COMMENTS

RECONSIDERING SPOLIATION DOCTRINE THROUGH THE LENS OF TORT LAW*

I. INTRODUCTION

The expansive growth of technology has drastically changed the way discovery is conducted in civil litigation. Litigants have always been required to preserve potentially relevant information to keep it available to the court and opponents as possible evidence. In a paper-based world, this was less problematic because documents were tangible and static—they generally existed in one place unless they were actively destroyed. Today, electronic information is easily created, altered, distributed, and destroyed. It exists in massive volume and requires great expense to manage and store. As a result, businesses frequently employ document management systems that automatically delete information after a relatively short period of time. The reasonable anticipation of litigation triggers an affirmative duty to halt typical destruction activity and to preserve potentially relevant information. Destruction or failure to preserve potentially relevant information after such a duty is triggered exposes a litigant to sanctions. Unfortunately, there is conflict among jurisdictions as to the scope of the duty to preserve evidence, and as to how egregious the breach of that duty must be before a court will impose case-altering sanctions.

Litigants are fearful of the potential for sanctions and, at the same time, uncertain about precisely what conduct will incur them. This leads parties to unreasonable behavior; they overpreserve electronically stored information at staggering financial costs. The uncertainty of the law has also dramatically increased the motions practice surrounding e-discovery sanctions. All of this has the cumulative effect of driving up the total cost of discovery and straining the very purpose of the Federal Rules of Civil Procedure: the just, speedy, and inexpensive determination of every action.[1]

This Comment will reconsider contemporary spoliation doctrine through the lens of tort law and present new structures for spoliation analysis. Using tort principles, which promote the protection of individuals' legally protected interests in light of the benefits to society as a whole, this Comment suggests that current spoliation doctrine can be adapted to encourage more reasonable primary behavior and more efficient litigation practice. Section II provides a historical perspective of the field of spoliation generally. Part III.A discusses the sources of power for a particular kind of remedy for

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1. FED. R. CIV. P. 1.

spoliation—discovery sanctions. Part III.B describes the elements that must be established in various jurisdictions to prove sanctionable spoliation, while Part III.C explains the remedies available if those elements are proven. Part III.D describes consequences that have resulted from the uncertainty in this area of law, illuminating the need for a more consistent approach. Section IV provides a reconceptualization of spoliation doctrine by examining the principles and policies that underlie the theories of tort liability. Specifically, Part IV.A compares the underlying theories of tort liability with the theories that have historically justified spoliation. Finally, Part IV.B suggests three possible approaches for reorganizing spoliation doctrine to serve better the ultimate purposes of the Federal Rules of Civil Procedure and to benefit society as a whole. Part IV.C recommends the best application of each approach.

II. HISTORICAL OVERVIEW OF SPOLIATION

Spoliation is the destruction or material alteration of evidence, rendering it unavailable to the court or an opposing party in litigation.[2] Spoliation doctrine began in the law of evidence with the "spoliation inference," an instruction by the court that any lost evidence would have been unfavorable to the party that lost it.[3] Two basic theories underlie spoliation doctrine: consciousness of guilt and fairness of process.[4] Based on the Latin maxim *omnia praesumuntur contra spoliatorem*—"all things are presumed against a wrongdoer"—the former theory reflects the logical deduction that a guilty party destroys incriminating evidence.[5] This foundational proposition has, for centuries, been the subject of debate.[6] Nevertheless, under this view, legal controls for the destruction of evidence represent the protection of truth from the wrongful conduct of the spoliator.[7]

2. Victor Stanley, Inc. v. Creative Pipe, Inc., 269 F.R.D. 497, 516 (D. Md. 2010) (quoting Silvestri v. Gen. Motors Corp., 271 F.3d 583, 590 (4th Cir. 2001)); *see also* JAMIE S. GORELICK ET AL., DESTRUCTION OF EVIDENCE § 1.1 (1989) (stating "*destruction of evidence* means rendering discoverable matter permanently unavailable to the court and the opposing party"); SEDONA CONFERENCE, THE SEDONA CONFERENCE GLOSSARY: E-DISCOVERY & DIGITAL INFORMATION MANAGEMENT 48 (Sherry B. Harris ed., 3d ed. 2010) (defining spoliation as "the destruction of records or properties, such as metadata, that may be relevant to ongoing or anticipated litigation, government investigation, or audit").

3. GORELICK ET AL., *supra* note 2, § 1.3; *see also* Lawrence Solum & Stephen Marzen, *Truth and Uncertainty: Legal Control of the Destruction of Evidence*, 36 EMORY L.J. 1085, 1160–62 (1987) (explaining the epistemology of the spoliation inference).

4. GORELICK ET AL., *supra* note 2, § 2.3.

5. *Id.* § 1.3; *see also id.* § 2.3 (stating that "[w]hen a party is once found to be fabricating, or suppressing, documents, the natural, indeed the inevitable, conclusion is that he has something to conceal, and is conscious of guilt" (quoting Warner Barnes & Co. v. Kokosai Kisen Kabushiki Kaisha, 102 F.2d 450, 453 (2d Cir. 1939), *modified*, 103 F.2d 430 (2d Cir. 1939))).

6. *Compare* The Pizzaro, 15 U.S. (2 Wheat.) 227, 227 (1817) (noting that spoliation of papers thrown off a ship prior to capture "justif[ies] the suspicions of the court" but deprives the defendant "of no right to which he is otherwise entitled"), *with* Pomeroy v. Benton, 77 Mo. 64, 86 (1882) (describing how the court "thwarts [the spoilator's] iniquitous purpose, by indulging a presumption which supplies the lost proof, and thus defeats the wrongdoer by the very means he had so confidently employed to perpetrate the wrong").

7. *See* Charles R. Nesson, *Incentives to Spoliate Evidence in Civil Litigation: The Need for Vigorous Judicial Action*, 13 CARDOZO L. REV. 793, 793 (1991) (describing spoliation as "a form of cheating which blatantly compromises the ideal of the trial as a search for truth").

The latter theory—fairness of process—emphasizes the cost to the judicial process that results from unavailable evidence.[8] Regardless of the motives behind the destruction, spoliation undermines the search for truth by denying both parties and the court equal opportunity to discover and use evidence relevant to the case.[9] On this theory, controlling the destruction of evidence promotes "courtroom truth"—that is, a verdict achieved through a fair process.[10] These two theories, which are not necessarily inconsistent, have guided the development of spoliation doctrine.[11]

Regardless of the underlying theory, courts regulate destruction of evidence to preserve truth seeking, fairness, and the integrity of the judicial system.[12] This regulation takes various forms. The spoliation inference still exists to redress allegations raised during trial of destruction of evidence.[13] A few states recognize spoliation as an independent tort.[14] This Comment is primarily concerned with regulation that occurs when allegations of spoliation are made prior to trial. As discussed more fully below, courts regulate pretrial spoliation through use of discovery sanctions.[15]

III. DISCOVERY SANCTIONS FOR SPOLIATION

A. Sources of the Court's Sanctioning Power

There are two distinct sources from which federal courts draw the authority to sanction parties for spoliation of evidence: (1) the court's inherent power and (2) the Federal Rules of Civil Procedure.[16] First, the court has inherent power to manage its own affairs to achieve the orderly and expeditious disposition of cases.[17] Exercising this power, the court may sanction conduct that is inconsistent with the orderly administration of justice or that undermines the integrity of the judicial system.[18] It is crucial to the system's integrity that litigants maintain confidence in its truth-seeking

8. GORELICK ET AL., *supra* note 2, § 2.3.

9. *Id.*

10. Solum & Marzen, *supra* note 3, at 1162 (citing John MacArthur Maguire & Robert C. Vincent, *Admissions Implied from Spoliation or Related Conduct*, 45 YALE L.J. 226, 238 (1935)).

11. *See* GORELICK ET AL., *supra* note 2, § 2.3 (explaining that spoliation may simultaneously subvert fairness of the judicial process and also indicate the spoliator's consciousness of guilt).

12. *Id.* § 1.3

13. *Id.* § 3.2.

14. *See* GORELICK ET AL., *supra* note 2, § 4.3 (discussing creation of spoliation tort in California); James T. Killela, *Spoliation of Evidence: Proposals for New York State*, 70 BROOK. L. REV. 1045, 1065–69 (2005) (summarizing approaches by various jurisdictions); Solum & Marzen, *supra* note 3, at 1100–06 (discussing independent tort actions for intentional and negligent spoliation).

15. GORELICK ET AL., *supra* note 2, § 3.2; Solum & Marzen, *supra* note 3, at 1094.

16. This Comment is concerned with the law governing spoliation sanctions in the federal courts. State courts can and do develop independent rules for controlling destruction of evidence.

17. Chambers v. NASCO, Inc., 501 U.S. 32, 43 (1991) (citing Link v. Wabash R.R. Co., 370 U.S. 626, 630–31 (1962)); United States v. Hudson, 11 U.S. (7 Cranch) 32, 34 (1812)).

18. Victor Stanley, Inc. v. Creative Pipe, Inc., 269 F.R.D. 497, 517 (D. Md. 2010) (quoting United States v. Shaffer Equip. Co., 11 F.3d 450, 462 (4th Cir. 1993)).

function.[19] Because the truth cannot be uncovered if potential evidence is not preserved, sanctions for spoliation are an appropriate exercise of the court's inherent power to manage its own affairs.[20]

But the court's power to sanction under its inherent authority carries limitations. The Supreme Court has admonished courts to exercise their inherent power "with restraint and discretion" because the inherent powers are shielded from democratic controls.[21] The court's inherent power to sanction is also limited to circumstances where the party at issue acted in bad faith.[22] Because of these limitations, the Supreme Court has instructed that courts should base sanctions on the Federal Rules of Civil Procedure, as long as the Rules provide an adequate sanction for the conduct.[23]

Federal Rule of Civil Procedure 37(b) grants a court authority to impose specific sanctions against a party who fails to obey a discovery order.[24] The advisory committee notes indicate that Rule 37 was meant to give broad power to the court to sanction discovery violations.[25] The rule applies to violations of court orders made under specific Rules and includes agreements made by the parties pursuant to Rule 26(f) about preservation of discoverable information. Rule 37(b)(2)(A) lists specific sanctions permissible, including:

> (i) directing that the matters embraced in the order or other designated facts be taken as established . . . ;
>
> (ii) prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence;
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> (iii) striking pleadings in whole or in part;
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> (iv) staying further proceedings until the order is obeyed;
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> (v) dismissing the action or proceeding in whole or in part;
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> (vi) rendering a default judgment against the disobedient party; or
>
> (vii) treating as contempt of court the failure to obey any order [of the court]. . . .[26]

Rule 37(b)(2)(C) also permits the court to order the disobedient party or its lawyer to pay reasonable expenses, including attorney's fees, caused by the failure to obey the order.[27]

19. *Id.* at 525–26.

20. *Id.*

21. *Chambers*, 501 U.S. at 44; Roadway Express, Inc. v. Piper, 447 U.S. 752, 764 (1980).

22. *See Chambers*, 501 U.S. at 50 (citing *Roadway Express*, 447 U.S. at 767) (stating that a court must find bad faith before ordering a sanction pursuant to the court's inherent powers); Micron Tech., Inc. v. Rambus, Inc., 645 F.3d 1311, 1326 (Fed. Cir. 2011) (indicating that bad faith is "normally a prerequisite" to dispositive sanctions under the court's inherent powers); Rimkus Consulting Grp., Inc. v. Cammarata, 688 F. Supp. 2d 598, 615 (S.D. Tex. 2010) (stating that *Chambers* may require culpability greater than negligence before a court can issue sanctions under its inherent authority). *But see* Stevenson v. Union Pac. R.R. Co., 354 F.3d 739, 745 (8th Cir. 2003) (declining to interpret *Chambers* to mean bad faith is a condition precedent to every sanction issued pursuant to inherent powers).

23. *Chambers*, 501 U.S. at 50.

24. FED. R. CIV. P. 37(b)(2).

25. FED. R. CIV. P. 37(b) advisory committee's note (1970).

26. FED. R. CIV. P. 37(b)(2)(A).

27. *Id.* 37(b)(2)(C).

B. Sanctionable Conduct

A party moving for sanctions for spoliation of evidence must generally prove three elements: (1) the spoliating party had a duty to preserve the evidence; (2) the evidence was destroyed or lost with a culpable state of mind; and (3) the evidence was relevant and prejudicial—that is, a reasonable person could find the spoliated evidence would have supported the moving party's claim or defense.[28] Each of these elements—the duty to preserve, culpable state of mind, and relevance and prejudice—lacks a fixed, consistent standard of application.

1. The Duty to Preserve

At common law, a party has a duty to take reasonable steps to preserve evidence related to pending or reasonably foreseeable litigation.[29] While the duty to preserve has existed historically, electronic storage of information has dramatically increased both the volume of potential evidence available for litigation[30] and the risk that such evidence will be lost.[31] As a result, it has become progressively more important to litigants to define the parameters of the preservation duty.[32] For a party that has an information management system that allows users to manage their own documents, or that automatically deletes documents after a certain period of time, the preservation obligation requires affirmative steps to ensure that potentially relevant information is not lost in the ordinary course of business.[33] Among these affirmative steps, counsel

28. *See* Victor Stanley, Inc. v. Creative Pipe, Inc., 269 F.R.D. 497, 520–21, 521 n.31 (D. Md. 2010) (summarizing comparable tests across all jurisdictions); *see also* SEDONA CONFERENCE, THE SEDONA PRINCIPLES: BEST PRACTICES RECOMMENDATIONS & PRINCIPLES FOR ADDRESSING ELECTRONIC DOCUMENT PRODUCTION 70 (Jonathan M. Redgrave et al. eds., 2d ed. 2007) (stating that sanctions should only apply if there is a clear duty to preserve, a culpable failure to preserve and produce relevant electronically stored information, and a reasonable probability that the loss of the evidence has materially prejudiced the adverse party).

29. Zubulake v. UBS Warburg, L.L.C. (*Zubulake IV*), 220 F.R.D. 212, 217 (S.D.N.Y. 2003); *see also* SEDONA CONFERENCE, *supra* note 28, at 11 (stating that electronically stored information is potentially discoverable under the Federal Rules of Civil Procedure and must be properly preserved when reasonably anticipated to be relevant to litigation). This Comment is primarily concerned with evidence that must be preserved in accordance with a common law duty to make such evidence available to an opposing party in litigation. The duty to preserve evidence may also arise from other sources, including specific statutes or regulations. FED. R. CIV. P. 37(f) advisory committee's note (1970).

30. *See* Jason R. Baron, *Law in the Age of Exabytes: Some Further Thoughts on 'Information Inflation' and Current Issues in E-Discovery Search*, 17 RICH. J.L. & TECH. 9, 3–4 (2011), http://jolt.richmond.edu/vl7i3/article9.pdf (discussing the "exploding volume and complexity" of potential electronic evidence).

31. *See* SEDONA CONFERENCE, *supra* note 28, at 28 (recognizing that some electronic information management systems necessarily overwrite or delete data on a routine basis).

32. *See* Bennett B. Borden et al., *Four Years Later: How the 2006 Amendments to the Federal Rules Have Reshaped the E-Discovery Landscape and are Revitalizing the Civil Justice System*, 17 RICH. J.L. & TECH. 10, 34–35 (2011), http://jolt.richmond.edu/vl7i3/article10.pdf (discussing the development of information governance plans as the ease of document preservation systems has created "vast repositories of information").

