\(^ {264}\) a Swiss holding company sued the United States attorney general, seeking return of property that it alleged had been wrongfully seized by the United States during World War II.\(^ {265}\) When the holding company failed to comply with a discovery order that would have caused the holding company to violate Swiss law, the district court dismissed the complaint as a sanction.\(^ {266}\)

The Supreme Court ultimately reversed the dismissal of the complaint.\(^ {267}\) The Court rejected the holding company’s argument that Rule 37 required willfulness for a litigant to violate a discovery order, noting that “this argument turns on too fine a literalism and unduly accents certain distinctions found in the language of the various subsections of Rule 37.”\(^ {268}\) Rather, the Court observed that Rule 37 “allows a court all the flexibility it might need in framing an order appropriate to a particular situation.”\(^ {269}\)

Yet despite this apparent setback, the holding company ultimately prevailed as the Court imposed limits on the use of Rule 37. The Court’s statement about flexibility initially appears to favor the view that Rule 37 gives federal courts broad latitude to craft sanctions, but the Court quickly cut back on any seemingly boundless freedom to sanction litigants. The Court held that

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\(^ {263}\) Ironically, *Sibbach* had not challenged Rule 37. *Sibbach*, who had been held in contempt for refusing a physical examination under Rule 35, *Sibbach*, 312 U.S. at 7, only challenged Rule 35; the issue of Rule 37 was raised by the chairman of the Rules Advisory Committee in an amicus brief, *see* Burbank, *supra* note 256, at 1181 (discussing how the challenge to Rules 35 and 37 were brought before the Court).


\(^ {265}\) *Id.* at 198–200.

\(^ {266}\) *Id.* at 202–03.

\(^ {267}\) *Id.* at 213.

\(^ {268}\) *Id.* at 207.

\(^ {269}\) *Id.* at 208.
Rule 37 must be interpreted in light of previous decisions that limited the power of federal courts. Thus, because the holding company did not act with “willfulness, bad faith, or any fault,” dismissing its complaint was error, despite Rule 37’s apparent authority for permitting the district court to dismiss the complaint. Although the Court used broad language that might include any level of culpability being enough to support a sanction under Rule 37, its reliance on the established historical level of culpability for imposing a particular sanction—in this case, dismissal of the complaint—strongly evidences the Court’s intent to interpret Rule 37 in light of historical practices.

Between Rogers and the next case in which the Court addressed Rule 37, the rule was amendment. In 1970, the advisory committee clarified that a party’s “refusal” to comply with a discovery order did not mean that the refusal was willful. This change reflected the Court’s decision in Rogers. This clarification, however, did not change the Court’s view that the imposition of a particular sanction must still comport with the traditional standards for imposing that sanction.

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270 See id. at 209 (“The provisions of Rule 37 which are here involved must be read in light of the provisions of the Fifth Amendment that no person shall be deprived of property without due process of law, and more particularly against the opinions of this Court in Hovey . . . and Hammond Packing Co.”); see also Stephen R. Bough, Spitting in a Judge’s Face: The 8th Circuit’s Treatment of Rule 37 Dismissals and Default Discovery Sanctions, 43 S.D. L. REV. 36, 40 (1998) (interpreting Rogers as holding “that sanctions should only be imposed when the wrongful conduct was willful or in bad faith, not due to inability”).

271 Id. at 212.

272 Id. at 213.


274 Id. (citing Rogers, 357 U.S. 197).

275 The 1970 amendments are the only ones that have any bearing on the scope of courts’ power to issue an adverse inference instruction under Rule 37.
After the 1970 amendments, the Court next addressed Rule 37 six years later in *National Hockey League v. Metropolitan Hockey Club, Inc.*, the third of the Rule 37 decisions. The hockey club had filed an antitrust claim against the National Hockey League but the case had been dismissed after the club did not timely answer interrogatories. The Court upheld this sanction because of the hockey club’s “flagrant bad faith” and “callous disregard” of the discovery process. Not upholding the dismissal of the complaint after the hockey club’s actions during litigation would mean “other parties to other lawsuits would feel freer than we think Rule 37 contemplates they should feel to flout other discovery orders of other district courts.” The Court noted that Rule 37 serves both punitive and deterrent goals.

*Roadway Express, Inc. v. Piper* was the fourth time that the Court took up Rule 37. *Piper* was a class-action race discrimination case. The plaintiff’s counsel failed to respond timely to interrogatories, did not appear for scheduled hearings, and never produced the plaintiff for a scheduled deposition. Eventually, the defendant moved to dismiss the suit and for attorney’s fees under Rule 37, and the district court granted the motion, citing multiple sources of authority. Although the Court spent most of the opinion focusing on these other sources, the Court did note that the conduct of either a party or a party’s attorney could give a court a reason to impose a sanction under Rule 37.

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277 *Id.* at 639.
278 *Id.* at 643.
279 *Id.*
280 *Id.* These goals are similar to the goals that undergird the adverse inference instruction. See supra notes 44–48 and accompanying text.
282 *Id.* at 754.
283 *Id.* at 755.
284 *Id.* at 756.
285 *Id.* at 764.
Finally, the Court took up Rule 37 again in *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*. Of all the Rule 37 cases, this is the only one that dealt specifically with an adverse inference instruction. The case did not involve the destruction of evidence, but rather the repeated disregard of the district court’s orders and nonproduction of evidence. In this case, Compagnie des Bauxites de Guinee (CBG) sued Insurance Corporation of Ireland (ICI), seeking payment under an insurance policy. When ICI refused to cooperate with discovery involving whether the district court had personal jurisdiction over ICI, the district court warned ICI that the court would infer that jurisdiction existed under Rule 37(b) if ICI failed to cooperate. When ICI still failed to produce the required documents, the court imposed the sanction and assumed that jurisdiction existed. Although the context of the sanction here—personal jurisdiction—was unusual, the Court noted that Rule 37(b)(2) was grounded in *Hammond Packing Co.* The Court upheld the sanction because of ICI’s “continued delay and an obvious disregard” of the district court’s orders, despite multiple warnings. Although the Court never used “bad faith” or “intentional” to describe ICI’s conduct, the Court’s decision was clearly influenced by the bad conduct of ICI, conduct which went well beyond mere negligence.