33. Zubulake v. UBS Warburg, L.L.C. (*Zubulake V*), 229 F.R.D. 422, 432 (S.D.N.Y. 2004); *see also* GORELICK ET AL., *supra* note 2, § 8.5 (explaining that failure to prevent destruction can "constitute an *intentional omission* with the same consequences as an *intentional act* to destroy evidence").

generally should issue a "litigation hold"—a notice, usually in writing, instructing a client and its employees to save potentially relevant information and describing a mechanism by which they may do so.[34] The preservation duty "runs first to counsel," who should advise the client of the type of information that may be relevant and the necessity of preventing its destruction.[35]

a. Triggering the Preservation Obligation

The duty to preserve begins when litigation is reasonably anticipated.[36] For a defendant, the duty begins not only upon receipt of a complaint,[37] but during the period before litigation when the defendant has notice, or should know, evidence may be relevant to future litigation.[38] The mere existence of a dispute does not necessarily trigger the duty,[39] and yet litigation need not be "imminent" before the duty attaches.[40] Reasonable foreseeability of litigation will turn on the likelihood that a certain kind of incident will result in litigation,[41] the knowledge of certain employees about threatened litigation based on either their participation in the dispute,[42] or notification received from a potential adversary.[43]

b. Scope of the Preservation Obligation

Once the duty to preserve has triggered, a party "must not destroy unique, relevant

34. *Zubulake V*, 229 F.R.D. at 433; SEDONA CONFERENCE, *supra* note 28, at 32.

35. Telecom Int'l Am., Ltd. v. AT&T, Corp., 189 F.R.D. 76, 81 (S.D.N.Y. 1999); *accord* Huntsville Golf Dev., Inc. v. Brindley Constr., Co., No. 1:08–00006, 2011 WL 3420602, at *20 (M.D. Tenn. Aug. 4, 2011) (noting once notice that litigation is likely to be filed, "the obligation to preserve evidence runs first to counsel" and discussing the duty to advise clients of "obligations to retain pertinent documents"); Point Blank Solutions, Inc. v. Toyobo Am., Inc., No. 09-61166-CIV, 2011 WL 1456029, at *12 (S.D. Fla. Apr. 5, 2011) (explaining counsel holds the duty); Mosel Vitelic Corp. v. Micron Tech. Inc., 162 F. Supp. 2d 307, 311 (D. Del. 2000) (assigning obligation to preserve evidence first to counsel).

36. See *supra* note 29 and accompanying text for a definition of the preservation obligation.

37. *See* Borden et al., *supra* note 32, at 35 (noting that litigation usually becomes reasonably likely for a defendant when it is served with a complaint).

38. Zubulake v. UBS Warburg, L.L.C. (*Zubulake IV*), 220 F.R.D. 212, 216 (S.D.N.Y. 2003).

39. Goodman v. Praxair Servs., Inc., 632 F. Supp. 2d 494, 510 (D. Md. 2009).

40. Hynix Semiconductor, Inc. v. Rambus, Inc., 645 F.3d. 1336, 1345 (Fed. Cir. 2011), *cert. denied*, 132 S. Ct. 1540 (2012).

41. *See* Stevenson v. Union Pac. R.R. Co., 354 F.3d 739, 748 (8th Cir. 2004) (finding defendant railroad had a duty to preserve dispatch recordings because defendant knew "such tapes would be important to any litigation over an accident that resulted in serious injury or death, and . . . that litigation is frequent when there has been an accident involving death or serious injury").

42. *See Zubulake IV*, 220 F.R.D. at 217 (stating the duty to preserve evidence relevant to an employee discrimination suit had triggered when plaintiff's chain of supervisors, a former supervisor, and co-workers all "recognized the possibility [plaintiff] might sue").

43. *See Goodman*, 632 F. Supp. 2d at 511 (finding that the duty to preserve was triggered after defendant was put "on notice" by a letter openly threatening litigation). *But see* Oto Software, Inc. v. Highwall Techs., L.L.C., No. 08-cv-01897-PAB-CBS, 2010 WL 3842434, at *10 (D. Colo. Aug. 6, 2010) (finding the duty to preserve was not triggered by a letter from one software company to another expressing concern about violations of a license agreement because the letter did not suggest an infringement action was imminent or reasonably foreseeable).

evidence that might be useful to an adversary."[44] Because a broad obligation "would cripple entities which are almost always involved in litigation and make discovery even more costly and time-consuming,"[45] preservation requires reasonable efforts, not exhaustive compliance.[46] Specifically, parties should identify and retain documents from individuals likely to have information that will support the claims or defenses of any party, or that are relevant to the subject matter of the litigation.[47] Parties are not generally required to preserve data from sources that are inaccessible or unduly burdensome[48]—such as deleted, residual, or fragmentary data, or disaster recovery tapes[49]—unless they are the exclusive source of relevant information.[50] The obligation extends to all potentially relevant information that is within a party's possession, custody, and control; therefore, it does not run to documents controlled by third parties, although the litigant may be required to inform an opposing party of evidence in third-party hands.[51]

c. Difficulties in Application

Identifying the trigger and scope of the preservation obligation requires a fact-intensive inquiry, made difficult by the parties' imprecise knowledge about the subject matter of the litigation prior to the filing of a complaint.[52] Moreover, case law does not

44. *Zubulake IV*, 220 F.R.D. at 217; *accord* Perez v. Vezer Indus. Prof'ls, Inc., No. CIV S–09–2850 MCE CKD, 2011 WL 5975854, at *6 (E.D. Cal. Nov. 29, 2011) (discussing the scope of the duty to preserve); Olesky v. Gen. Elec. Co., No. 06 C 1245, 2011 WL 4626015, at *3 (N.D. Ill. Oct. 3, 2011) (identifying the scope of the duty to preserve as that of the broad disclosure obligations); Hunt v. Marquette Transp. Co. Gulf-Inland, L.L.C., No. CIV.A. 09-6055, 2011 WL 3924926, at *2 (E.D. La. Aug. 5, 2011) (explaining unique, relevant evidence must not be destroyed if it might be useful to an adversary); E*Trade Sec., L.L.C. v. Deutsche Bank AG, 230 F.R.D. 582, 591 (D. Minn. 2005) (recognizing a party's anticipation of a lawsuit triggers duty not to destroy "unique, relevant evidence that might be useful to an adversary").

45. SEDONA CONFERENCE, *supra* note 28, at 28.

46. *Id.* at 28; *Zubulake IV*, 220 F.R.D. at 217.

47. Pippins v. KPMG, L.L.C., No. 11 Civ. 0377, 2011 WL 4701849, at *5–6 (S.D.N.Y. Oct. 7, 2011) (citing *Zubulake IV*, 220 F.R.D. at 217–18); *see also* Zubulake v. UBS Warburg, L.L.C. (*Zubulake V*), 229 F.R.D. 422, 436 (S.D.N.Y. 2004) (identifying the relevant individuals as "the people identified in a party's initial disclosure and any subsequent supplementation thereto").

48. *See* Rimkus Consulting Grp. v. Cammarata, 688 F. Supp. 2d 598, 613 (S.D. Tex. 2010) (noting that reasonable preservation conduct turns on what is proportional to the case); *Zubulake IV*, 220 F.R.D. at 218 (finding that a litigation hold does not generally extend to inaccessible backup tapes); SEDONA CONFERENCE, *supra* note 28, at 33 (stating that the preservation obligation does not normally impose "heroic or unduly burdensome requirements" on organizations with respect to electronically stored information).

49. *See* SEDONA CONFERENCE, *supra* note 28, at 35 ("Absent specific circumstances, preservation obligations should not extend to disaster recovery backup tapes created in the ordinary course of business."). Disaster recovery tapes, or backup tapes, are a specific type of electronic storage media that capture data for the purpose of restoration in the event of unexpected data loss. *See* Sedona Conference, *Commentary on Preservation, Management, and Identification of Sources of Information that are Not Reasonably Accessible*, 10 SEDONA CONF. J. 281, 289 (2009). They are typically recycled at regular intervals and capture data sequentially, rather than in a manner organized for archival purpose. *See id.* at 296. As a result, the identification, preservation, and retrieval of information on disaster recovery tapes may be difficult. *See id.*

50. *See, e.g.*, *Zubulake IV*, 220 F.R.D. at 218 (creating an exception to the general rule and requiring preservation of backup tapes that are the sole source of identifiable documents from key players).

51. *See* Silvestri v. Gen. Motors Corp., 271 F.3d 583, 591 (4th Cir. 2001).

52. *See* Borden et al., *supra* note 32, at 37 ("[W]hen a triggering event occurs before the filing of a

provide consistent guidance about what a party must do to meet its obligation.[53] While some judges emphasize that a party's preservation efforts must only be reasonable, not perfect,[54] once a claim of spoliation is made, the reasonableness of a party's decisions will be evaluated ex-post, and the analysis will be colored by the consequences of any loss and the alternative preservation choices that might have prevented it.[55]

2. Culpable State of Mind

Once the duty to preserve attaches, culpable destruction, loss, or material alteration of documents may result in sanctions.[56] The culpability element reflects one of the two basic justifications for imposing spoliation sanctions[57]—that destruction of evidence derives from consciousness of guilt.[58] Culpability ranges from inadvertent loss of information for reasons unrelated to litigation, to intentional destruction intended to make evidence unavailable to an adversary.[59] Courts categorize such conduct using traditional tort definitions—negligence, gross negligence, and willfulness or bad faith—however, the meaning of these terms in the discovery context is not well defined.[60] Importantly, at this point in the spoliation analysis, courts purport

complaint, a company is on its own to determine the proper scope of preservation, and mistakes in this determination can be costly, even outcome determinative."); Hon. Paul W. Grimm et al., *Proportionality in the Post-Hoc Analysis of Pre-Litigation Preservation Decisions*, 37 U. BALT. L. REV. 381, 396–97 (2008) ("Even if the governing standard was fixed, the volume and complexity of discovery disputes presented to courts for resolution demonstrates that its application to specific factual situations remains open to debate").

53. Borden et al., *supra* note 32, at 36–37; *see also* Grimm et al, *supra* note 52, at 393 (quoting SHIRA A. SCHEINDLIN, MOORE'S FEDERAL PRACTICE: E-DISCOVERY: THE NEWLY AMENDED FEDERAL RULES OF CIVIL PROCEDURE 7 n.28 (2006)) ("The obligation to preserve relevant evidence cannot be defined with precision.").

54. *See, e.g.*, Rimkus Consulting Grp. v. Cammarata, 688 F. Supp. 2d 598, 613 (S.D. Tex. 2010) (stating that whether preservation conduct is acceptable will depend on what is reasonable).

55. *See* Orbit One Commc'ns Inc. v. Numerex Corp., 271 F.R.D. 429, 436 n.10 (S.D.N.Y. 2010) (explaining that, because a reasonableness standard is amorphous, parties may do better to retain "all relevant documents" to protect against spoliation); Pension Comm. of Univ. of Montreal Pension Plan v. Banc of Am. Sec., L.L.C., 685 F. Supp. 2d 456, 463 (S.D.N.Y. 2010) (explaining that a litigant's conduct will be measured by the judge through the backward lens of hindsight).

56. *See Silvestri*, 271 F.3d at 590 (determining that sanctions require some degree of fault). Under Federal Rule of Civil Procedure 37(e), the court is not permitted to sanction a party for failure to provide discovery of electronically stored information (ESI) lost as the result of routine, "good faith" operation of an information management system. Courts have not interpreted this safe harbor to apply to parties who fail to produce ESI lost after the common law duty to preserve has triggered. *See* Alexander B. Hastings, Note, *A Solution to the Spoliation Chaos: Rule 37(e)'s Unfulfilled Potential to Bring Uniformity to Electronic Spoliation Disputes*, 79 GEO. WASH. L. REV. 860, 876 (2011) (describing the narrow interpretation of "good faith" and inconsistent application of the safe harbor in Rule 37(e)).

57. See *supra* Section II for a discussion of the two underlying theories of spoliation doctrine.

58. *See* GORELICK ET AL., *supra* note 2, § 2.3 (discussing two epistemological theories of the spoliation inference); Drew D. Dropkin, Note, *Linking the Culpability and Circumstantial Evidence Requirements for the Spoliation Inference*, 51 DUKE L.J. 1803, 1826 (2002) (stating that high culpability permits the spoliator's state of mind to serve as a proxy for the contents of the evidence); *cf. Silvestri*, 271 F.3d at 593 (finding harsh sanctions for spoliation justified where either the spoliator's conduct was egregious or the effect of that conduct was severely prejudicial).

59. *Rimkus*, 688 F. Supp. 2d at 613; *see also Pension Comm.*, 685 F. Supp. 2d at 463 (describing a continuum of unacceptable conduct).

60. *See Pension Comm.*, 685 F. Supp. 2d at 463 (recognizing that the terms have no clear definition in

to examine a spoliator's "state of mind,"[61] but the subsequent analyses focus on actions.[62] The use of tort definitions further underscores that the relevant inquiry concerns conduct, not motivation.[63]

In determining the ultimate remedy for spoliation, circuits are divided over whether negligent conduct, as opposed to willful or bad faith conduct, is sufficient to support an imposition of severe sanctions.[64] Therefore, courts have generally focused on defining those levels of culpability. But in her landmark and controversial opinion in *Pension Committee of the University of Montreal Pension Plan v. Banc of America Securities, L.L.C.*,[65] United States District Court Judge Shira Scheindlin[66] attempted to describe and apply the full range of tort terms to discovery conduct.[67] She explained that judges must apply these concepts based on their own experience and a "gut reaction . . . as to whether a litigant has complied with its discovery obligations and how hard it worked to comply."[68] She also recognized that these "judgment call[s]" are subjective and may potentially be inconsistent.[69] Nevertheless, some jurisprudence has developed around the characterization of discovery misconduct and what actions constitute negligence, gross negligence, and willfulness or bad faith.

a. Reasonableness

A party fulfills its preservation obligation if it acts reasonably.[70] Reasonable conduct includes "concrete actions reasonably calculated to ensure that relevant materials will be preserved."[71] In most circumstances, mere mistake or a slight error in

the context of discovery misconduct).

61. *E.g.*, Victor Stanley, Inc. v. Creative Pipe, Inc., 269 F.R.D. 497, 520, 529 (D. Md. 2010); *see also* SEDONA CONFERENCE, *supra* note 28, at 73 (suggesting that a party's good faith destruction of evidence should not be sanctionable conduct).

62. *See, e.g.*, *Victor Stanley, Inc.*, 269 F.R.D. at 529 (describing acts, such as failure to collect evidence or sloppiness of review, which amount to negligence).

63. See *infra* notes 277–83 and accompanying text for a discussion of negligence in the tort context, where it is understood as conduct rather than a state of mind.

64. See *infra* Part III.C for a discussion of the sanctions available for spoliation. See *infra* notes 121–37 and accompanying text for a discussion of the circuits requiring negligent as opposed to willful or bad faith conduct before imposing severe sanctions.

65. 685 F. Supp. 2d 456 (S.D.N.Y. 2010).

66. Judge Scheindlin authored the *Zubulake* opinions, which set legal standards for electronic discovery that have since been widely adopted, and she is considered a thought leader on the topic. *See* Point Blank Solutions, Inc. v. Toyobo Am. Inc., No. 09–61166–CIV, 2011 WL 1456029, at *4 n.3 (S.D. Fla. Apr. 5, 2011).

67. *Pension Comm.*, 685 F. Supp. 2d at 463–64; *accord Victor Stanley, Inc.*, 269 F.R.D. at 529–30 (performing a similar analysis).

68. *Pension Comm.*, 685 F. Supp. 2d at 471 (internal quotation mark omitted).

69. *Id.* at 463; *see also* Surowiec v. Capital Title Agency, Inc., 790 F. Supp. 2d 997, 1006–07 (D. Ariz. 2011) (recognizing a lack of consensus among courts as to how the level of culpability is determined).

70. Jones v. Bremen High Sch. Dist. 228, No. 08 C 3548, 2010 WL 2106640, at *6 (N.D. Ill. May 25, 2010); *see also* Rimkus Consulting Grp. v. Cammarata, 688 F. Supp. 2d 598, 613 (S.D. Tex. 2010) (stating that whether preservation conduct is acceptable depends on what is reasonable); Mosaid Techs., Inc. v. Samsung Elecs. Co., 348 F. Supp. 2d 332, 338 (D.N.J. 2004) (finding sanctions are available where a party has notice of relevant evidence and fails to take "reasonable precautions" to preserve it).

71. *Jones*, 2010 WL 2106640, at *6 (citing Danis v. USN Commc'ns, Inc., No. 98 C 7482, 2000 WL 1694325, at *38 (N.D. Ill. Oct. 23, 2000)).

judgment that results in destroyed evidence will not amount to culpable conduct where a party has undertaken other actions to preserve the evidence believed to be relevant to the subject matter of the litigation.[72]

b. Negligence

By contrast, negligence is conduct that falls below the standard established by law for the protection of others against unreasonable risk of harm.[73] Negligence can arise even when a party "has considered the possible consequences carefully, and has exercised [its] own best judgment."[74] After the duty to preserve attaches, the failure to take reasonable steps to preserve or collect evidence that results in the destruction of relevant information is negligent.[75] For example, negligent behavior includes failure to take appropriate measures to preserve electronically stored information, sloppiness of review of evidence, and failure to assess the accuracy and validity of selected search terms.[76] The assessment is fact specific, and the circumstances of each case will determine if this kind of conduct is merely negligent, or worse.[77]

c. Gross Negligence

Gross negligence is failure to use care that even a careless person would use and differs from negligence in degree, not kind.[78] According to Judge Scheindlin, after the preservation duty is established, a party's "failure to adhere to contemporary standards can be considered gross negligence."[79] She identified specific acts that, if parties failed

72. *See* Centrifugal Force, Inc. v. Softnet Commc'ns, Inc., 783 F. Supp. 2d 736, 742–43 (E.D.N.Y. 2011) (finding plaintiff failed to prove culpability where a single email was destroyed after counsel issued an oral litigation hold instructing client to preserve all emails and computer documents relating to an individual at the center of a copyright infringement action); Marlow v. Chesterfield Cnty. Sch. Bd., No. 3:10cv18-DWD, 2010 WL 4393909, at *3 (E.D. Va. Oct. 28, 2010) (finding defendant did not culpably destroy handwritten notes where parties had been engaged in a good faith dispute as to proper scope of discovery and lost evidence was of de minimis value to the litigation); *cf.* Surowiec v. Capital Title Agency, Inc. 790 F. Supp. 2d 997, 1007 (D. Ariz. 2011) (finding gross negligence where defendant offered no evidence that it overlooked or misunderstood plaintiff's preservation demand letter, that preservation was not feasible, or that it undertook some preservation efforts but "innocently failed" to undertake others).

73. *Pension Comm.*, 685 F. Supp. 2d at 464 (quoting KEETON ET AL., PROSSER AND KEETON ON TORTS § 31, at 169 (5th ed. 1984)); *accord* N.V.E., Inc., v. Palmeroni, No. 06–5455, 2011 WL 4407428 at *3 (D.N.J. Sept. 21, 2011) (defining the standard of gross negligence); Victor Stanley, Inc. v. Creative Pipe, Inc., 269 F.R.D. 497, 529 (D. Md. 2010) (defining negligence as "[t]he failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation" (alteration in original)).

74. *Pension Comm.*, 685 F. Supp. 2d at 464 (alteration in original) (quoting KEETON ET AL., *supra* note 73, § 31, at 169); *see also In re* Semrow, No. 3:09–cv–1142 (VLB), 2011 WL 1304448 at *3 (D. Conn. March 31, 2011) (explaining that the negligence standard protects innocent litigants from a destruction of evidence by an adversary who acts with a "pure heart" and an "empty head" (quoting Orbit One Commc'ns Inc. v. Numerex Corp., 271 F.R.D. 429, 438 (S.D.N.Y. 2010))).

75. *Pension Comm.*, 685 F. Supp. 2d. at 465. *But see* Mosaid Techs. Inc. v. Samsung Elecs. Co., 348 F. Supp. 2d 332, 338 (D.N.J. 2004) (finding culpability irrelevant where a party has notice of evidence's relevance and allows it to be destroyed through failure to take reasonable precautions).

76. *Pension Comm.*, 685 F. Supp. 2d at 465; *Victor Stanley*, 269 F.R.D. at 530.

77. *Pension Comm.*, 685 F. Supp. 2d at 471.

78. *Id.* at 464 (citing KEETON ET AL., *supra* note 73, § 34, at 211–12).

79. *Id.*

to do them, would constitute gross negligence per se: (1) failure to issue a written litigation hold; (2) failure to identify all key players and ensure their electronic and paper records are preserved; (3) failure to cease the deletion of email or to preserve the records of former employees; and (4) failure to preserve backup tapes when they are the sole source of relevant information or when they relate to key players, if the information from those players is not obtainable from more readily accessible sources.[80] Notably, many courts—even courts in the same district—have declined to adopt the per se rules from *Pension Committee*.[81] Some courts particularly disagree with the requirement that a litigation hold be in writing—failure to issue a written litigation hold may not even be culpable conduct in some courts.[82]

d. Willfulness and Bad Faith

Willful conduct is intentional, reckless, or purposeful. It is unreasonable conduct done in disregard of a known or obvious risk, such that harm is highly likely to occur.[83] Spoliation is willful where the party intends to destroy evidence—for example, deleting an email[84] or destroying a computer[85]—or where procedures used to identify or

80. *Id.*; Williams v. N.Y. City Transit Auth., No. 10 CV 0882(ENV), 2011 WL 5024280, at *3 (E.D.N.Y. Oct. 19, 2011); *accord* N.V.E., Inc., v. Palmeroni, No. 06–5455 (ES), 2011 WL 4407428 at *4 (D.N.J. Sept. 21, 2011) (discussing failure to issue a written litigation hold); Phillips Elecs. N. Am. Corp. v. BC Technical, 773 F. Supp. 2d 1149, 1203 (D. Utah 2011) (stating failure to issue a written litigation hold, failure to collect paper or electronic records from key players, destruction of email, or destruction of backup tapes constitute grossly negligent or willful behavior). Other courts citing Judge Scheindlin's standard nevertheless engage in an analysis of culpable conduct, rather than simply applying the rule in a per se manner. *See* Nacco Materials Handling Grp., Inc., v. Lilly Co., 278 F.R.D. 395, 405 (W.D. Tenn. 2011) (finding that failure to collect records from key players was "at a minimum negligent"); Felman Prod., Inc. v. Indus. Risk Insurers, No. 3:09–0481, 2011 WL 4547012, at *12 (S.D. W. Va. Sept. 29, 2011) (finding gross negligence where plaintiff failed to issue a litigation hold for more than two years after the duty to preserve was triggered and more than one year after an explicit warning from the judge); Oto Software, Inc. v. Highwall Techs., Inc., No. 08-cv-01897-PAB-CBS, 2010 WL 3842434, at *13 (D. Colo. Aug. 6, 2010) (suggesting gross negligence "may" include failure to collect records from key personnel).

81. Michael W. Deyo, *Deconstructing* Pension Committee*: The Evolving Rules of Evidence Spoliation and Sanctions in the Electronic Discovery Era*, 75 ALB. L. REV. 305, 320–21 (2011/2012); *see also* Surowiec v. Capital Title Agency, Inc., 790 F. Supp. 2d 997, 1007 (D. Ariz. 2011) (finding per se rules to be "too inflexible" for such a dynamic area of law); Orbit One Commc'ns, Inc. v. Numerex Corp., 271 F.R.D. 429, 441 (S.D.N.Y. 2010) (disagreeing with *Pension Committee* and stating instead that failure to conform to certain practices is only one factor in a determination of culpability).

82. *See* Steuben Foods, Inc., v. Country Gourmet Foods, L.L.C., No. 08–CV–561S(F), 2011 WL 1549450, at *5 (W.D.N.Y. Apr. 21, 2011) (stating that a written litigation hold is not essential to avoid sanctions for spoliation); *Orbit One Commc'ns, Inc.*, 271 F.R.D. at 441 (stating that, under some circumstances, a formal litigation hold may not be required); Victor Stanley, Inc. v. Creative Pipe, Inc., 269 F.R.D. 497, 524 (D. Md. 2010) (stating that a litigation hold may not be necessary in every circumstance and reasonableness is the relevant consideration); Deyo, *supra* note 81, at 321 (suggesting that *Pension Committee*'s requirement of a litigation hold may inadvertently promote form over substance).

83. KEETON ET AL., *supra* note 73, § 34, at 213, *cited with approval in Pension Comm.*, 685 F. Supp. 2d. at 472.

84. *Cf.* Sampson v. City of Cambridge, 251 F.R.D. 172, 182 (D. Md. 2008) (declining to find willful conduct in the absence of any evidence that emails were purposefully destroyed or that a program was used to wipe the hard drive).

85. *See* Goodman v. Praxair Servs., Inc., 632 F. Supp. 2d 494, 522 (D. Md. 2009) (finding willful

preserve evidence are clearly deficient.[86] Bad faith is willful destruction done with the purpose of depriving an adversary of the evidence.[87] For example, in *Victor Stanley, Inc. v. Creative Pipe, Inc.*,[88] defendants clearly acted in bad faith when they "deleted thousands of files and ran programs to ensure their permanent loss immediately following preservation requests and orders, and immediately before scheduled discovery efforts."[89] Although some courts use the term interchangeably with willfulness,[90] other courts maintain the distinction, holding that willful conduct does not always rise to the level of bad faith.[91]

3. Relevance and Prejudice

Finally, a party seeking sanctions for spoliation of evidence must prove that the evidence lost was "relevant," and that the absence of the evidence will be prejudicial to the non-moving party. This burden is generally on the party moving for sanctions,[92] but in some jurisdictions, if the nonmoving party has acted with a requisite level of culpability, the relevance and prejudice of the lost evidence are presumed.[93]

a. Defining Relevance and Prejudice

Relevance in this context means more than it does in an evidentiary sense;[94] to be relevant, spoliated evidence must have supported one of the party's claims or defenses.[95] Prejudice exists where a party's ability to present its case, or to defend it, is

conduct where defendants intentionally destroyed a computer).

86. *See Surowiec*, 790 F. Supp. 2d at 1010–11 (finding defendant willfully violated a court order by using unreasonably narrow search terms that were not calculated to return responsive documents); McCargo v. Tex. Roadhouse, Inc., No. 09–cv–02889–WYD–KMT, 2011 WL 1638992, at *9 (D. Colo. May 2, 2011) (finding "willful and bad faith" conduct where defendant employee in possession of litigation hold notice knew video recordings would be overwritten and failed to act to preserve them).

87. *See* Micron Tech., Inc., v. Rambus, Inc., 645 F.3d 1311, 1326 (Fed. Cir. 2011) (explaining that the fundamental element of bad faith is "advantage-seeking behavior by the party with superior access to information"); *Goodman*, 632 F. Supp. 2d at 520 (citing Buckley v. Mukasey, 538 F.3d 306, 323 (4th Cir. 2008)) (describing intentional conduct that does not rise to the level of bad faith).

88. 269 F.R.D. 497 (D. Md. 2010).

89. *Victor Stanley*, 269 F.R.D. at 531. United States Magistrate Judge Paul Grimm described the defendants' actions in *Victor Stanley* as "the single most egregious example of spoliation that I have encountered in any case that I have handled or in any case described in the legion of spoliation cases I have read in nearly fourteen years on the bench." *Id.* at 515.

90. *E.g.*, Metro. Opera Ass'n. v. Local 100, Hotel Emps. & Rest. Emps. Int'l Union, 212 F.R.D. 178 (S.D.N.Y. 2003); *see also McCargo*, 2011 WL 1638992, at *9 (stating that bad faith "may not mean evil intent, but may simply signify responsibility and control").

91. *See In re* Hitachi Television Optical Block Cases, No. 08-cv-1746, 2011 WL 3563781, at *13 (S.D. Cal. Aug. 12, 2011) ("While all bad faith conduct is willful, not all willful acts are in bad faith."); *Victor Stanley*, 269 F.R.D. at 530 (recognizing the distinction between willful and bad faith conduct).

92. Williams v. N.Y. City Transit Auth., No. 10 CV 0882, 2011 WL 5024280 (E.D.N.Y. Oct. 19, 2011).

93. *See, e.g.*, Residential Funding Corp. v. DeGeorge Fin. Corp., 306 F.3d 99, 109 (2d Cir. 2002).

94. Federal Rule of Evidence 401, which provides an extremely broad definition, states that relevant evidence has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." FED. R. EVID. 401 (1974) (amended 2011).

95. *Residential Funding Corp.*, 306 F.3d at 108–09; *accord* Felman Prod., Inc. v. Indus. Risk Insurers,

compromised as a result of the lost evidence.[96] Even if evidence is destroyed intentionally, "if there is no prejudice to the opposing party, that influences the sanctions consequence."[97] Some circuits consider prejudice to the judicial system in addition to prejudice to an adversary.[98]

b. Rebuttable Presumptions

Once evidence is destroyed, it may only be possible to deduce its content from circumstantial evidence, or it may be impossible to know the content at all.[99] Placing the burden of proof on the allegedly prejudiced party may permit the spoliating party to "profit" from its destruction of evidence.[100] To rectify this potential unfairness, some jurisdictions presume the relevance and prejudice of evidence destroyed with a requisite level of culpability.[101] Any presumption is rebuttable by a showing that the moving party was not prejudiced—that is, that the lost evidence was merely cumulative or that it did not support the moving party's claims or defenses.[102]

No. 3:09–0481, 2011 WL 4547012, at *13 (S.D. W. Va. September 29, 2011) (stating that evidence is relevant when "a reasonable trier of fact could conclude that the lost evidence would have supported the claims or defenses of the party that sought it" (quoting *Victor Stanley*, 269 F.R.D. at 532)); Surowiec v. Capital Title Agency, Inc., 790 F. Supp. 2d 997, 1007–08 (D. Ariz. 2011) (stating that if "missing evidence would have helped the requesting party support its claims or defenses, that may be a sufficient showing [for] relevance" (quoting Rimkus Consulting Grp. v. Cammarata, 688 F. Supp. 2d 598, 616–17 (S.D. Tex. 2010))). Some courts suggest that if evidence is relevant for purposes of preservation, it is also relevant for purposes of awarding sanctions. *See, e.g.*, Victor v. Lawler, No. 3:08–CV–1374, 2011 WL 1884616, at *3 (M.D. Pa. May 18, 2011) (suggesting that sanctions are appropriate whenever evidence is destroyed after the duty to preserve attaches); *Surowiec*, 790 F. Supp. 2d at 1007–08 (discussing relevance and prejudice under the heading of the "scope of the duty to preserve"). By contrast, other courts require a higher showing of relevance, particularly where the sanction sought is more severe. *See, e.g.*, FTC v. Affiliate Strategies, Inc., No. 09–4104–JAR, 2011 WL 2084147, at *4 (May 24, 2011) (citing Zubulake v. UBS Warburg, L.L.C. (*Zubulake V*), 229 F.R.D. 422, 431 (S.D.N.Y. 2004)) (noting that some jurisdictions require proof that the lost evidence was "favorable" to the moving party before awarding a severe sanction); McGinnity v. Metro-North Commuter R.R., 183 F.R.D. 58, 62 (D. Conn. 1998) (citing Turner v. Hudson Transit Lines, Inc., 142 F.R.D. 68, 76 (S.D.N.Y. 1991)) (requiring a "nexus" between the lost evidence and any adverse inference sought).