Collectively, these cases reveal that Rule 37, while providing distinct authority for a court to give an adverse inference instruction, is informed by the historical practices that existed before the rule’s enactment. In the context of defaults—the most severe sanction under Rule 37—the

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287 *Id.* at 698.
288 *Id.* at 699.
289 *Id.*
290 The Court compared the imposition of a sanction under Rule 37(b) to establish personal jurisdiction as the equivalent of a waiver under Rule 12(h). *Id.* at 704. Unlike subject-matter jurisdiction, which is cannot be waived because it is part of Article III’s grant of judicial power, personal jurisdiction is based on due process, so an individual can waive it. *Id.* at 702.
291 *Id.* at 705.
292 *Id.* at 708.
Court clearly tied the limits on Rule 37 to the historical understanding of courts’ power to
dismiss cases. Implicitly, the Court took the same approach to lesser sanctions under Rule 37,
when its reasoning that upheld the adverse inference instruction in Insurance Corp. of Ireland
rested on ICI’s “obvious disregard” of the court’s orders and the nonproduction of evidence.

2. Rule 37 and the Adverse Inference Instruction. Having traced the history of Rule 37,
the question is how that history informs the power that the rule gives courts to give an adverse
inference instruction. Ultimately, this analysis reveals that Rule 37, like courts’ inherent power,
requires that a spoliator act with more than negligence for a court to give an adverse inference
instruction.

Rule 37(b)(2) provides courts with an array of sanctions, powers which mirror the
inherent powers that courts had before the Federal Rules of Civil Procedure were adopted. For
example, courts had the inherent power to strike pleadings and dismiss a case, a power that is
also found in Rule 37(b)(2). Likewise, federal courts have inherent power to stay
proceedings, and Rule 37(b)(2) gives them same power. Furthermore, federal courts have

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curiam); Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v.
294 See Ins. Corp. of Ir., 456 U.S. at 708.
295 See Hammond Packing Co. v. Arkansas, 212 U.S. 322, 350 (1909) (“The inherent want of
power in a court to do what was done in Hovey v. Elliott was in that case deduced from no
especial infirmity of the judicial power to reach the result, but upon the broad conception that
such power could not be called into play by any department of the government without
transgressing the constitutional safeguard as to due process, at all times dominant and controlling
where the Constitution is applicable.”).
296 See Fed. R. Civ. P. 37(b)(2)(A)(iii) (providing that the district court may “strik[e] pleadings in
whole or in part”); id. 37(b)(2)(A)(v) (providing that the district court may “dismiss[] the action
or proceeding in whole or in part”).
297 See Landis v. N. Am. Co., 299 U.S. 248, 254 (1936) (“[T]he power to stay proceedings is
incidental to the power inherent in every court to control the disposition of the causes on its
docket with economy of time and effort for itself, for counsel, and for litigants.”).
the inherent power to enter default judgment, and they also have the power to enter default judgment under Rule 37(b)(2). That these inherent powers would be put into a rule that all courts could have and follow makes sense, given that the Federal Rules of Civil Procedure were created to bring greater uniformity to federal courts. By putting these inherent powers into a rule, then the sanctions that courts had been giving could be standardized. The rules therefore did not need to create new powers, but rather only codify the powers that existed.

Given the basis of Rule 37 is the powers that courts already enjoyed, that the Supreme Court has interpreted the powers that Rule 37 grants in light of these historical practices is unsurprising. In its first opportunity to address the substance of Rule 37, the Court unequivocally stated that the sanctions permitted under the rule were informed by earlier decisions on the limits of judicial power.

Therefore, the authority that Rule 37 gives federal courts to give an adverse inference instruction should be interpreted based on the understanding of the inference that existed when Rule 37 was adopted. In 1938 when the Federal Rules of Civil Procedure went into effect, no federal courts had shifted to allowing a spoliator’s negligence to support an adverse inference

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298 See Fed. R. Civ. P. 37(b)(2)(A)(iv) (providing that the district court may “stay[] further proceedings until the order is obeyed”).


300 See Fed. R. Civ. P. 37(b)(2)(A)(vi) (providing that the district court may “render[] default judgment against the disobedient party”).

301 See Burbank, supra note 256, at 1023–24 (“It was common knowledge at the time the Rules Enabling Act was passed that it represented the conclusion of a campaign, conducted for more than twenty years by the American Bar Association, for a uniform federal procedure bill authorizing the Supreme Court to promulgate rules of procedure in civil actions at law.”).

302 See supra note 258.

instruction. Furthermore, on the only occasion in which the Supreme Court has discussed Rule 37 and the adverse inference instruction, the Court based its decision upholding the instruction on the defendant’s “obvious disregard” of the district court’s orders. Although *Insurance Corp. of Ireland* did not present the question of whether negligence could have supported an adverse inference instruction, the Court’s reasoning in upholding the sanction in that case was entirely consistent with the traditional basis for giving an adverse inference instruction—a bad-faith act by a party flouting a court’s order.

Rule 37 thus gives federal courts the power to give an adverse inference instruction only when the spoliator acts with more than negligence. Courts that require bad faith to for a court to give an adverse inference instruction exercise their power within the limits of Rule 37. Courts that base an adverse inference instruction on Rule 37 when the spoliator acts only negligently, however, exceed their authority under the rule.

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304 The shift did not begin until the 1990s and 2000s. See supra notes 128–157.
306 See Armory v. Delamirie, 1 Str. 505, 93 Eng. Rep. 664 (K.B. 1722) (instructing that the quality of the jewel that the defendant deliberately refused to return to the plaintiff was of the “finest” quality).
307 See, e.g., Stevenson v. Union Pac. RR Co., 354 F.3d 739, 746–50 (8th Cir. 2004).

The broad discretion that a district court enjoys for determining an appropriate sanction does not pose a problem for the argument that a district court does not have the authority to give an adverse inference instruction based on a spoliator’s negligence under Rule 37. Although a district court’s decision to give an adverse inference instruction under Rule 37 is reviewed for abuse of discretion, e.g., see Stevenson, 354 F.3d at 750, if a district court makes an error of law, that is necessarily an abuse of discretion, see Koon v. United States, 518 U.S. 81, 100 (1996). Giving an adverse inference instruction based on the wrong legal standard is an error of law and thus reversible error.
IV. Why Federal Courts Should Not Give an Adverse Inference Instruction Based on a Spoliator’s Negligence

In addition to the fact that federal courts cannot give the instruction based on a spoliator’s negligence, federal courts should not give the instruction in those instances.\footnote{309} Section A shows why, even without these limitations of inherent power and Rule 37(b), courts still should not give an adverse inference instruction when a spoliator acts only negligently as a matter of logic. Then, Section B explains why not giving an adverse inference instruction based on a spoliator’s negligence effectively furthers the three goals of the adverse inference instruction.

A. Connecting the Dots and Making the Inference

Fundamentally, the adverse inference instruction is just that—an inference. The instruction is based on the “common sense observation” that a party who destroys evidence is “more likely to have been threatened” by that evidence than a party in the same position who does not destroy the evidence.\footnote{310} Given that this is the inference that the court allows the jury to draw when the court gives the instruction, the critical issue is ensuring that the spoliator’s actions can support this inference. This issue is so critical because the adverse inference instruction has such a powerful effect on litigation. As Judge Scheindlin wrote in Zubulake,

In practice, an adverse inference instruction often ends litigation—it is too difficult a hurdle for the spoliator to overcome. The in terrorem effect of an adverse inference is obvious. When a jury is instructed that it may “infer that the party who destroyed potentially relevant evidence did so ‘out of a realization that the [evidence was] unfavorable,’” the party suffering this instruction

\footnote{309} Additionally, although Parts III.A and III.B apply only to federal courts, the logic of Part IV also applies to state courts. Therefore, state courts should likewise give an adverse inference instruction only when a spoliator acts with bad faith.

\footnote{310} Nation-Wide Check Corp., Inc. v. Forest Hills Distributors, Inc., 692 F.2d 214, 218 (1st Cir. 1982)
will be hard-pressed to prevail on the merits. Accordingly, the adverse inference instruction is an extreme sanction and should not be given lightly.\footnote{Zubulake v. UBS Warburg LLC, 220 F.R.D. 212, 219–20 (S.D.N.Y. 2003) (internal citation omitted) (alteration in original); see also Morris v. Union Pac. R.R., 373 F.3d 896, 900 (8th Cir. 2004) (“An adverse inference instruction is a powerful tool in a jury trial.”).}

When a spoliator destroys evidence with bad faith, this inference is easy to draw. In cases of intentional spoliation, the spoliator knew the litigation was pending and made a deliberate decision to destroy certain evidence. That decision was made presumably because the evidence was harmful to the spoliator’s case and the spoliator did not want that evidence to come before the jury.\footnote{See, e.g., Wal-Mart Stores, Inc. v. Johnson, 106 S.W.2d 718, 721 (Tex. 2003) (“[A] party who has deliberately destroyed evidence is presumed to have done so because the evidence was unfavorable to its case.”).} The fact that the evidence is unfavorable to the spoliator is the very reason that the spoliator destroyed it.\footnote{See Brewer v. Quaker State Oil Refining Co., 72 F.3d 326, 334 (3d Cir. 1995) (“When the contents of a document are relevant to an issue in a case, the trier of fact generally may receive the fact of the document’s nonproduction or destruction as evidence that the party that has prevented production did so out of the well-founded fear that the contents would harm him.” (emphasis added)).} This is the crucial part of the inference: that the evidence that was destroyed was unfavorable to the spoliator. As the Seventh Circuit put it, “The crucial element is not that the evidence was destroyed but rather the reason for the destruction.”\footnote{S.C. Johnson & Son, Inc. v. Louisville & Nashville R. Co., 695 F.2d 253, 258 (7th Cir. 1982).}

Inferring that the evidence was unfavorable is easy because the spoliator knew what he was doing—he knew that he was destroying relevant evidence, and he was doing it for the purpose of keeping the evidence out of the litigation. And the most logical reason for destroying the evidence is that the evidence was going to hurt his case. Thus, the inference is justified.\footnote{Proving bad faith may not always be easy, but a party seeking an adverse inference instruction can prove that the spoliator acted with this level of culpability. See Morris v. Union Pac. R.R., 373 F.3d 896, 902 (8th Cir.2004) (“Intent is rarely proved by direct evidence, and a district court has substantial leeway to determine intent through consideration of circumstantial evidence, witness credibility, motives of the witnesses in a particular case, and other factors.”).}
In cases in which the spoliator acts merely negligently, however, the inference is far weaker, if it exists at all. When a party only negligently destroys evidence, that party does not demonstrate a conscious decision to keep evidence away from the jury because the evidence was harmful to his case.\textsuperscript{316} Without a deliberate act expressing a “desire to suppress the truth,”\textsuperscript{317} determining that the evidence was harmful to the spoliator is incredibly difficult, if not impossible.\textsuperscript{318} Thus, the inference that the party who destroyed evidence destroyed that evidence because it was damaging to the party’s case is lacking. Because this critical connection cannot be made, the adverse inference instruction is inappropriate when a party acts only negligently.

The most plausible argument for giving the instruction based on negligence comes from then-Judge Breyer’s decision in Nation-Wide Check Corp., Inc.\textsuperscript{319} but ultimately that argument is unpersuasive. The argument went as follows: the “abandonment of potentially useful evidence is, at a minimum, an indication that [the spoliator] believed the records would not help his side of the case . . . .”\textsuperscript{320} Essentially, this argument contends that if the evidence were helpful to the spoliator, he would have consciously preserved it for trial; that the spoliator did not preserve the evidence suggests that the evidence was not helpful. Yet not helpful is not the equivalent of harmful; just because the evidence was not going to help the spoliator’s case does not mean that

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\item \textsuperscript{316} See Vick v. Texas Emp’t Comm’n, 514 F.2d 734, 737 (5th Cir. 1975) (“Mere negligence is not enough, for it does not sustain an inference of consciousness of a weak case.” (quoting MCCORMICK, EVIDENCE § 273 (1972))).
\item \textsuperscript{317} Stevenson v. Union Pac. RR Co., 354 F.3d 739, 746 (8th Cir. 2004).
\item \textsuperscript{318} See United States v. Laurent, 607 F.3d 895, 902 (“In general, the instruction usually makes sense only where the evidence permits a finding of bad faith destruction; ordinarily, negligent destruction would not support the logical inference that the evidence was favorable to the defendant.”).
\item \textsuperscript{319} Nation-Wide Check Corp, Inc. did not address the mental culpability required for the instruction to be given. See Nation-Wide Check Corp., Inc. v. Forest Hills Distributors, Inc., 692 F.2d 214, 218–20 (1st Cir. 1982); see also supra note 150. Nevertheless, the argument applies in the context of negligent spoliation.
\item \textsuperscript{320} Nation-Wide Check Corp., Inc., 692 F.2d at 219.
\end{itemize}
the evidence was going hurt the spoliator’s case. As a decision in the Southern District of New York acknowledged, “Because we do not know what has been destroyed, it is impossible to accurately assess what harm has been done to the [innocent party] and what prejudice it has suffered. Such documents may have been helpful to the [defendants], helpful to plaintiffs, or of no value to any party.” Thus, without a tighter nexus suggesting that the evidence that was destroyed was harmful to the spoliator’s case, a court should not give an adverse inference instruction when a spoliator acts merely negligently.