96. *Victor Stanley*, 269 F.R.D. at 532 (citing Silvestri v. Gen. Motors Corp., 271 F.3d 583, 593–94 (4th Cir. 2001)). Other jurisdictions use language that indicates some stronger prejudice is necessary. For example, evidence may need to be "crucial" to a claim or defense, or it may need to have "substantially" denied a party the ability to present or defend a claim. *See, e.g.*, Managed Health Care Solutions, Inc. v. Essent Healthcare, Inc., 736 F. Supp. 2d 1317, 1323–24 (S.D. Fla. 2010) (requiring evidence to be crucial to proving case); *Rimkus*, 688 F. Supp. 2d at 612–13 (limiting discoverable evidence to that which supports a party's claims or defenses).

97. *Rimkus*, 688 F. Supp. 2d at 613.

98. *E.g.*, *Victor Stanley*, 269 F.R.D. at 532 (citing Krumwiede v. Brighton Assoc., L.L.C., No. 05 C 3003, 2006 WL 1308629, at *11 (N.D. Ill. May 6, 2010)).

99. *See* Kronisch v. United States, 150 F.3d 112, 127 (2d Cir. 1998) ("[I]n the absence of the destroyed evidence, we can only venture guesses with varying degrees of confidence as to what that missing evidence may have revealed.").

100. *Id.* at 128.

101. *See, e.g.*, Residential Funding Corp. v. DeGeorge Fin. Corp., 306 F.3d 99, 109 (2d Cir. 2002) (determining that satisfaction of culpable state of mind factor may be sufficient to permit an adverse inference). *But see Rimkus*, 688 F. Supp 2d at 616 (stating that requiring the moving party to prove relevance and prejudice provides an important check on spoliation allegations and motions).

102. Pension Comm. of Univ. of Montreal Pension Plan v. Banc of Am. Sec., L.L.C., 685 F. Supp. 2d

In the Second Circuit, if evidence is destroyed by at least gross negligence, the relevance of that evidence may be presumed.[103] The presumption is not mandatory when a party acted with gross negligence, but where a party acts with bad faith, that alone is sufficient circumstantial evidence to conclude that what was lost was unfavorable to the spoliating party.[104] If spoliation was done negligently, the moving party maintains the burden of proving relevance and prejudice.[105] In the Fourth Circuit,[106] Sixth Circuit,[107] and Seventh Circuit,[108] relevance or prejudice may be presumed if a party destroyed the evidence willfully. In the Eighth Circuit[109] and Eleventh Circuit,[110] evidence of bad faith destruction will support a presumption of prejudice. Other circuits continue to require the innocent party to prove relevance or prejudice.[111]

C. Remedies Available

Once the complaining party proves the elements necessary to show spoliation—duty to preserve, culpably destroyed relevant evidence, and prejudice from the loss—the court must decide what type of sanction is appropriate. Spoliation sanctions are meant to serve prophylactic, punitive, and remedial functions.[112] The goal is to restore

456, 468–69 (S.D.N.Y. 2010); *see also* E.I. du Pont de Nemours & Co. v. Kolon Indus., Inc., 803 F. Supp. 2d 469, 499 (E.D. Va. 2011) (finding that a presumption of relevance can only be rebutted by clear and convincing evidence that the lost documents were of little or minimal import); SEDONA CONFERENCE, *supra* note 28, at 72 (stating that destruction of duplicative or tangentially relevant information does not constitute prejudice).

103. *Residential Funding Corp.*, 306 F.3d at 109; *accord* Housing Rights Ctr. v. Sterling, No. CV 03-859 DSF, 2005 WL 3320739, at *8 (C.D. Cal. Mar. 2, 2005).

104. *Pension Comm.*, 685 F. Supp. 2d at 467; *see also Residential Funding Corp.*, 306 F.3d at 109 (stating that "a showing of gross negligence in the destruction or untimely production of evidence will in some circumstances suffice . . . to support a finding that the evidence was unfavorable to the grossly negligent party").

105. *Pension Comm.*, 685 F. Supp. 2d at 467–68.

106. *E.g.*, Sampson v. City of Cambridge, 251 F.R.D. 172, 179 (D. Md. 2008) (stating that intentional or willful failure to preserve establishes, without more, that the destroyed documents were relevant).

107. *E.g.*, Chrysler Realty Co. v. Design Forum Architects, Inc., No. 06-CV-11785, 2009 WL 5217992, at *5 (E.D. Mich. Dec. 31, 2009) (applying Michigan law).

108. *See In re* Kmart Corp., 371 B.R. 823, 853 (Bankr. N.D. Ill. 2007) (declining to allow a presumption of relevance or prejudice where the alleged spoliation was not done intentionally).

109. *See* E*Trade Sec., L.L.C. v. Deutsche Bank AG, 230 F.R.D. 582, 592 (D. Minn. 2005) (stating that the "substantial and complete" nature of destruction justified a finding of prejudice).

110. *Cf.* Se. Mech. Servs., Inc. v. Brody, 657 F. Supp. 2d 1293, 1299–1300 (M.D. Fla. 2009) (noting that although the Eleventh Circuit "has not set forth specific guidelines on the imposition of such sanctions," circumstances indicating bad faith generally permit an inference that the lost evidence was unfavorable to the destroying party).

111. The First Circuit requires the party seeking a sanction to prove that the destroying party knew of litigation and the document's relevance to litigation. *See* Booker v. Mass. Dept. of Pub. Health, 612 F.3d 34, 46 (1st Cir. 2010) (discussing the evidentiary foundation that must be shown at trial for a spoliation jury instruction). The Fifth Circuit requires a party to prove that the lost evidence was both relevant and prejudicial. *See* Rimkus Consulting Grp. v. Cammarata, 688 F. Supp. 2d 598, 617 (S.D. Tex. 2010) (suggesting even bad faith destruction of evidence would require the party moving for sanctions to prove the evidence would have been relevant).

112. GORELICK ET AL., *supra* note 2, § 3.15.

the prejudiced party to the position it would have been in had the evidence not been destroyed.[113] Sanctions should also punish spoliators and deter future destruction of evidence.[114] Courts agree that the severity of a sanction for failure to preserve must be proportionate to the culpability involved and the prejudice that results, and generally they should impose the least harsh sanction that will achieve the three functions.[115] Less harsh sanctions include cost-shifting or further discovery;[116] the most severe sanctions include claim dismissal or default judgment.[117]

One of the most commonly sought sanctions is an adverse inference jury instruction, a severe sanction that either requires or permits the jury to presume that the destroyed documents would have been unfavorable to the spoliating party.[118] The adverse inference instruction is based on the historical spoliation notion that destruction of evidence indicates a guilty conscience.[119] As a practical matter, imposition of an adverse inference may be "all but a declaration of victory" for the opposing party.[120] Jurisdictions are split as to the level of mental culpability or prejudice that warrants imposition of severe sanctions, including an adverse inference jury instruction.

In the Second Circuit, severe sanctions, including the adverse inference sanction, are available for negligent spoliation.[121] In an oft-quoted passage, United States Magistrate Judge James Francis explained:

> It makes little difference to the party victimized by the destruction of evidence whether that act was done willfully or negligently. The adverse inference provides the necessary evidentiary mechanism for restoring the evidentiary balance. The inference is *adverse* to the destroyer not because of any finding of moral culpability, but because the risk that the evidence would have been detrimental rather than favorable should fall to the party responsible for its loss.[122]

This rationale is consistent with the Second Circuit's characterization of the

113. West v. Goodyear Tire & Rubber Co., 167 F.3d 776, 779 (2d Cir. 1999); Victor Stanley, Inc. v. Creative Pipe, Inc., 269 F.R.D. 497, 534 (D. Md. 2010); Pension Comm. of Univ. of Montreal Pension Plan v. Banc of Am. Sec., L.L.C., 685 F. Supp. 2d 456, 469 (S.D.N.Y. 2010).

114. GORELICK ET AL., *supra* note 2, § 3.1.

115. *E.g.*, *Rimkus*, 688 F. Supp. 2d at 618 (S.D. Tex. 2010) ("[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." (citing Anderson v. Beatrice Foods Co., 900 F.2d 388, 395 (1st Cir. 2001))).

116. *Victor Stanley*, 269 F.R.D. at 536.

117. Silvestri v. Gen. Motors Corp., 271 F.3d 583, 593 (4th Cir. 2001).

118. *See Rimkus*, 688 F. Supp. 2d 618–19 (describing the adverse inference instruction as less severe than terminating sanctions, but "among the most severe sanctions a court can administer").

119. GORELICK ET AL., *supra* note 2, § 1.3; *see also* FTC v. Affiliate Strategies, Inc., No. 09-4104-JAR, 2011 WL 2084147, at *6 (D. Kan. May 24, 2011) (noting that the adverse inference "brands one party as a bad actor").

120. Jackson v. Harvard Univ., 721 F. Supp. 1397, 1412 (D. Mass. 1989); *see also* Morris v. Union Pac. R.R., 373 F.3d 896, 900–01 (8th Cir. 2004) (describing the adverse inference instruction as a "powerful tool" that invites jury speculation and that should be used cautiously as a sanction).

121. Pension Comm. of Univ. of Montreal Pension Plan v. Banc of Am. Sec., L.L.C., 685 F. Supp. 2d 456, 467–68 (S.D.N.Y. 2010).

122. Turner v. Hudson Transit Lines, Inc., 142 F.R.D. 68, 75 (S.D.N.Y. 1991) (Francis, J.). *See also* Residential Funding Corp. v. DeGeorge Fin. Corp., 306 F.3d 99, 108 (2d Cir. 2002) (adopting *Turner* standard).

standard of care required by the preservation duty. In *Zubulake V*, Judge Scheindlin explained, "[o]nce that [preservation] duty is made clear to a party, either by court order or by instructions from counsel, that party is on notice of its obligations and acts at its own peril."[123] These statements indicate that spoliation doctrine in the Second Circuit is based on a fair process theory.[124] The court sanctions the negligent spoliator because he created the risk that relevant evidence would be lost, which in turn deprived the adversary and the court of the fair opportunity to use the evidence in the judicial process.[125] The Sixth[126] and Ninth[127] Circuits appear to follow this rationale in permitting an adverse inference instruction to be imposed for negligent spoliation.

By contrast, in the First[128] and Fourth[129] Circuits, the court may only impose an adverse inference instruction if it finds that the spoliating party acted willfully. Moreover, in the Third,[130] Fifth, [131] Seventh,[132] Eighth,[133] Tenth,[134] and Eleventh[135]

123. Zubulake v. UBS Warburg, L.L.C. (*Zubulake V*), 229 F.R.D. 422, 436 (S.D.N.Y. 2004).

124. See *supra* notes 8–10 and accompanying text for a description of the fair process theory.

125. *See Residential Funding Corp.*, 306 F.3d at 108 (finding the adverse inference instruction appropriate in some cases of negligent spoliation because "each party should bear the risk of its own negligence").

126. *See* Beaven v. U.S. Dept. of Justice, 622 F.3d 540, 555 (6th Cir. 2010) (finding the district court did not abuse its discretion in imposing a nonrebuttable adverse inference where Defendants negligently destroyed a folder that was critical to Plaintiff's ability to prove its claim); Rogers v. T.J. Samson Cmty. Hosp., 276 F.3d 228, 232 (6th Cir. 2002) (quoting Welsh v. United States, 844 F.2d 1239, 1248 (6th Cir. 1988)) (stating that an adverse inference is appropriate when a party is unable to prove an essential element of its case due to the opposing party's negligent spoliation).

127. Lewis v. Ryan, 261 F.R.D. 513, 521 (S.D. Cal. 2009) (citing *Residential Funding Corp.*, 306 F.3d at 108) (stating that California courts have adopted the Second Circuit's standards for imposing an adverse inference, under which the requisite culpability includes negligence); *see also* Glover v. BIC Corp., 6 F.3d 1318, 1329 (9th Cir. 1993) (finding bad faith is not a prerequisite to the court's broad discretionary power to impose an adverse inference instruction).

128. *See* Booker v. Mass. Dept. of Pub. Health, 612 F.3d 34, 45 (1st Cir. 2010) (describing an evidentiary threshold for the adverse inference that includes the spoliator's knowledge of the adversary's claim and the destroyed document's relevance).

129. E.I. du Pont de Nemours v. Kolon Indus. Inc., 803 F. Supp. 2d 469, 499 (E.D. Va. 2011) (citing Vodusek v. Bayliner Marine Corp., 71 F.3d 148, 156 (4th Cir. 1995)) (stating that an adverse inference instruction requires a bad faith or a finding of willful destruction of relevant evidence).

130. *See* Bull v. United Parcel Serv., Inc., 665 F.3d 68, 77 (3d. Cir. 2012) (finding that the district court abused its discretion when it determined plaintiff committed sanctionable spoliation where the record revealed no evidence of bad faith).

131. *See* Vick v. Tex. Emp't Comm'n, 514 F.2d 734, 737 (5th Cir. 1975) ("The adverse inference to be drawn from destruction of records is predicated on bad conduct of the defendant."); Rimkus Consulting Grp. v. Cammarata, 688 F. Supp. 2d 598, 614 (S.D. Tex. 2010) (stating that severe sanctions, including an adverse inference, may not be imposed unless there is evidence of bad faith).

132. *See* Faas v. Sears, Roebuck & Co., 532 F.3d 633, 644 (7th Cir. 2008) (quoting Park v. City of Chicago, 297 F.3d 606, 615 (7th Cir. 2002)) (requiring bad faith to support an adverse inference instruction and stating that the critical element is the reason for destruction).

133. *See* Estate of Seaman ex rel. Seaman v. Hacker Hauling, No. C10–4094–MWB, 2011 WL 6938346, at *5–8 (N.D. Iowa Oct. 18, 2011) (reviewing the development of Eighth Circuit law on the circumstances under which spoliation sanctions are appropriate); Bootheel Ethanol Investments, L.L.C. v. SEMO Ethanol Co-op., 1:08-CV-59 SNLJ, 2011 WL 4549626, at *4 (E.D. Mo. Sept. 30, 2011) (citing Mentz v. New Holland N. Am., Inc., 440 F.3d 1002, 1006 (8th Cir. 2006)) (finding an adverse inference instruction appropriate where evidence indicated party destroyed a computer in bad faith).