Finally, allowing a spoliator’s negligence to support the instruction is not saved by the permissive, rather than mandatory, nature of the instruction and by the ability of the jury to decide either that destroyed evidence was not relevant or that no spoliation even occurred. If the logical connection between the destroyed evidence and the fact that the evidence was harmful to the spoliator’s case is not present, the jury should not be given the opportunity to conclude that the connection did exist.

Between bad faith and negligence, two other levels of fault remain: willful and gross negligence. Although the inference may be stronger with these levels of fault, they still are not enough to support a court giving an adverse inference instruction. Gross negligence, like negligence, fails to allow the jury to draw a sufficient inference to connect the evidence that was destroyed and the idea that the evidence was harmful to the spoliator. Courts have tried to justify

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322 See Panel Discussion, Sanctions in Electronic Discovery Cases: Views from the Judges, 78 FORDHAM L. REV. 1, 6 (2009) (statement of Judge Scheindlin) (“When a court issues an adverse inference instruction, the court's finding of spoliation can be second-guessed by the jury. Although the court has already found that a party caused evidence to be lost and that a sanction is appropriate, the jury has to do it all over again.”).
the gross-negligence standard by requiring a greater showing of relevance, but this justification fails. Most fundamentally, this standard still leaves the court and the jury unable to “know what has been destroyed.” And without knowing what is destroyed, the jury cannot determine that the spoliator destroyed the evidence to hide something that was harmful. Furthermore, increasing the relevance requirement does not save this gross-negligence standard. Just because the destroyed evidence can be shown to be relevant does not mean that the evidence was harmful. As with the negligent spoliator, the jury does not know why the evidence was destroyed, and thus it cannot logically conclude that the grossly negligent spoliator destroyed evidence to suppress that evidence and keep it from the jury. The adverse inference is thus inappropriate when a spoliator is grossly negligent.

Likewise, a willful act should be not enough to support an adverse inference instruction. With a willful act, but not one done in bad faith, the jury may see a more plausible connection between the destruction of evidence of the fact that the evidence was harmful to the spoliator’s case. But again, the crucial fact that the evidence was destroyed because it was harmful is missing. Of course, that the spoliator knew that he was destroying relevant evidence offers a

\[\text{See, e.g., Klezmer ex rel. Desyatni v. Buynak, 227 F.R.D. 43, 50 (E.D.N.Y. 2005) ("If a court finds bad faith or gross negligence, the bad faith (always) and the gross negligence (usually) can support a finding that the destroyed or lost evidence was relevant to the claims of the party seeking it."); Zubulake v. UBS Warburg LLC, 229 F.R.D. 422, 431 (S.D.N.Y. 2004) ("The concept of "relevance" encompasses not only the ordinary meaning of the term, but also that the destroyed evidence would have been favorable to the movant. This corroboration requirement is even more necessary where the destruction was merely negligent, since in those cases it cannot be inferred from the conduct of the spoliator that the evidence would even have been harmful to him. This is equally true in cases of gross negligence or recklessness . . . .") (internal citations and quotation marks omitted)).}\]

\[\text{See supra notes 111–127.}\]
stronger inference that the evidence was not helpful, and in fact might have been harmful. Yet it still requires a far greater inference than when the evidence was destroyed in bad faith because the jury does not have strong evidence of why the evidence was destroyed, as the jury has when the evidence is destroyed in bad faith. Therefore, a willful act by a spoliator should still be insufficient for a court to give an adverse inference instruction.

This Section has shown that only bad-faith destruction of evidence logically supports giving an adverse inference instruction. Without this bad-faith act by the spoliator, the inference that the destroyed evidence was harmful to the spoliator’s case is lacking. Bad faith provides this crucial connection between the destroyed evidence and the inference that the evidence was damaging to the spoliator’s case. Thus, the limits that currently exist on the power of federal courts to give an adverse inference instruction should remain because they ensure that the inference actually draws the inference that it alleges to infer.

B. Furthering the Three Purposes of the Adverse Inference Instruction

The adverse inference instruction serves three purposes: to punish, deter, and remedy. The best use of the instruction will serve all three of the goals and not sacrifice one goal for the sake of another. Ultimately, requiring a spoliator to act in bad faith best serves all three aims of the instruction. This Section explains how the bad-faith requirement for the spoliator’s mental culpability serves these goals.

1. The Punishment Goal. The punishment goal of the instruction is simple: the spoliator must suffer for his act that harmed the opposing party. As Professor McCormick puts it, “The

327 See supra Part I.C.
328 See Turner v. Hudson Transit Lines, Inc., 142 F.R.D. 68, 74 (S.D.N.Y. 1991) (“[The instruction] serves as a retribution against the immediate wrongdoer. ‘[T]he law, in hatred of the spoiler, baffles the destroyer, and thwarts his iniquitous purpose, by indulging a presumption which supplies the lost proof, and thus defeats the wrongdoer by the very means he had so
real underpinning of the rule of admissibility may be a desire to impose swift punishment, with a certain poetic justice, rather than concern over niceties of proof.”

This sense of punishment is rooted in desert, the idea that “wrongdoing deserves punishment.”

This goal of punishment, however, is not unbounded. Just as in criminal law, the “notion that the punishment should fit the crime” applies to spoliation sanctions as well. In the context of spoliation sanctions, the First Circuit made this point colorfully: “[T]he judge should take pains neither to use an elephant gun to slay a mouse nor to wield a cardboard sword if a dragon looms. Whether deterrence or compensation is the goal, the punishment should be reasonably suited to the crime.” After all, the more culpable the spoliator, the more deserving he is of punishment. To determine the spoliator’s fault and how deserving he is of punishment, the “ultimate focus” is the spoliator’s mental culpability. Thus, the greater the spoliator’s mental culpability, the greater his punishment should be.

To determine what level of mental culpability deserves an adverse inference instruction, one must first have an appreciation for how severe a punishment an adverse inference instruction is. Judge Scheindlin has called the adverse inference instruction “an extreme sanction [that] should not be given lightly.” Judge Scheindlin also noted that the instruction makes it hard—if confidentially employed to perpetrate the wrong.”

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329 KENNETH S. BROWN, MCCORMICK ON EVIDENCE § 265 (6th ed. 2006).
332 Rimkus Consulting Grp., Inc. v. Cammarata, 688 F. Supp. 2d 598, 618 (S.D. Tex. 2010) (“Courts also agree that the severity of a sanction for failing to preserve when a duty to do so has arisen must be proportionate to the culpability involved and the prejudice that results.”).
334 Greyhound Lines, Inc. v. Wade, 485 F.3d 1032, 1035 (8th Cir. 2007)
not impossible—for the party against whom the instruction is given to prevail on the merits.\textsuperscript{336}

The Tenth Circuit has taken a similar view of the instruction, writing,

\begin{quote}
An adverse inference is a powerful sanction as it “brands one party as a bad actor” and “necessarily opens the door to a certain degree of speculation by the jury, which is admonished that it may infer the presence of damaging information in the unknown contents of an erased audiotape.”\textsuperscript{337}
\end{quote}

These statements recognize just how incredibly harsh the adverse inference instruction is. That other harsher sanctions—such as dismissal\textsuperscript{338} or the complete exclusion of evidence\textsuperscript{339}—exist does not mean that the adverse inference instruction is not a severe sanction. For example, dismissing a case officially ends the litigation, but the adverse inference instruction effectively does the same thing.\textsuperscript{340} Similarly, that the jury may ignore the adverse inference instruction does not undercut the severity of the instruction. Despite concerns about juries ignoring the instruction,\textsuperscript{341} no evidence suggests that juries do this with any regularity.

For a party that destroys evidence in bad faith, such a severe sanction is appropriate. That party has deliberately tried to subvert the judicial process, and punishment should be harsh and swift. But for a party who only negligently destroys evidence, the punishment should be less

\textsuperscript{336} Zubulake, 220 F.R.D. at 220; see also Panel Discussion, supra note 322, at 6 (statement of Judge Scheindlin) (“Adverse inference instructions have a strong tendency to affect the outcome of the trial.”); id. at 7–8 (statement of Judge Scheindlin) (commenting that “the adverse inference instruction can have a devastating impact on the party against whom the inference is drawn”).


\textsuperscript{338} See, e.g., Silvestri v. Gen. Motors Corp., 271 F.3d 583, 585 (4th Cir. 2001) (dismissing a case as punishment for spoliating evidence).

\textsuperscript{339} See, e.g., Vagenos v. LDG Fin. Servs., LLC, No. 09-cv-2672(BMC), 2009 WL 5219021 at *2 (E.D.N.Y. Dec. 31, 2009) (treating the exclusion of evidence as a more severe sanction than the adverse inference instruction).


\textsuperscript{341} See James T. Killelea, Note, Spoliation of Evidence: Proposals for New York State, 70 BROOK. L. REV. 1045, 1061 & n.102 (2005) (recognizing the possibility that juries may refuse to follow an adverse inference instruction).
severe. The negligent spoliator, of course, deserves some punishment; costs for trying to recover destroyed evidence and fines are reasonable and proportionate punishments for the negligent spoliator.\textsuperscript{342} The negligent spoliator does not, however, deserve a litigation-ending sanction. His conduct, although culpable, was not terribly bad.\textsuperscript{343} Additionally, courts have a preference for deciding cases on their merits,\textsuperscript{344} and giving an adverse inference instruction would undermine this preference.

Arguments in support of allowing negligent spoliation to support an adverse inference instruction generally do not focus explicitly on the punitive rationale. Rather, they typically take either of two approaches. First, they deemphasize the role of punishment in the instruction.\textsuperscript{345} Alternatively, they fold the punitive rationale into the instruction’s deterrence aim.\textsuperscript{346}

\textsuperscript{342} See, e.g., Passlogix, Inc. v. 2FA Tech., LLC, 708 F. Supp. 2d 378, 420–23 (S.D.N.Y. 2010) (imposing a fine on a negligent spoliator but declining to impose costs because of difficulties in determining what the costs were).

\textsuperscript{343} Courts must use their normal factfinding means, such as briefing and hearings, to determine the level of culpability with which a spoliator acted. If a spoliator consistently fails to preserve evidence relevant to litigation, that pattern of destruction may well be evidence of bad faith. Thus, simply because evidence was lost without a spoliator deliberately destroying that particular piece of evidence does not mean that an adverse inference instruction may not be warranted.

\textsuperscript{344} See Eltel v. McCool, 782 F.2d 1470, 1472 (9th Cir. 1986) (“Cases should be decided upon their merits whenever reasonably possible.”).

\textsuperscript{345} See Jonathan Judge, Comment, Reconsidering Spoliation: Common-Sense Alternatives to the Spoliation Tort, 2001 Wis. L. Rev. 441, 463–64 (2001) (arguing that the adverse inference instruction “extended to negligent spoliation of evidence, and that its use as a punishment device be curtailed”).

\textsuperscript{346} See Adams, supra note 39, at 17 (“Punishing the negligent spoliation of evidence deters spoliation by imposing the consequence of the spoliation on the spoliator, who would generally be the cheapest cost avoider.”).

Some courts also combine the punishment and deterrence rationale. See, e.g., Shamis v. Ambassador Factors Corp., 34 F. Supp. 2d 879, 890 (S.D.N.Y. 1999) (“The punitive purpose both deters parties from destruction of relevant evidence and directly punishes the party responsible for spoliation [sic].”). The better view—and the more common view—is to treat deterrence and punishment as separate rationales. See Silvestri v. Gen. Motors Corp., 271 F.3d 583, 590 (4th Cir.2001) (“[T]he applicable sanction should be molded to serve the prophylactic, punitive, and remedial rationales underlying the spoliation doctrine.” (quoting West v. Goodyear Tire & Rubber Co., 167 F.3d 776, 779 (2d Cir. 1999))). Treating punishment and deterrence as
Yet both of these approaches are misguided. For those who seek to remove or diminish the punitive rationale, they bluntly ignore a fundamental aspect of the adverse inference instruction. Courts widely recognize that the instruction should punish the spoliator in that case, not just deter future spoliation. 347 By removing punishment as a rationale for the instruction, the instruction becomes less of a scalpel for courts to manage a particular case and more of a blunt tool for broadly affecting the behavior of all litigants. The instruction, from its earliest days, has always had a particular focus on the parties in a particular case. 348 Therefore, ignoring the punitive rationale untethers the instruction from its moorings.