Circuits, the sanction of adverse inference is not available absent a showing of bad faith on the part of the spoliator. These courts reason that an adverse inference is only warranted by intentional conduct, because negligent destruction does not demonstrate consciousness of guilt or a weak case.[136] The focus on intentionality in these courts indicates that their spoliation doctrine is premised upon a consciousness of guilt theory.[137]

Finally, some circuits (including courts that generally require intentionality) are willing to impose severe sanctions, including an adverse inference or dismissal, on the alternate justification of severe prejudice to the innocent party, even if culpability is minimal.[138] The justification here is that the aggrieved party is irreparably prejudiced; that is, the loss of evidence has substantially denied the party the ability to defend the claim.[139]

D. Unanticipated Consequences

As evidenced above, there is a lack of consistency across jurisdictions with regard to the precise trigger of the preservation obligation, the precise acts a party must perform to meet its preservation obligation, the culpability that will attach to specific failures to act, and the severity of sanction that levels of culpability will incur. As a result, litigants, especially large institutions and organizations that regularly litigate across jurisdictions, are left with uncertainty about "how to conduct themselves in a way that will comply with multiple, inconsistent standards."[140] Some courts have attempted to quell the confusion surrounding spoliation sanctions by emphasizing that reasonableness and proportionality should be at the forefront of all inquiries into

134. Turner v. Pub. Serv. Co. of Colo., 563 F.3d 1136, 1149 (10th Cir. 2009) (citing Aramburu v. Boeing Co., 112 F.3d 1398, 1407 (10th Cir. 1997)) (holding that an aggrieved party seeking an adverse inference must prove bad faith, because negligence does not support an inference of consciousness of a weak case).

135. *See* Bashir v. Amtrak, 119 F.3d 929, 931 (11th Cir. 1997) (stating the adverse inference instruction is predicated on bad faith conduct); Denim N. Am. Holdings, L.L.C. v. Swift Textiles, L.L.C., 816 F. Supp. 2d 1308, 1329 (M.D. Ga. 2011) (finding an adverse inference would not be appropriate where plaintiff's routine deletion of emails did not amount to bad faith).

136. *See, e.g.*, *Rimkus*, 688 F. Supp. 2d at 615–16 (requiring a party establish that destroyed evidence was relevant to a claim or defense to receive an adverse inference instruction); Vodusek v. Bayliner Marine Corp., 71 F.3d 148, 156 (4th Cir. 1995) ("An adverse inference about a party's consciousness of the weakness of his case . . . cannot be drawn merely from his negligent loss or destruction of evidence.").

137. See *supra* notes 5–7 and accompanying text for a discussion of the consciousness of guilt theory.

138. *E.g.*, Silvestri v. Gen. Motors Corp., 271 F.3d 583, 593 (4th Cir. 2001).

139. *Id.* The First and courts in the Ninth Circuits appear to follow this rationale. *See, e.g.*, Trull v. Volkswagen of Am., Inc., 187 F.3d 88, 95–96 (1st Cir. 1999) (recognizing that egregious, bad faith conduct is not the sole ground for the most severe sanctions); Erlandson v. Ford Motor Co., No. 08-CV-1137-BR, 2009 WL 3672898, at *6 (D. Or. Oct. 30, 2009) (permitting sanction of dismissal where plaintiff's willful destruction of a vehicle left the defendant with no adequate substitute to evaluate and defend the personal injury claim). The Third Circuit, which balances the degree of fault and prejudice, implicitly does as well. *See, e.g.*, Schmid v. Milwaukee Elec. Tool Corp., 13 F.3d 76, 79 (3d Cir. 1994) (laying out a standard that asks, in part, "whether there is a lesser sanction that will avoid substantial unfairness to the opposing party").

140. Victor Stanley, Inc. v. Creative Pipe, Inc., 269 F.R.D. 497, 532 (D. Md. 2010).

whether a party has fulfilled its discovery obligations.[141] At the same time, however, the frequency of motions for sanctions for spoliation of evidence has increased, generating additional costs and concerns for litigants, lawyers, and the judiciary.[142]

1. Frequency of Spoliation Issues

A recent study found that motions for sanctions based on spoliation of evidence are not a "common" form of sanctions motion.[143] They account for an estimated five percent of motions for discovery sanctions in civil cases.[144] Since the 2006 Amendments to the Federal Rules of Civil Procedure, however, there has been a rapid increase in the number of cases involving e-discovery sanctions generally,[145] and failure to preserve is the most common sanctionable conduct.[146] It is also likely that allegations of spoliation are raised between parties more frequently than the issue is actually litigated.[147] Statistics also suggest that cases involving spoliation allegations are among the most contentious[148] and correlate with a much higher likelihood of ending at trial than the average civil case.[149]

2. Costs to Litigants

Although the statistics suggest the likelihood is small that spoliation sanctions will arise in litigation, the potential severity of those sanctions may be sufficient to drive private behavior.[150] Organizational litigants may be concerned with the reputational cost associated with mere allegations of spoliation.[151] Courts have begun to recognize that fear of sanctions, coupled with uncertain legal standards, may lead parties to make inefficient choices about preservation.[152] United States Magistrate Judge (and now

141. *E.g.*, *id.* at 523; *Rimkus*, 688 F. Supp. 2d. at 607.

142. *See generally* Dan H. Willoughby, Jr. et al, *Sanctions for E-Discovery Violations: By the Numbers*, 60 DUKE L.J. 789 (2010).

143. EMERY G. LEE III, FED. JUDICIAL CTR., MOTIONS FOR SANCTIONS BASED UPON SPOLIATION OF EVIDENCE IN CIVIL CASES: REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES 4 (2011).

144. *Id.* This figure is extrapolated from a study of eight sample districts. *Id.*

145. *See* Willoughby et al., *supra* note 142, at 794 (stating that there were more cases involving e-discovery sanctions in 2009 than in all years prior to 2005 combined).

146. *Id.* at 805.

147. LEE, *supra* note 143, at 5.

148. *See id.* (speculating that low settlement rate in spoliation cases is attributable to animosity among the litigants).

149. *See id.* (stating that spoliation cases terminate in trial 16.5% of the time, as compared to 0.6% of civil cases generally). Lee suggests that spoliation motions could represent a kind of strategy. *Id.* If that is accurate, the uncertainty of this area of law creates a battleground on which contentious parties may shed their bad blood.

150. *See id.* at 5–6 (suggesting that fear of severe sanctions might lead parties to overpreserve ESI, even where the probability of those sanctions is relatively small).

151. *See* WILLIAM H.J. HUBBARD, PRELIMINARY REPORT ON THE PRESERVATION COSTS: SURVEY OF MAJOR COMPANIES 14 (2011) (explaining parties' reluctance to risk spoliation sanctions despite their statistical unlikelihood).

152. *See* Rimkus Consulting Grp. v. Cammarata, 688 F. Supp. 2d 598, 607 (S.D. Tex. 2010) ("The frequency of spoliation allegations may lead to decisions about preservation based more on fear of potential

District Court Judge) Paul Grimm aptly described the problem:

> How then do such corporations develop preservation policies? The only "safe" way to do so is to design one that complies with the most demanding requirements of the toughest court to have spoken on the issue, despite the fact that the highest standard may impose burdens and expenses that are far greater than what is required in most other jurisdictions in which they do business or conduct activities.[153]

Organizational and corporate litigants are basing preservation decisions on the very real risk of receiving sanctions unless extremely extensive preservation is done.[154] Some companies are redesigning their information management systems to be more responsive to litigation, rather than business demands.[155]

The costs of capturing and segregating information for litigation, and then ultimately reviewing that information for relevance, are real and burdensome. For example, a corporate general counsel recently estimated that, of the company's 200,000 employees, ten percent were under a litigation hold, with the company saving approximately twenty terabytes of data.[156] To put that figure into perspective, a single terabyte of disk space could hold approximately five hundred million pages of plain text.[157] That same general counsel provided an illustration of preservation efforts on a single matter, for which litigation was anticipated, but not actually pending. The company spends $100,000 per month to identify, segregate, and preserve data, and total costs exceeded $5 million, not including the cost of human effort in identifying and clarifying the "key players" in the dispute.[158]

While corporate and organizational litigants—parties most likely to be involved in the largest and most expensive cases—bear a disproportionate amount of litigation costs generally,[159] the rules related to spoliation sanctions affect sophisticated and unsophisticated parties alike.[160] For each dispute over electronically stored information,

future sanctions than on the reasonable need for information.").

153. Victor Stanley, Inc. v. Creative Pipe, Inc., 269 F.R.D. 497, 532 (D. Md. 2010); *see also* Grimm et al., *supra* note 52, at 396 ("Counsel faced with determining the scope of the pre-litigation duty to preserve cannot know which discovery standard will subsequently apply. While prudence may suggest application of the broader standard, doing so may unnecessarily increase the cost of preservation of ESI.").

154. Meeting Notes, Mini-Conference on Preservation and Sanctions for the Discovery Subcommittee of the Advisory Committee on Civil Rules 4 (Sept. 9, 2011), http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/DallasMiniConf_Materials/Notes%20from%20the%20Mini-Conference%20on%20Preservation%20and%20Sanctions.pdf.

155. *Id.* at 2.

156. *Id.*

157. Gregory D. Shelton, *Don't Let the Terabyte You: New E-Discovery Amendments to the Federal Rules of Civil Procedure*, 73 DEF. COUNS. J. 324, 324 (2006). *But see* Craig Ball, *The Page Equivalency Myth*, L. TECH. NEWS, (Aug. 1, 2007), http://www.law.com/jsp/lawtechnologynews/PubArticleLTN.jsp?id=1202435505290&slreturn=20120813184717 (explaining that a reliable estimation of page equivalency requires consideration of the quantity and form of the data—for example, images as opposed to plain text).

158. Meeting Notes, *supra* note 154, at 2; *see also* HUBBARD, *supra* note 151, at 13 (stating that preservation costs are largely borne in-house by the client and are extremely difficult to quantify).

159. *See* HUBBARD, *supra* note 151, at 6–7 (explaining the "long tail" phenomenon associated with litigation costs).

160. LEE, *supra* note 143, at 7.

a party's litigation costs increase by ten percent—for both plaintiffs and defendants.[161]

3. Costs to the Judicial System

At the same time, the debate over spoliation sanctions strains the judicial system. Allegations of spoliation arise in all types of civil suits.[162] When spoliation is litigated, it detracts from the merits of the case by increasing motions practice.[163] Increased motions practice crowds the docket of the courts and delays the resolution of disputes.[164] The court's limited resources are drained "by having to wade through voluminous filings, hold lengthy hearings, and then spend dozens, if not hundreds, of hours painstakingly setting forth the underlying facts before turning to a legal analysis that is multi-factored and involved."[165] Sanctions, if they are ultimately imposed, do nothing to redress the opportunity cost of deciding the spoliation motion instead of the merits of the case.[166] Because of the inefficiencies resulting from the lack of clarity about spoliation sanctions, a more consistent approach is desirable.

IV. RECONCEPTUALIZING SPOLIATION THROUGH TORT PRINCIPLES AND POLICIES

Although spoliation doctrine has its roots in the law of evidence, this Comment suggests that contemporary spoliation doctrine may benefit from examining the law of torts. Tort law balances the conflicting interests of parties in light of the social and economic interests of society in general. Tort liability provides redress for "injuries"—unjustified invasions into the legally protected interests of others. This Section explores the justifications and bases for imposing tort liability, and draws out themes, rationales, and policy determinations that may ultimately inform a discussion about sanctions for spoliation of evidence. This is not to suggest that specific tort rules be adopted into spoliation doctrine, but rather that tort law may serve as a familiar lens through which we examine and organize the competing interests at play in spoliation doctrine. There are several good reasons for doing this.

First, as discussed above, courts are using tort definitions to define the levels of culpability with which documents are destroyed, but thus far those terms generally have been divorced from the body of law where they originate.[167] A more complete

161. EMERY G. LEE III & THOMAS E. WILLGING, FED. JUDICIAL CTR., LITIGATION COSTS IN CIVIL CASES: MULTIVARIATE ANALYSIS: REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES 5, 7 (2010).

162. *See* LEE, *supra* note 143, at 6–7 (providing a statistical distribution of the nature of suits involving spoliation sanctions).

163. Willoughby et al., *supra* note 142, at 793.

164. *See, e.g.*, Victor Stanley, Inc. v. Creative Pipe, Inc., 269 F.R.D. 497, 532 (D. Md. 2010) (describing the procedural delays resulting from motions for discovery sanctions); Pension Comm. of Univ. of Montreal Pension Plan v. Banc of Am. Sec., L.L.C., 685 F. Supp. 2d 456, 471 n.56 (S.D.N.Y. 2010) (noting that resolution of the spoliation motion took more than three hundred hours on the part of Judge Scheindlin and her clerks).

165. *Victor Stanley*, 269 F.R.D. at 527.

166. *Id.*

167. See *infra* notes 309–15 and accompanying text for a discussion of the degrees of culpability in the tort context, and *supra* notes 73–91 and accompanying text for a discussion of the application of these terms in the spoliation context.

understanding of how these partially adopted concepts function in the tort context will increase their utility in the spoliation context. The policies that motivated the terms' original development in torts reflect concerns that are becoming increasingly relevant to the spoliation of electronically stored evidence.[168]

Second, while the rules of evidence and procedure—which underlie current spoliation doctrine—seek to achieve fairness, efficiency, and truth in the judicial system, tort law injects more explicit consideration of the social utility of conduct.[169] The tort system seeks to discourage unreasonable interference with the legally protected interests of others. [170] Fundamentally, spoliation is an interference with the opposing party's interest in proving or defending its claim and the court's interest in fairly adjudicating disputes.[171] But if spoliation doctrine is restricted to its evidentiary roots—that is, if we limit the scope of our perspective to the specific dispute or even to the judicial system—we fail to account for the very real and burdensome impact spoliation doctrine can have on individuals' and organizations' primary behavior.[172] Tort policies incorporate that broader community perspective.[173] This suggests that tort concepts may be useful in determining how to encourage reasonable behavior toward preservation of evidence, and how to compensate parties for information lost as the result of a failure to preserve.

Finally, the history of tort law suggests that its policies may be particularly useful in guiding the progress of spoliation doctrine. Modern tort doctrine developed in response to the Industrial Revolution.[174] Common law that had developed for centuries suddenly faced new challenges in light of technological advances that simultaneously improved the quality of life and had a "marvelous capacity for smashing the human body."[175] The tort system had to adapt to encourage the growth and use of industrial technology while protecting individuals from its inherent dangers.[176]

This is precisely analogous to the circumstances that surround the current information revolution: until recently, the spoliation rules served our ends in a world where evidence primarily existed tangibly and was generally available unless it was affirmatively destroyed. But the information revolution has given us new technologies

168. See *infra* note 315 and accompanying text for an explanation of tort law's rejection of degrees of culpability due to the confusion they created, and *supra* notes 80–82 and 90–91 for examples of confusion resulting from attempts to apply these vague standards in spoliation cases.

169. Although social utility is most closely aligned with the economic deterrence theory of tort law, it is implicated in corrective justice as well through the normative judgments that determine what conduct is "wrongful" or injurious toward another. See *infra* Part IV.A.1 for a discussion of these two theories.

170. KEETON ET AL., *supra* note 73, § 1, at 3.

171. Indeed, a minority of jurisdictions recognize spoliation as an independent tort. *See generally* GORELICK ET AL., *supra* note 2, § 4.3.

172. See *supra* Part III.B.2 for a discussion of the unanticipated consequences for litigants and the judicial system as the result of uncertain and inconsistent spoliation doctrine.

173. *See* KEETON ET AL., *supra* note 73, § 1, at 5–6 (discussing the social foundations of tort law).

174. See *infra* note 282 and accompanying text for a discussion of the impact of the Industrial Revolution on the development of modern tort law.

175. LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 467 (2d ed. 1985).

176. *See* Lawrence M. Friedman & Jack Ladinsky, *Social Change and the Law of Industrial Accidents*, 67 COLUM. L. REV. 50, 51–52 (1967) (discussing the law's responsiveness to new injuries sustained during rapid industrial development).

with a marvelous capacity to create and destroy evidence.[177] Spoliation doctrine must adapt and recognize the immense social utility in the electronic storage of information, while still protecting individual litigants from the potential dangers of its use. With the benefit of hindsight, we can evaluate the policies used by the tort system in achieving desirable behavior under these new circumstances.