Those who seek to combine the punitive and deterrence rationales are on more solid ground with the instructions historical underpinnings, 349 but this approach runs the risk of overpunishing spoliators. If courts consider punishment and deterrence together, they are far more likely to issue harsher punishments because of the deterrence benefits that a particularly harsh punishment has on litigants in other cases. The punishment would not longer “fit the crime,” 350 and the spoliator would be disproportionately punished relative to his offense.

The best way to ensure that the spoliator’s punishment comports with his culpability is to treat the punishment rationale as focused on desert. An adverse inference instruction is a severe separate rationales also provides support for treating the punishment rationale as focused on desert because deterrence, another rationale for punishment, is treated as a distinct rationale for the adverse inference instruction.

347 See, e.g., Clark Const. Grp., Inc. v. City of Memphis, 229 F.R.D. 131, 141 (W.D. Tenn. 2005) (noting that the court should “punish the spoliating party for its actions”).

348 See The Pizarro, 15 U.S. (2 Wheat) 227, 240 (1817) (focusing on the litigants in that case in determining that the instruction was not appropriate); Armory v. Delamirie, 1 Str. 505, 93 Eng. Rep. 664 (K.B. 1722) (focusing on the goldsmith’s conduct in determining that the instruction was warranted).


sanction that, for all practical purposes, can end litigation. Therefore, only the most culpable spoliators—those who act in bad faith—deserve this harsh punishment. And by focusing on the punishment rationale as ensuring that a spoliator gets his just desert, courts can ensure that the punishment fits the crime.

2. The Deterrence Goal. To have an effective adversarial system and prevent a party from destroying evidence, a court must have rules that deter misconduct and encourage a party to preserve relevant evidence. Because the evidence is under the potential spoliator’s control, he is the party in the best position to preserve that evidence. Thus, courts seek to deter this potential spoliator from destroying evidence and undermining the judicial process. The adverse inference instruction serves that prophylactic purpose. It deters parties from destroying evidence by threatening a severe punishment if they do. The instruction party places the risk of destroyed evidence “on the party responsible for its loss.”

Those who believe negligent spoliation should support an adverse inference look to tort law as an analogy. In Turner v. Hudson Transit Lines, Inc., the Southern District of New York reasoned:

The adverse inference thus acts as a deterrent against even the negligent destruction of evidence. This is perfectly appropriate: deterrence is not a function limited to punitive sanctions where intent has been demonstrated. In the law of torts, for example, damages for negligence serve to deter such conduct in the future.

351 See Kronisch v. United States, 150 F.3d 112, 126 (2d Cir. 1998)
352 See Adams, supra note 39, at 17 (“The spoliator usually has access to the evidence and can prevent its spoliation . . . .”).
353 Residential Funding Corp. v. DeGeorge Fin. Corp., 306 F.3d 99, 108 (2d Cir. 2002); see also Laurie S. Longinotti, Case Comment, Evidence-Welsh v. United States: Negligent Spoliation of Evidence: The Creation of A Rebuttable Presumption, 19 MEM. ST. U. L. REV. 229, 233 (1989) (observing that the deterrence rationale “attempts to deter a party from destroying relevant evidence prior to trial by placing the risk of destruction upon that party”).
Certainly, the adverse inference can be administered in a way to deter negligent spoliation. Indeed, the law can deter any level of undesirable conduct. For supporters of allowing the spoliator’s negligence to support the instruction, putting the burden to preserve evidence on the party who was control of the evidence—and thus placing the risk of loss with this party—is most fair.

Admittedly, the duty to preserve evidence and the risk of loss of that evidence should be on the party who has control of that evidence. That proposition seems uncontestable. But imposing this duty and risk on the party who has control of the evidence does not mean that the adverse inference instruction is the proper way to deter and the proper risk to impose.

Looking at how the adverse inference can deter spoliation in a vacuum misses the broader point of the instruction. The instruction is part of the judge’s toolbox for managing litigation. It is designed to help resolve disputes, but other considerations are also involved in how best to resolve disputes. One goal is ensuring that litigation leads to the truth. This truth-seeking function—not the preservation of evidence—is paramount. Evidence therefore should be preserved because it leads to truth, not because of some inherent value in preserving it. In this

355 Cf. Herring v. United States, 555 U.S. 135, 144 (2009) (observing that the Fourth Amendment’s exclusionary rule is designed “to deter deliberate, reckless, or grossly negligent conduct” by police).
357 See United States v. Harper, 662 F.3d 958, 961 (7th Cir. 2011) (commenting that “trials are searches for truth”).
358 See Adams, supra note 39, at 17 (“If the goal of the litigation process is simply to achieve the optimal level of preservation of evidence, allocating the cost of spoliation onto the spoliator through an adverse inference instruction could well be appropriate. But the goal of litigation should be ascertaining the true facts in the case, not efficiently preserving evidence.”); Wm. Grayson Lambert, Focusing on Fulfilling the Goal: A New Approach for How Choice-of-Law Regimes Should Characterize Statutes of Limitations, ______________ ("Deciding cases accurately is of the most important jobs that a court has.").
sense, using the adverse inference instruction—or, for that matter, any and all discovery sanctions—to deter spoliation is useful because it increases the odds that evidence is preserved for trial.

That desire to preserve evidence for trial, however, must be balanced with the costs of that deterrence. Litigation, particularly discovery, is an incredibly expensive endeavor, and the Supreme Court has shown acute concern for this expense. The benefits and costs of discovery must be balanced to allow parties to access the relevant evidence without imposing burdens that drive the cost of the discovery beyond the value of the litigation. If negligent spoliation can support an adverse inference instruction, then litigants will be forced to take much greater extremes to preserve any evidence that may be relevant to the litigation, which will undoubtedly increase expenses. This increased cost will be particularly applicable to organizational litigants consisting of multiple people accessing this information, especially electronically stored information. Although a technical cost-benefit analysis is difficult, if not impossible, these costs are significant. Yet the benefits of preserving evidence are significant, particularly to the party who suffers the harm of losing that evidence. Still, despite the natural desire to ensure that a


360 See Bell Atl. Corp. v. Twombly, 550 U.S. 544, 557–60 (2007) (showing particular worry for the costs of discovery in evaluating the standard that a complaint must meet to survive a motion to dismiss).

361 See Regan-Touhy v. Walgreen Co., 526 F.3d 641, 649 (10th Cir. 2008) (“The burdens and costs associated with electronic discovery, such as those seeking ‘all email,’ are by now well known, and district courts are properly encouraged to weigh the expected benefits and burdens posed by particular discovery requests (electronic and otherwise) to ensure that collateral discovery disputes do not displace trial on the merits as the primary focus of the parties' attention.”).
party gets the chance to put on its evidence at trial, that desire should not lead to a policy that creates such an overwhelming deterrence that the deterrence has greater compliance costs than evidentiary benefits.\footnote{Although Federal Rule of Civil Procedure 37(e) may not provide an excuse for negligent spoliation, that rule does reflect the reality that preserving \textit{all} electronically stored information is virtually impossible. \textit{See} Fed. R. Civ. P. 37(e) ("Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.").}

Requiring a spoliator act in bad faith before giving an adverse inference instruction still acts as a deterrent. The instructive provides a clear punishment—and a severe one—for the spoliator who acts in bad faith. This bad faith is not limited to actually destroying evidence after litigation arises; it also extends to bad-faith decisions to never preserve evidence in the first place. For example, in \textit{Lewy v. Remington Arms Co., Inc.},\footnote{\textit{Lewy v. Remington Arms Co., Inc.}, 836 F.2d 1104 (8th Cir. 1988).} the Eighth Circuit noted that a document-retention policy could be instituted in bad faith.\footnote{\textit{Id.} at 1112.} For example, document-retention policy specifically designed to ensure that potentially damaging documents never were preserved would be bad faith. The adverse inference instruction deters litigants from engaging in such behavior and incentives them to act in good faith.

Of course, willful or grossly negligent acts still remain. If deterring simple negligence is too costly but if bad faith can still be deterred by the instruction, then the instruction can also deter willful and grossly negligent acts. A decision must thus be made about the extent to which courts should deter potential spoliation. In the context of the Fourth Amendment, the Supreme Court has drawn the line between negligence and gross negligence: grossly negligent—or
worse—police acts result in the exclusion of evidence, but merely negligent acts do not.\textsuperscript{365} Although this exclusionary rule standard may suggest that the line should be drawn in the same place in the context of the adverse inference instruction, the exclusionary rule standard does not compel this result. Other sanctions exist for spoliation. For instance, the spoliator can be fined or pay costs incurred by the other side.\textsuperscript{366} For Fourth Amendment violations, however, the exclusionary rule is the only realistic sanction to remedy the wrong.\textsuperscript{367}

Still, the adverse inference instruction can deter grossly negligent or willful spoliation, just as it can deter negligent spoliation. But that deterrence comes at the same cost as deterring negligent spoliation: it leaves open the possibility that by using such a powerful tool to deter misconduct, the litigation could be effectively ended without getting to the truth. The instruction does, after all, effectively end litigation.\textsuperscript{368} Willful or grossly negligent spoliation can lead to a sanction that ends the case without sufficiently supporting the inference that the destroyed evidence was that damaging to the spoliator’s case.\textsuperscript{369}

Ultimately, the adverse inference instruction serves as a useful tool against bad-faith spoliation. That the instruction can also deter other types of spoliation does not mean that using the instruction to deter that type of spoliation is the correct choice. The instruction is simply a tool that the judge can use to help find the truth of the issues in the case. Allowing the instruction

\textsuperscript{367} See RONALD JAY ALLEN, WILLIAM J. STUNTZ, JOSEPH L. HOFFMAN, DEBRA A. LIVINGSTON, & ANDREW D. LEIPOLD, CRIMINAL PROCEDURE: INVESTIGATION AND RIGHT TO COUNSEL 353–61 (2d ed. 2011) (discussing tort damages, injunctions, criminal prosecutions, and administrative and political remedies as alternatives to the exclusionary rule and noting that these options are far less common as remedies for Fourth Amendment violations).
\textsuperscript{369} See supra notes 323–326.
to deter spoliation other than bad-faith spoliation risks elevating the desire to preserve evidence above the search for truth. The instruction is therefore best used to deter bad-faith spoliation while serving the broader truth-seeking goals of the judicial system.

3. The Remedial Goal. The adverse inference instruction’s third goal is to provide a remedy for the injured party who was denied the advantage of useful evidence. The instruction should “place the non-spoliating party in the position it should have been in” if the evidence had not been destroyed.370

When the spoliator acts with bad faith and the inference that the instruction allows the jury to draw is present, the adverse inference instruction serves this remedial purpose nicely. The prejudiced party gets the benefit of the destroyed evidence because the jury knows the type of evidence that was destroyed and presumes that the evidence was harmful to the spoliator.

When the spoliator acts with less than bad faith, however, the instruction no longer serves its remedial purpose and “goes beyond making [the] plaintiff whole.”371 Recall why negligent, grossly negligent, and willful spoliation does not logically support the inference: these levels of culpability do not connect sufficiently the destroyed evidence and the fact that the evidence was harmful to the spoliator.372 Without this connection, giving the adverse inference instruction when the spoliator acts with less than bad faith does not make the nonspoliating party whole;

370 Clark Const. Grp., Inc. v. City of Memphis, 229 F.R.D. 131, 141 (W.D. Tenn. 2005); see also Rimkus Consulting Grp., Inc. v. Cammarata, 688 F. Supp. 2d 598, 618 (S.D. Tex. 2010) (“A measure of the appropriateness of a sanction is whether it ‘restore[s] the prejudiced party to the same position he would have been in absent the wrongful destruction of evidence by the opposing party.’” (citing West v. Goodyear Tire & Rubber Co., 167 F.3d 776, 779 (2d Cir. 1999))).
371 Mosiad Techs. Inc. v. Samsung Elecs., Inc., 224 F.R.D. 595, 600 (D.N.J. 2004). In Mosiad, the court was worried that giving the instruction “would elevate [the evidence] to an arguably unjustified level of importance and create a potentially insurmountable hurdle for defendants.” Id.
372 See supra Part IV.A.
rather, it gives the nonspoliating party a windfall: the nonspoliating party gets the benefits of the adverse inference instruction without ever showing that the instruction is actually warranted by the connecting the destroyed evidence to the fact that the evidence was harmful to the spoliator’s case. Like other areas of the law that rejects remedies that do more than make the plaintiff whole,\textsuperscript{373} spoliation sanctions should similarly reject such remedies.