A. Identifying a Unified Theory

1. Two Theories of Tort Liability

There are two basic theories about the purpose of tort law: one focuses on a rights-based understanding of justice and the other focuses on an economic-based understanding of deterrence.[178] And like the theories behind spoliation, these tort theories are sometimes compatible and sometimes in tension.[179]

The first theory justifies tort liability in terms of individual rights and correlative duties.[180] This theory is often connected to the traditional moral foundation of tort law.[181] A tort, quite literally, is a "wrong."[182] In a sense, tort law is about defining conduct that is "wrongfully injurious" toward another person, such that the wrongdoer is required to compensate the injured person.[183] This theory is supported by the idea that "the most flagrant wrongs" were, historically, the first to receive redress.[184] While early common law was willing to hold defendants liable for even accidental injuries, on the basis that the invasion of another's interest was wrongful, gradually the law rejected the idea of imposing liability for injuries resulting from pure accident.[185]

177. See *supra* notes 30–31 and accompanying text for a discussion of the rapidly increasing volume of information and accompanying risks of destruction.

178. Gary T. Schwartz, *Mixed Theories of Tort Law: Affirming Both Deterrence and Corrective Justice*, 75 TEX. L. REV. 1801, 1801 (1997). *See generally* JULES COLEMAN, RISKS AND WRONGS (1992) (explaining the tort system in terms of wrongful acts); WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF TORT LAW (1987) (proffering the most well-known economic analysis of tort law, which emphasizes deterrence through optimization of costs related to accidents). This Part summarizes and simplifies these theories, about which there is voluminous, nuanced commentary. *See generally* John C.P. Goldberg, *Twentieth-Century Tort Theory*, 91 GEO. L.J. 513 (2003) (breaking down each theory into further subdivisions and analyzing their relationships).

179. Schwartz, *supra* note 178, at 1829–32 (explaining both theories and advocating an understanding that incorporates both); *see also* Jeffrey J. Rachlinski, *Misunderstanding Ability, Misallocating Responsibility*, 68 BROOK. L. REV. 1055, 1059 (2003) (explaining that "the two basic purposes of tort law coincide often enough that courts rarely find it necessary to delineate tort law's purposes with greater precision").

180. Mark A. Geistfeld, *The Principle of Misalignment: Duty, Damages, and the Nature of Tort Liability*, 121 YALE L.J. 142, 180 (2011).

181. KEETON ET AL., *supra* note 73, § 4, at 21–22; *see also* Stephen R. Perry, *The Moral Foundations of Tort Law*, 77 IOWA L. REV. 449, 449–50 (1992) (collecting and summarizing arguments that justify tort law based on individual moral rights).

182. *See* Goldberg, *supra* note 178, at 516 (discussing the medieval definition of the term).

183. John C.P. Goldberg & Benjamin C. Zipursky, *Torts as Wrongs*, 88 TEX. L. REV. 917, 919 (2010); *see also* Goldberg, *supra* note 178, at 563–64 (stating that torts generally seem to empower victims of "wrongdoing to seek redress for those wrongs").

184. KEETON ET AL., *supra* note 73, § 4, at 21.

185. *See* RESTATEMENT (SECOND) OF TORTS § 8 (1965) (defining "unavoidable accident" as harm that is not caused by any tortious act of the person whose conduct is questioned). The obvious exception to this is

Literature draws an important distinction between "legal wrongs" and "moral wrongs."[186] Over centuries, the law has used custom and public opinion to crystallize individual rights and privileges—in essence, defining legally "wrongful" acts.[187] Our modern common law continues to determine liability in part based on the wrongful character of the defendant's conduct and its interference with the plaintiff. From the perspective of this theory, which is based on the loosely defined term "corrective justice," the goal of the torts system is "achieving right"—vindicating moral interest through a structure that considers agent-relative reasons for compensation.[188]

By contrast, another theory views tort law as a system for deterring future injurious acts, thereby reducing the costs to society as a whole, by developing rules that incentivize actors to either take precautions or avoid dangerous activity altogether.[189] This view originated in Holmes's writings on torts, and particularly Holmes's view that law was continually moving away from moral standards and toward objective, external standards.[190] Once an actor assesses risk, "action is taken at the actor's own peril."[191] Imposing liability encourages deterrence of future tortious actions by forcing actors to internalize the costs associated with those actions.[192] On this view, tort law is seen to "promote efficiency in the sense of minimizing the sum of expected damages and costs of care."[193] Tort law, on this view, is concerned with "losses" instead of "wrongs," and with crafting rules that allocate costs associated with losses such that society as a whole makes the most efficient use of resources.[194]

These perspectives have competed as tort law has developed, from the late nineteenth century when theorists demanded there be no liability without "fault" involving personal blame, to the twentieth century when defendants began to be held liable "for well-intentioned and entirely reasonable conduct, because it is considered to be good social policy that their enterprises should pay their way by bearing the loss they inflict."[195] Both theories remain vital in the ongoing academic and doctrinal

strict liability, which is imposed regardless of fault. See *infra* Part IV.B.3 for a discussion of strict liability.

186. *See* Goldberg & Zipursky, *supra* note 183, at 930 (explaining that the adjective "legal" identifies a kind of wrong that is distinct and bears only resemblance to a genuine "wrong").

187. KEETON ET AL., *supra* note 73, § 5, at 27. See Goldberg & Zipursky, *supra* note 183, at 947–53, for an interesting analysis that attempts to recapture an understanding of torts as "wrongs." Goldberg and Zipursky invoke the ideas of H.L.A. Hart to describe rules of conduct as resulting from entrenched social practices. *Id.* at 948. Certain families of social practices result in duty-imposing rules resulting from either moral or legal directives, which bear similarities. *Id.* at 949. A tort, then, is a legal wrong in that it violates a rule of conduct imposed by a legal directive. *Id.* at 949–51.

188. Matthew S. O'Connell, *Correcting Corrective Justice: Unscrambling the Mixed Conception of Tort Law*, 85 GEO. L.J. 1717, 1717–18, 1728–29 (1997); *see also* Goldberg, *supra* note 178, at 570–78 (describing and critiquing the corrective justice argument).

189. *See* Goldberg, *supra* note 178, at 544–53.

190. O.W. HOLMES, JR., THE COMMON LAW 38 (1881).

191. KEETON ET AL., *supra* note 73, § 4, at 21.

192. Goldberg, *supra* note 178, at 545.

193. William Powers, Jr., *On Positive Theories of Tort Law*, 66 TEX. L. REV. 191, 191 (1987) (reviewing LANDES & POSNER, *supra* note 178).

194. Goldberg, *supra* note 178, at 545.

195. KEETON ET AL., *supra* note 73, § 4, at 22.

development of tort law.[196]

2. Justifying Sanctions for Spoliation: Competing Theories

As previously suggested, the spoliation cases can be understood to reflect the sometimes-competing theories of consciousness of guilt and fairness of process.[197] I now suggest that the dual theories behind spoliation doctrine parallel the dual perspectives on tort law. This comparison illustrates what I perceive to be the source of tension within spoliation doctrine. In the tort context, corrective justice and economic deterrence represent "two major camps" of thought that have indirectly influenced the development of the common law.[198] The division among circuits on spoliation issues demonstrates that similar "camps" are forming based on comparable normative attitudes about what spoliation doctrine should achieve. Recognizing this division will be a crucial step toward creating a coherent, intelligible doctrine of spoliation in the twenty-first century.[199]

a. Consciousness of Guilt and Corrective Justice

The consciousness of guilt theory[200] represents a kind of corrective justice[201] in the spoliation context. Where sanctions are justified based on the spoliator's consciousness of guilt, the destructive act is understood as a wrong perpetrated by the spoliator. From this perspective, the imposition of a sanction vindicates the interests of the party who lost the evidence based on the agent-relative determination that the destroyer acted to protect his own interest and, therefore, should bear the costs associated with the loss instead of the innocent party.[202] This is consistent with an understanding of tort liability as a form of redress for the actor's wrongful conduct. Even the maxim "all things are presumed against the wrongdoer" implies that a sanction serves this same corrective function: it is invoked in response to the wrongful act of destruction, with the purpose of "achieving right" by levying some burden on the destroyer that benefits the opposing party.[203] The adverse inference, for example,

196. *See* G. Edward White, *The Unexpected Persistence of Negligence, 1980–2000*, 54 VAND. L. REV. 1337, 1355 (2001) (describing the correlation between the development of case law and both efficiency-based economic perspectives on tort law and corrective justice perspectives); *cf.* Goldberg, *supra* note 178, at 579 (concluding that theory is an important part of practical judgment and decision making).

197. See *supra* notes 3–10 and accompanying text for a discussion of the two underlying theories that justify spoliation doctrine.

198. Schwartz, *supra* note 178, at 1801.

199. *Cf.* Goldberg, *supra* note 178, at 580–81 (explaining that what we want from judges in the tort context is a consistent, coherent set of rules and principles, and arguing that "for that to happen . . . judges must have some sense that that is what they are doing—they need to see themselves as part of an undertaking that aspires toward intelligibility and coherence").

200. See *supra* notes 3–7 and accompanying text for a discussion of the consciousness of guilt theory.

201. See *supra* notes 180–88 and accompanying text for a summary of a corrective justice theory of tort.

202. See *supra* note 7 and accompanying text for an account of spoliation as a kind of cheating that requires judicial correction.

203. See *supra* note 188 and accompanying text for a discussion of "achieving right" as a goal of the tort system.

"defeats the wrongdoer" by inverting the legal consequence of a lack of evidence.[204] In the absence of a sanction, the opposing party could not establish facts to support its claims or defenses. The adverse inference corrects this state of affairs by permitting a presumption that the evidence would have supported those claims or defenses.[205] But, importantly, the justification is that the spoliator's destructive act was wrongful and thus warrants certain "inevitable conclusions" about his behavior.[206]

b. Fairness of Process and Allocation of Losses

By contrast, the fair process theory[207] represents a deterrence-based allocation of losses[208] in the spoliation context. This perspective emphasizes that a "correct verdict is one that results from a fair process," and the destruction of evidence prevents fair process by creating inequities between the parties in their access to relevant evidence.[209] The cost of the destruction is not only the resulting hardship on the opposing party to prove their claims or defenses, but also the cost to the judicial system as a whole.[210] The sanction serves to rectify those inequities by reallocating the cost to the destroying party by assessing monetary costs, additional discovery, an adverse inference, etc.[211] The idea is that the spoliating party is in the best position to guard against the loss of evidence in its possession; therefore, it should internalize the total cost related to any loss.[212] By injecting the sanction into the party's analysis of the costs and benefits of destroying evidence, we deter future spoliation by incentivizing more thorough preservation.[213] The sanction is not justified based on the wrongful character of the spoliator's act, but rather on rules that allocate the costs of lost evidence in a manner that promotes the efficiency and fairness of the judicial process.[214]

3. Choosing a Theory

As mentioned previously, these theories—in both the tort and spoliation

204. Pomeroy v. Benton, 77 Mo. 64, 86 (1882).

205. See *supra* notes 118–20 and accompanying text for a description of the adverse inference.

206. GORELICK ET AL., *supra* note 2, § 1.3.

207. See *supra* notes 8–10 and accompanying text for a discussion of the fair process theory.

208. See *supra* notes 189–94 and accompanying text for a discussion of deterrence through allocation of losses in the tort context.

209. GORELICK ET AL., *supra* note 2, § 2.3.

210. *See* Pension Comm. of Univ. of Montreal Pension Plan v. Banc of Am. Sec., L.L.C., 685 F. Supp. 2d 456, 461–62 (S.D.N.Y. 2010) (stating that, when adequate preservation does not happen, "the integrity of the judicial process is harmed and courts are required to fashion a remedy").

211. See *supra* notes 116–17 for a discussion of the remedies available for spoliation.

212. See *supra* note 122 and accompanying text for Judge Francis's justification for redistributing the risk of detrimental evidence to the party responsible for the loss.

213. *See Pension Comm.*, 685 F. Supp. 2d at 469 (explaining that sanctions should deter future spoliation).

214. *See* Turner v. Hudson Transit Lines, Inc., 142 F.R.D. 68, 75 (S.D.N.Y. 1991) (specifically stating that the adverse inference is not applied due to spoliator's moral culpability). See *supra* note 194 and accompanying text for a discussion of the notion, under deterrence theory, that tort law crafts rules that address the efficiency of broader social conduct.

contexts—are not necessarily mutually exclusive. Spoliation can subvert the fairness of judicial proceedings and also evidence consciousness of guilt,[215] just as tort law can remedy wrongful conduct and produce efficiency.[216] To the extent that these conditions align, a sanction or liability may be imposed based on either theory, with the same result. The problem is that, while the theories may at times be compatible, they often "entail opposing interpretations and prescriptions."[217] Because the spoliation theories differ in the value they place on the wrongfulness of the actor's conduct, they will diverge—and lead to divergent results—as the actor's culpability decreases. This is evidenced by the split among circuits on the issue of the level of culpability required to justify severe sanctions.[218]

The approach of the Fourth and Fifth Circuits, and the courts that follow them, appear to align most closely with a consciousness of guilt theory. Where the "wrongful" element is missing—where the spoliating party acted without intent—a severe sanction does not attach.[219] The sanction, therefore, serves to "correct" wrongful conduct.

The approach of the Second Circuit, and the courts that follow it, appears to follow a fair process theory. As Judge Francis said, the sanction restores the evidentiary balance.[220] In essence, these circuits shift the costs associated with lost evidence to the party who was in the best position to prevent its loss. This is justified, as Judge Scheindlin said, because the party aware of its preservation duty "acts at its own peril."[221] The party failing to accurately analyze the risks and benefits of properly preserving evidence is, thus, made to internalize the costs associated with the consequence of that action.[222] Further, these courts appear to embrace a deterrence rationale—they craft and present rules that evidence an intent to control discovery behavior broadly beyond the dispute at bar.[223]

215. GORELICK ET AL., *supra* note 2, § 2.3.

216. See *supra* note 179 for a list of scholars arguing that both tort theories can practically coexist.

217. Goldberg, *supra* note 178, at 580 (discussing tort theory and noting specifically that "[a] corrective justice theorist's account of what the legal concept of fault means, or the function it performs, is quite different from—and sometimes incompatible in application with—the account of fault offered by the interpretive economist").

218. See *supra* Part III.C for a discussion of the various circuit requirements for imposition of severe sanctions.

219. See *supra* notes 128–36 and accompanying text for a list of jurisdictions requiring intentional conduct before severe sanctions attach.

220. See *supra* note 122 and accompanying text for Judge Francis's characterization of the adverse inference.

221. Zubulake v. UBS Warburg, L.L.C. (*Zubulake V*), 229 F.R.D. 422, 436 (S.D.N.Y. 2004).

222. *See id.* at 436–37 (finding that defendant willfully spoliated and ordering that the jury be given an adverse inference and that the defendant pay the costs of any necessary depositions or redepositions and the instant motion).