Proponents of allowing a spoliator’s negligence to support the instruction have two arguments that the remedial purpose is served when negligent spoliation results in an adverse inference instruction, but these are arguments are ultimately unpersuasive. First, they point to the corroboration requirement. In \textit{Turner v. Hudson Transit Lines, Inc.}, the Southern District of New York wrote:

\begin{quote}
[S]ome extrinsic evidence of the content of the evidence is necessary for the trier of fact to be able to determine in what respect and to what extent it would have been detrimental. This corroboration requirement is even more necessary where the destruction was merely negligent, since in those cases it cannot be inferred from the conduct of the spoliator that the evidence would even have been harmful to him.\textsuperscript{374}
\end{quote}

Yet this very statement explains why the instruction is both unwarranted and unnecessary in the case of negligent spoliation. The instruction is unwarranted because no inference connects the “conduct of the spoliator” with the fact that the evidence “would even have been harmful to him.”\textsuperscript{375} Thus, the very inference that the court would be allowing the jury to draw by giving the instruction is utterly lacking.

\textsuperscript{373} Most notably, contract law prohibits a recovery that puts a party “in a better position than [the party] would have been in had the contract been satisfactorily performed.” \textit{Ostano Commerzanstalt v. Telewide Sys., Inc.}, 880 F.2d 642, 649 (2d Cir. 1989).
\textsuperscript{375} \textit{See id.}
Next, the instruction is unnecessary because when the nonspoliating party can offer extrinsic evidence of what the destroyed evidence was, the jury can base its decision on that extrinsic evidence, rather than on the destroyed evidence. The adverse inference instruction is premised on the idea that the spoliator tried to suppress damaging evidence. That a jury may logically infer something about the content of destroyed evidence from extrinsic evidence is not the same as the adverse inference, and the judge need not give that instruction. Jury instructions generally tell jurors to “their general knowledge and experience possessed in common with other people” to reach a verdict. Therefore, jurors can use their common sense about the destroyed evidence when they have extrinsic evidence about that destroyed evidence, and they do not need an adverse inference instruction.

Second, proponents of allowing a spoliator’s negligence to support the instruction claim that if the spoliator is still allowed to present rebuttal evidence, then the spoliator can overcome the instruction and explain why the jury should not draw the inference. Courts that allow negligent spoliation to support the instruction often given an irrebuttable presumption when the spoliator acts in bad faith but only a rebuttal presumption when the spoliator is merely negligent. The rebuttal presumption, however, still leaves the likely open the possibility that

376 See Greyhound Lines, Inc. v. Wade, 485 F.3d 1032, 1035 (8th Cir. 2007) (stating that the instruction is premised on preventing spoliators from “suppress[ing] the truth”).
377 75A Am. Jur. 2d Trial § 1223.
378 See, e.g., Pension Comm. of Univ. of Montreal Pension Plan v. Banc of Am. Sec., 685 F. Supp. 2d 456, 470–71 (S.D.N.Y. 2010) (“In its most harsh form, when a spoliating party has acted willfully or in bad faith, a jury can be instructed that certain facts are deemed admitted and must be accepted as true. At the next level, when a spoliating party has acted willfully or recklessly, a court may impose a mandatory presumption. Even a mandatory presumption, however, is considered to be rebuttable. The least harsh instruction permits (but does not require) a jury to presume that the lost evidence is both relevant and favorable to the innocent party. If it makes this presumption, the spoliating party's rebuttal evidence must then be considered by the jury, which must then decide whether to draw an adverse inference against the spoliating party.
the jury draws the inference because the instruction itself, no matter how carefully phrased, still labels the spoliator as a wrongdoer.\textsuperscript{379} This labeling makes the jury far less likely to believe the spoliator’s explanation of what happened to the destroyed evidence. The rebuttable presumption then provides little protection for the negligent spoliator from facing a severe sanction. Instead, it provides the nonspoliating party with an undeserved benefit.

\textbf{CONCLUSION}

The adverse inference instruction is a common tool that judges use after a party destroys evidence. Despite traditionally being limited to bad-faith spoliation, courts have begun to allow negligent spoliation to support the instruction. This trend, however, is misguided for two reasons. First, it disregards the limits on the authority of federal courts. Article III gives federal courts the inherent power that English and state courts had at the time of ratification. That inherent power allows federal courts to give an adverse inference instruction when a spoliator acts with bad faith, but it does not allow federal courts to give the instruction when the spoliator is merely negligent. Similarly, Rule 37(b), while providing a separate basis for giving the instruction, has the same limitations: federal courts can give an adverse inference instruction only when the spoliator acts with bad faith. Thus, federal courts do not have the power to give an adverse inference instruction when a spoliator is merely negligent in destroying evidence.

Second, this trend ignores the inference in the adverse \textit{inference} instruction: the spoliator’s bad faith provides the logical link between the destroyed evidence and the fact that the evidence was harmful to the spoliator’s case. Negligence does not provide this connection because a negligent spoliator does not consciously destroy evidence, thereby suggesting he was

\textsuperscript{379} See Morris v. Union Pac. R.R., 373 F.3d 896, 900 (8th Cir. 2004) (observing that the instruction “brands one party as a bad actor”).
trying to hide something. Also, this bad-faith requirement serves the three purposes of the adverse inference instruction. This requirement ensures that only the most culpable spoliators receive this severe punishment. Next, it effectively deters spoliation in the broader context of the judicial process. And finally, it provides an appropriate remedy for a party who suffer the harm of bad-faith spoliation without giving an undeserved benefit to the party who suffers the harm of merely negligent spoliation.

Given the limits on the power of federal courts and the logical soundness of those limits, federal courts cannot—and should not—give an adverse inference instruction when a spoliator negligently destroys evidence. Rather, the instruction should be reserved for bad-faith spoliation.