223. *See, e.g.*, Pension Comm. of Univ. of Montreal Pension Plan v. Banc of Am. Sec., L.L.C., 685 F. Supp. 2d 456, 461–62 (S.D.N.Y. 2010) (discussing litigants' duties generally and noting that "'[t]hose who cannot remember the past are condemned to repeat it.' By now, it should be abundantly clear that the duty to preserve means what it says and that a failure to preserve records—paper or electronic—and to search in the right places for those records, will inevitably result in the spoliation of evidence." (alteration in original) (footnote omitted) (quoting 1 GEORGE SANTAYANA, *Reason in Common Sense*, *in* THE LIFE OF REASON 1, 82 (Prometheus Books 1998) (1905))).

To the extent that spoliation cases are decided by judges with fundamentally inconsistent notions about the goals of spoliation sanctions, we will continue to see inconsistency rather than cohesiveness in spoliation rules and principles.[224] It appears, then, if achieving consistency in spoliation doctrine is desired, that we must also find a coherent theory for when and how to impose sanctions.[225]

The next obvious question is how to choose between them. Some inspiration can be drawn here from the tort context. There is no reason to think that either theory is inherently superior to the other; in fact, neither theory (in either context) has been explicitly adopted by a court. Rather, these theories are best seen as analytical tools. As such, they should be evaluated in terms of how useful they are for organizing our knowledge.[226] To make that determination, it is appropriate to examine how they operate in specific applications. That is the task of the following Part.

B. Identifying Sanctionable Conduct: Three Approaches

As discussed in Part IV.A above, in considering whether to impose sanctions, the court's current focus is on the culpability of the spoliating party and the prejudice to the opposing party.[227] I propose that these terms be seen as representative of each party's interests. Culpability and prejudice, if they are present, exist in relationship to the parties' shared circumstances—that is, the facts relating to their relationship and the particular dispute that gave rise to the litigation. It makes little sense to evaluate culpability and prejudice in isolation, because their existence is relative.

Rather than analyzing culpability and prejudice separately as two of three distinct elements required to be proved, I suggest that the court should balance these interests in light of the interest of society in general, by using one of the three approaches described below. I discuss each potential approach through the lens of the three bases for tort liability: intent, negligence, and strict liability. The goal of this Part is to provide a structure to the balancing process that will help courts determine which facts should be relevant and will promote consistency.

1. Intent

One possible approach to balancing interests would be to sanction a party who intentionally destroys relevant evidence. This approach requires an understanding of what constitutes an intentional act and the specific factors that make an intentional act sanctionable. As discussed below, courts have explored these issues in determining when liability should attach to intentional acts that cause physical injury. From their

224. *Cf.* Goldberg, *supra* note 178, at 580 (suggesting that judicial adherence to pluralistic tort theories "give[s] up on the idea of law," and calling instead for legal coherence, "a demand rooted in elemental notions of fairness, predictability, and efficacy").

225. *See id.* (suggesting that judges, rather than adhering to divergent theories, should strive toward rendering decisions that "form and reform a relatively coherent collection of rules and principles").

226. *Cf.* Powers, *supra* note 193, at 202–03 (explaining that there would be reason to prefer an economic analysis of tort law if it proved to be useful to organizing our knowledge about the law).

227. See *supra* note 28 and accompanying text for a thorough discussion of the elements a moving party must prove before sanctions will be imposed. The first element is establishing that the preservation duty has attached.

analysis emerge two important considerations that prove crucial to this balancing approach in the spoliation context: certainty of consequences and justification for actions.

a. Tort Liability for Intentional Acts

i. Defining Intent

Tort law imposes liability for certain intentional acts that result in injury. Intent is one of the fundamental, organizing concepts of law, and one of the easiest to misunderstand.[228] Intent is a state of mind about the consequences of an act or omission, done with the purpose and belief that specific consequences will, or are substantially certain to, result.[229] Prosser describes the misunderstanding regarding intent as a muddling of the relationship between act, intent, and motive.[230] Intent is concerned with the actual consequences of an act or omission, while motive is concerned with the more remote reasons for desiring those consequences.[231] While a malevolent motive may tip the balance in an ultimate determination of liability, a desire to do harm is not necessary or sufficient to a finding of intent.[232] Rather, tortious intent is concerned with a desire to bring about results that invade another person's legally protected interests.[233] An actor intends not only the specific consequence he bears in mind at the time he acts, but all the consequences that are substantially certain to result from the act.[234]

ii. Distinguishing Intent from Negligence

It is on this last point that an intentional act is distinguished from a negligent one. To act intentionally, an actor must have more than a knowledge and appreciation for the risk that certain consequences could result—those consequences must be at least substantially certain.[235] Where the danger of harm is less than a substantial certainty, and is merely a foreseeable risk that a reasonable person would avoid, the actor's conduct is negligent.[236]

228. KEETON ET AL., *supra* note 73, § 8, at 33; Anthony J. Sebok, *Purpose, Belief, and Recklessness: Pruning the* Restatement (Third)*'s Definition of Intent*, 54 VAND. L. REV. 1165, 1165–68 (2001).

229. RESTATEMENT (SECOND) OF TORTS § 8A (1965); *id* § 8A cmt. b.

230. KEETON ET AL., *supra* note 73, § 8, at 34.

231. *Id.* at 35.

232. *See id.* (noting that a justifiable motive may preclude liability for intentional acts).

233. *Id.* at 36; *see also* James Gordley, *The Common Law in the Twentieth Century: Some Unfinished Business*, 88 CALIF. L. REV. 1815, 1838–44 (2000) (tracing the development of theoretical thought behind tortious intent, from Sir Frederick Pollock through Prosser).

234. RESTATEMENT (SECOND) OF TORTS § 8A cmt. b (1965).

235. *Id.*; KEETON ET AL., *supra* note 73, § 8, at 34; *e.g.*, Harn v. Cont'l Lumber Co., 506 N.W.2d 91, 95 (S.D. 1993) ("To establish intentional conduct, more than the knowledge and appreciation of risk is necessary. The known danger must cease to become only a foreseeable risk which an ordinary, reasonable, prudent person would avoid (ordinary negligence) and become a substantial certainty.").

236. KEETON ET AL., *supra* note 73, § 8, at 36; *see also* Oliver Wendell Holmes, Jr., *Privilege, Malice, and Intent*, 8 HARV. L. REV. 1, 1 (1894) (explaining that when the harm that occurs was greatly probable, we say it was done intentionally, but where the probability is only considerable, we say it was done negligently).

That difference may seem like shades of gray, but the distinction is crucial. While all torts represent a balancing of the interests of the parties in light of the interests of society as a whole, the balancing is accomplished in different ways. For negligence and strict liability, the balancing is accomplished in a single step, through the creation and application of a single standard of care.[237] For intentional torts, the balancing of interests is accomplished through a two-step process that evaluates the tortious act in light of any privilege of the actor.[238] The elements of the tort and the established privileges are determined over time by legal rules.[239] Determination of liability for intentional acts requires an application of rules, which have built in the balanced interests of the parties and society.[240] Whether and when infliction of injury is justified will depend on "considerations of policy and of social advantage."[241] The injured party is protected by the existence of the tort and the defendant is protected by the available privileges.[242]

iii. Prima Facie Tort

A general theory of liability for intentionally caused injury can be found in a discussion of the "prima facie tort."[243] The *Restatement (Second) of Torts* describes the general principle behind liability for intended consequences thus: "One who intentionally causes injury to another is subject to liability to the other for that injury, if his conduct is generally culpable and not justifiable under the circumstances."[244] This statement reflects the dual nature of the interest-balancing test for intentional torts.[245] The actor's conduct must wrongfully cause an injury and be unjustifiable under the circumstances.[246] The comment to the Restatement explains that the evaluative process breaks down into four factors: "(1) the nature and seriousness of the harm to the injured party, (2) the nature and significance of the interests promoted by the actor's conduct,

237. RESTATEMENT (SECOND) OF TORTS § 870 cmt. c (1979).

238. *Id.*

239. *Id.*

240. *Id.*; *see also* KEETON ET AL., *supra* note 73, § 5, at 27 (explaining that, through the gradual development of law as informed by custom and public opinion, rights and privileges of parties have become legal standards).

241. Vegelahn v. Guntner, 44 N.E. 1077, 1080 (1896) (Holmes, J., dissenting).

242. *Cf. id.* ("[I]n numberless instances the law warrants the intentional infliction of temporal damage, because it regards it as justified.").

243. *See generally* Kenneth J. Vandevelde, *A History of Prima Facie Tort: The Origins of a General Theory of Intentional Tort*, 19 HOFSTRA L. REV. 447 (1990). The prima facie tort is most closely associated with Justice Holmes, *id.* at 449–50, who stated, "[i]t has been considered that, *prima facie*, the intentional infliction of temporal damage is a cause of action, which, as a matter of substantive law, whatever may be the form of pleading, requires a justification if the defendant is to escape," Aikens v. Wisconsin, 195 U.S. 194, 204 (1904).

244. RESTATEMENT (SECOND) OF TORTS § 870 (1979).

245. See *supra* notes 238–42 and accompanying text for an explanation of the two-step process for balancing the interests of the actor and society in intentional torts.

246. RESTATEMENT (SECOND) OF TORTS § 870 cmt. e (1979); *see also* Note, *The Prima Facie Tort Doctrine*, 52 COLUM. L. REV. 503, 507–08 (1952) (explaining that the intent element is easily met because intent to cause injury is not a requirement, and therefore, the issue of justification plays a large role).

(3) the character of the means used by the actor and (4) the actor's motive."[247] These factors combine into a single determination about the balancing of interests.[248]

The severity of the harm inflicted and the importance of the interests at stake weigh heavily in the balancing process.[249] In established intentional torts, for example, physical harm weighs more heavily than emotional harm, because some emotional harm is expected in a social world with many free individuals.[250]

The interests promoted by the actor have become the basis for established privileges at common law.[251] Justifying the actor's conduct requires weighing public and private interests.[252] The greater importance of the actor's interests—to himself and to society—the more justified his conduct.[253] Justification can be measured by a subjective or objective standard.[254] Objectively, even if the actor does not act with a specific purpose in mind, the importance of the interest promoted may justify the conduct.[255] Subjectively, if the actor's motive is to harm the injured party, that factor becomes very important to a determination of liability.[256] Historically, there was some disagreement over whether a malevolent motive could render an otherwise lawful act tortious.[257] In discussing the general theory of intentional tort, Holmes emphasized that the actor's malevolent motive was relevant to a determination of whether the conduct was justified rather than the substantial certainty of the consequences of an act.[258]

The foreseeability of harm, then, is measured by an objective test, while the justification for the actor's conduct is measured in part by his subjective state of mind.[259] Malice—rather than being the far end of a continuum on which lies intentionality, negligence, and accident—measures a separate dimension of the actor's conduct.[260] Prosser more or less echoes this, stating that the defendant's state of mind becomes an important factor in balancing interests, especially where "the rights and privileges of the parties are not fixed by definite rule but are interdependent and

247. RESTATEMENT (SECOND) OF TORTS § 870 cmt. e (1979).

248. *Id.*

249. *Id.* § 870 cmt. f.

250. *Id.*; *see also* Kenneth Vandevelde, *The Modern Prima Facie Tort Doctrine*, 79 KY. L.J. 519, 536 (1991) (explaining that whether to recognize the putative plaintiff's injury as legally cognizable is one of the most important policy choices courts confront in applying this doctrine).

251. RESTATEMENT (SECOND) OF TORTS § 870 cmt. g (1979).

252. Vandevelde, *supra* note 250, at 529; Note, *supra* note 246, at 509 ("The interests of the parties and that of society form the matrix out of which the decision is rendered.").

253. RESTATEMENT (SECOND) OF TORTS § 870 cmt. g (1979) ("The importance of these interests to the owner and to society is a significant factor in the balancing process.").

254. Vandevelde, *supra* note 250, at 531.

255. RESTATEMENT (SECOND) OF TORTS § 870 cmt. g (1979).

256. *Id.* § 870 cmt. h; Note, *supra* note 246, at 509–10 ("Where a defendant acts from pure spite, gratification of his ill will being the major benefit sought, any damage the plaintiff suffers looms large in the scales."); *see also* Vandevelde, *supra* note 250, at 532 (noting that the prima facie tort has been both criticized and defended on the ground that it makes evil motive actionable).

257. KEETON ET AL., *supra* note 73, § 4, at 21.

258. Vandevelde, *supra* note 243, at 474 (citing Holmes, *supra* note 236, at 2–6).

259. *Id.* at 475.

260. *See id.* at 474–75 (explaining Holmes's shift from a purely objective standard in *The Common Law*, to one that at least recognized the subjective element of malice in *Privilege, Malice, and Intent*).

relative."[261] The defendant's liability, then, depends on the weight of both the certainty of the resulting injury and the actor's state of mind at the time the injury was inflicted.

b. Sanctioning Intentional Spoliation

This discussion illustrates how we might control spoliation by focusing on intentionally destructive acts. The court could sanction a party who intentionally destroys relevant evidence, if the destruction is generally culpable and not justified under the circumstances. This approach would involve a two-step balancing process, akin to the determination of liability for intentional torts.[262] The interests of the adversary are protected through the availability of the sanction and the interests of the actor are protected through the availability of justifications.[263]

i. Defining Intentional Spoliation

A definition of "intent" based on substantial certainty of consequences should supplant the definition of "willfulness" currently used in spoliation doctrine—a definition that includes "intentional, reckless, or purposeful" conduct done in the face of a risk that is "highly likely" to result in harm.[264] The latter definition is too indistinct, and therefore invites inconsistent application.[265] Where the consequence of the actor's conduct is less than a substantial certainty, the actor is not acting intentionally.[266]

In the spoliation context, a party acts intentionally where, at the time of destruction, the loss of relevant evidence is substantially certain to result from the party's act or failure to act. While this looks similar to the standard already being applied,[267] it differs in important ways. First, this definition looks at whether the destruction of *relevant* evidence was substantially certain. What makes intentionality culpable is the desire to bring about results *that invade the legally protected interests* of another. If the destroyed evidence is not relevant, the adversary's legally protected interests have not been invaded. Importantly, the certainty of loss is measured at the time of destruction. This timing element takes account of the imprecise nature of the trigger and scope of the preservation obligation. Where the nature of reasonably anticipated litigation is poorly defined, the loss of relevant evidence will not be substantially certain because what is "relevant" will not be substantially certain at the time of destruction.

261. KEETON ET AL., *supra* note 73, § 5, at 28.

262. See *supra* notes 238–42 and accompanying text for a discussion of the two-step balancing approach incorporated into intentional tort liability rules.

263. See *supra* notes 240–42 for an explanation of these concepts in the tort context.

264. See *supra* Part III.B.2.d for a discussion of the definition of willfulness as applied to spoliation sanctions.

265. See *infra* note 315 for a list of commentaries explaining the difficulty applying a willfulness standard in tort law.

266. See *supra* notes 235–36 and accompanying text for an explanation of the substantial certainty requirement for tortious intent.

267. See *supra* notes 84–86 and accompanying text for examples of how the "willful" standard has been applied to destruction of evidence.

Second, the focus on intentionality, as it is defined here, shifts consideration of the spoliator's "bad faith" from the characterization of the act itself to any potential justification for the actor's destruction. This shift, consistent with Holmes's analysis in the tort law context, recognizes the important distinction between the spoliator's intent and his motive.[268] The spoliation cases currently either treat bad faith as tantamount to willful conduct,[269] or treat bad faith as willful conduct done for the purpose (motive) of depriving the adversary of access to the evidence.[270] But the adversary's legally protected interest in having access to relevant evidence is invaded whenever the spoliator acts (or fails to act) to preserve, with knowledge that the relevant evidence is substantially certain to be destroyed. This is true regardless of the reasons for which the party destroys, or fails to preserve, the evidence. Bad faith is not a manner of destruction; it is a reason for destruction. Therefore, consideration of the spoliator's bad faith is appropriately transferred to consideration of any potential justifications for the destructive act.

ii. Factors to Consider

The factors to consider under this approach, then, reflect the factors that make up the prima facie tort, and include: (1) the nature of the lost evidence and the degree to which its absence impairs the adversary's ability to establish its claims or defenses, (2) the nature and significance of the interests promoted by the destruction, (3) the character of the means by which the evidence was destroyed, and (4) the destroying party's motive.[271] No single factor is dispositive, but rather they all function to balance the interests of the parties in light of societal interests.

The first factor essentially evaluates the prejudice to the adversary, and this factor weighs heavily.[272] The second factor considers the reason the evidence was destroyed in a global sense: was the cost of preserving the evidence disproportionate to the value of the anticipated litigation or was the preservation of the evidence impairing the efficient business practices of the party?[273] Similarly, the third factor considers the manner in which the evidence was lost: was it actively deleted by an individual employee who was under a litigation hold? Was it automatically deleted through the party's information management system? Finally, the fourth factor considers the motive of the destroying party. Where the party acted with bad faith—with the purpose to deprive the adversary of evidence—this factor should weigh heavily.[274]

268. See *supra* 260–61 and accompanying text for Holmes's distinction between malice and intent, and Prosser's supporting commentary.

269. See *supra* note 90 for a list of cases supporting this proposition.

270. See *supra* note 87 for a list of cases employing this definition.

271. See *supra* note 247 and accompanying text for a discussion of the factors that make up the prima facie tort.

272. See *supra* notes 249–50 and accompanying text for a description of weight given to severity of harm in the tort context.

273. See *supra* notes 251–56 and accompanying text for a discussion of the interests promoted by an actor's conduct and how they factor into liability analysis.

274. See *supra* notes 259–61 for a discussion of the relevance of an actor's bad faith in determining tort liability.

iii. Relationship to Current Spoliation Doctrine

This approach fits most closely with current spoliation doctrine. It retains and incorporates the existing requirements of relevance and prejudice, and similarly gives great weight to the destroying party's bad faith.[275] However, this approach reorganizes and refines the current analysis. It defines intent in terms of certainty of consequences, segregating the issue of the actor's reason for destruction. This definition enables more straightforward application, because it measures a single dimension of the actor's conduct. The current definition of "willful," by contrast, muddles the actor's intent and motive. This approach also shifts the context in which the court considers a document's relevance from the time of the motion for sanctions to the time of destruction. This is a crucial distinction, because relevance is not an inherent quality in any document—relevance increases and decreases as parties develop their legal theories and litigation strategies. A document holder must make preservation decisions before those theories and strategies are apparent. While some hindsight bias may be inevitable, the court should make every effort to evaluate a document's relevance at the time it was destroyed. A party's preservation conduct must only be sanctionable where the loss of relevant evidence was substantially certain at the time of destruction.

For example, consider the situation where litigation is reasonably anticipated, but a complaint has not been filed. Counsel issues a litigation hold explaining the subject of anticipated litigation, and describing what it believes to be relevant information. Based on the information in the hold notice, an employee moves what she believes to be relevant emails to a folder designated by the company's counsel. The employee regularly deletes emails not in the folder, because her company limits the permissible size of her mailbox, and deleted emails are purged from the system every seven days. Subsequent to the filing of a complaint, it becomes apparent that a deleted email would have been relevant. The employee has intentionally deleted the email, because it was substantially certain that the email would be purged, but this is not sanctionable spoliation, because the relevance of the email was not known at the time of destruction.

The example makes clear that this approach gives some assurance to parties that, even if documents are intentionally destroyed, the reasons for destruction may provide some justification for the otherwise-culpable act. This is not the same as providing a carte blanche excuse for failing to adequately preserve evidence. A party's malevolent motive, or its willful blindness to facts indicating documents' relevance, would be important considerations in determining whether sanctions are appropriate. Rather, this approach supplies what is missing from the current spoliation analysis—assurance that the reasons for the party's choices will be considered, and that specific acts or failures will not demonstrate culpability per se.[276]

2. Negligence

A second balancing approach would be to sanction a party who destroys evidence

275. See *supra* notes 92–93 and accompanying text for a discussion of the existing requirements of relevance and prejudice, and *supra* notes 87–88 and accompanying text for a discussion of bad faith spoliation.

276. See *supra* note 80 and accompanying text for a list of acts that amount to gross negligence per se under Judge Scheindlin's definition.

negligently. Here, tort law is useful for elucidating key elements in the analysis of negligent conduct: unreasonable risk and reasonable care. Like spoliation doctrine, tort law has also grappled with how to allocate burdens of proof where the alleged wrongful act has created a disparity in knowledge between the parties. Drawing from the experience of tort law with these issues, it is clear that the importance and difficulty of measuring risk creates a challenge to applying this balancing approach to the spoliation context.

a. Tort liability for Negligence

i. Negligence Defined

In contrast to intentionality, negligence is conduct that falls below the standard established by law for the protection of others against unreasonable risk of harm.[277] Negligent conduct includes an *act* that a reasonable person would recognize creates an unreasonable risk toward another, and also a *failure to act* for the protection or assistance of another, where the actor is under a duty to do so.[278] Prior to the development of modern tort law, negligence was a state of mind indicating carelessness or inadvertence—it was a manner in which another tort could be committed.[279] In the early nineteenth century, however, negligence came to be understood as conduct, which formed an independent basis for liability.[280] Its earliest applications were to breaches of duties owed as a result of special relationships, such as innkeepers to guests or common carriers to passengers.[281] The real rise of negligence as an independent tort is typically associated with the Industrial Revolution—when the number of accidental injuries increased with the proliferation of industrial machinery and the railways, and negligence developed to provide a remedy for injuries incurred through accidental conduct.[282]

ii. Unreasonable Risk

Negligence is concerned with risk and the conduct taken in the face of risk. Risk

277. RESTATEMENT (SECOND) OF TORTS § 282 (1965); *see also* KEETON, *supra* note 73, § 31, at 170 (explaining that the standard is one of "conduct, rather than of consequences").

278. RESTATEMENT (SECOND) OF TORTS § 284 (1965). A negligent omission is distinct from nonfeasance—that is, a failure to act when the actor owes no duty to the other party. *See* Price v. E.I. DuPont de Nemours & Co., 26 A.3d 162, 171 (Del. 2011) (discussing the distinction between misfeasance and nonfeasance). The former is a basis for liability, but the latter is not actionable. *See generally* Jean Elting Rowe & Theodore Silver, *The Jurisprudence of Action and Inaction in the Law of Tort: Solving the Puzzle*, 33 DUQ. L. REV. 807, 824–48 (1995) (explaining the "paradox" of negligent omissions and unactionable nonfeasance, and their development in twentieth-century tort law).

279. KEETON ET AL., *supra* note 73, § 28, at 160–61.

280. *Id.*

281. *Id.* at 161.

282. *Id.*; *see also* Friedman & Ladinsky, *supra* note 176, at 51–53 (explaining the development of tort law in response to industrial accidents). *But see* Robert J. Kaczorowski, *The Common-Law Background of Nineteenth-Century Tort Law*, 51 OHIO ST. L.J. 1127, 1127–29 (1990) (providing a "corrective" view, arguing that tort rules, principles, and policies have remained relatively consistent and did not change sharply in the nineteenth century).

is danger of injury that is, or should be, apparent to a person in the actor's position.[283] While all human acts bear some risk of harm to others, tort liability is imposed for acts that create an unreasonable risk.[284] This means that the risk must be recognizable and of a character that a reasonable person would guard against.[285] A risk is recognizable to the actor if a reasonable person, similarly equipped and situated, would also recognize the risk.[286] According to the Restatement, to recognize a risk an actor must know "the qualities and habits of human beings" as well as "the common law, legislative enactments, and general customs in so far as they are likely to affect the conduct of the other or third persons."[287] Additionally, when the potential consequences of a recognizable risk are severe, then precautions must be taken to guard against them, even though they may be unlikely.[288] The risk is to be measured at the time the alleged negligent conduct occurred.[289]

We discuss measuring risk in terms of a balancing test.[290] Risk becomes unreasonable where its magnitude outweighs the utility of the act or the manner in which it was done.[291] Because tort law is concerned with the balancing of interests in light of benefits to society as a whole, the law considers the social value of the interest advanced, and the extent to which the interest is advanced by *this* conduct as opposed to some alternative, less dangerous, course of action.[292] For example, inconvenience or cost may justify taking small risks, but not extreme ones.[293] Calculating risk becomes especially complicated where the actor's conduct in the face of a recognizable risk serves an interest that is socially valuable.[294] Unsurprisingly, the calculus of risk is the

283. KEETON ET AL., *supra* note 73, § 31, at 170.

284. *Id.*

285. *See id.* (explaining that no person can be expected to guard against a risk that is so unlikely, it would commonly be disregarded); David W. Barnes & Rosemary McCool, *Reasonable Care in Tort Law: The Duty to Take Corrective Precautions*, 36 ARIZ. L. REV. 357, 379–80 (1994) (stating that the duty to use reasonable care is traditionally limited to circumstances where a reasonable person would recognize risks).

286. RESTATEMENT (SECOND) OF TORTS § 289 (1965).

287. *Id.* § 290; *see also* Rachlinski, *supra* note 179, at 1068–71 (discussing the role that human cognitive abilities play in defining the reasonableness of conduct in the face of risk).

288. RESTATEMENT (SECOND) OF TORTS § 290 (1965).

289. KEETON ET AL., *supra* note 73, § 31, at 170 ("It is not enough that everyone can see now that the risk was great, if it was not apparent when the conduct occurred.").

290. The calculus of risk is exemplified by Judge Learned Hand's formula, first expressed in *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947). According to the Hand rule, a person is only negligent where the probability (P) of and gravity (L) of injury outweighs the burden of precaution (B)—in other words, where $B < P \times L$. Richard W. Wright, *Negligence in the Courts: Introduction and Commentary*, 77 CHI.-KENT L. REV. 425, 425–26 (2002).

291. RESTATEMENT (SECOND) OF TORTS § 291 (1965).

292. *Id.* § 292; KEETON ET AL., *supra* note 73, § 31, at 173 (stating that it "is fundamental that the standard of conduct which is the basis of the law of negligence is usually determined with a risk-benefit form of analysis").

293. KEETON ET AL., *supra* note 73, § 31, at 173; *see also* Ehud Guttel, *The (Hidden) Risk of Opportunistic Precautions*, 93 VA. L. REV. 1389, 1400 (2007) ("Where the cost of a precaution is lower than its expected benefit in reducing the harm and no alternative, less costly prevention measure exists, a party's failure to invest in the precaution is considered unreasonable behavior.").

294. *See* Guttel, *supra* note 293, at 1400–06 (discussing inefficiencies that may result from imposing liability based on a party's untaken precautions).

topic of voluminous theoretical literature.[295] As a practical matter, the mathematical nature of the calculation often gives way to a discussion of whether behavior taken in the face of risk is "reasonable."[296]

iii. Reasonable Care

In the face of unreasonable risk, the failure to exercise reasonable care may result in liability. Negligence carries with it the idea of "social fault."[297] The whole theory of negligence presupposes some uniform standard of behavior agreed upon by society.[298] The standard of care for a given situation may be set by legislative or administrative act, by judicial decision, or through application by a fact-finder.[299] In situations that frequently recur, it may be possible to create fairly definite rules about how a party should conduct itself; this is when judicial determination is appropriate.[300] Regardless of how the standard is determined, the touchstone is the conduct of a reasonable person in like circumstances.[301]

In this way, the standard of "reasonable care" already incorporates the balanced interests of the parties and society.[302] This is in contrast to intentional torts, which balance interests by comparing the wrongful act and justifications in the specific circumstances; a determination of negligence is simply an application of the standard of reasonable care.[303] Care that is "reasonable" under the circumstances is care that recognizes and accounts for the actor's own interests as well as the interests of others and society at large.[304] No separate consideration of reasons for the actor's conduct in the circumstances is appropriate or necessary.

In determining the relevant standard of care in particular circumstances, custom plays a nebulous role. Evidence of custom informs an analysis of the risks of a situation

295. *See generally* Goldberg, *supra* note 178, at 544–60 (collecting and summarizing economic deterrence theories of tort law, closely aligned with risk-utility analysis).

296. Richard W. Wright, *Hand, Posner, and the Myth of the "Hand Formula"*, 4 THEORETICAL INQUIRIES L. 145, 151–53 (2003) (noting that the Hand Formula is rarely cited and few courts explicitly or implicitly use a risk-utility analysis in determining liability). *See generally* Stephen G. Gilles, *The Invisible Hand Formula*, 80 VA. L. REV. 1015 (1994) (noting that juries are typically instructed to use a reasonable person standard rather than the Hand formula and discussing how the two standards differ).

297. RESTATEMENT (SECOND) OF TORTS § 282 cmt. f (1965).

298. KEETON ET AL., *supra* note 73, § 32, at 173.

299. RESTATEMENT (SECOND) OF TORTS § 285 (1965).

300. *Id.*

301. *Id.* § 283.

302. Rachlinski, *supra* note 179, at 1066 (explaining that the contours and nature of risks that the reasonable person would take are determined by "collective intuition about appropriate behavior").

303. See *supra* note 237 and accompanying text for a discussion of the single-step balancing of interests in negligence liability.

304. Rachlinski, *supra* note 179, at 1064 (stating that the reasonable person standard "converts the esoteric and intractable distinction between reasonable and unreasonable risks into a comprehensible, intuitive inquiry"); Ronald K.L. Collins, *Language, History and the Legal Process: A Profile of the "Reasonable Man,"* 8 RUTGERS L.J. 311, 314 (1977) (citing Osborne M. Reynolds, Jr., *The Reasonable Man of Negligence Law: A Health Report on the "Odious Creature,"* 23 OKLA. L. REV. 410, 414 (1970)) (describing the reasonable person as a "child of a certain social necessity" that reflects both the consistent and changing elements of society's expectations of behavior).

and the precautions that should be taken to meet them.[305] There is a common sense notion that acting in conformity with what is typically done is compliance with reasonable behavior.[306] Customs pose a challenge, however, because the ordinary course of action may become unreasonable in light of a single material fact in a given situation.[307] Some customs are the result of habit or routine, while others are the result of "cost-paring and corner-cutting" that is associated with negligence.[308]

Because the standard of care is determined by the conduct of a reasonable man in like circumstances, the actor's care must increase to be commensurate with the risk of injury.[309] As the circumstances become more dangerous, reasonable care requires greater precautions.[310] Understood this way, it is clear there is a single degree of care (reasonable care), and failure to meet it amounts to negligence.[311] An older approach, ultimately rejected, held that more dangerous situations required a higher "degree" of care; and conduct that deviated from the standard would be proportionally considered a greater "degree" of negligence.[312] These degrees included slight negligence, gross negligence, and willful, wanton, or reckless conduct.[313] Ultimately, with the exception of recklessness,[314] common law rejected these distinctions because they were vague

305. RESTATEMENT (SECOND) OF TORTS § 295A (1965); *see also* Gideon Parchomovsky & Alex Stein, *Torts and Innovation*, 107 MICH. L. REV. 285, 291 (2008) (stating that a defendant's failure to comply with industry customs is evidence that defendant acted negligently).

306. Kenneth S. Abraham, *Custom, Noncustomary Practice, and Negligence*, 109 COLUM. L. REV. 1784, 1798 (2009) (suggesting that customary practice is probative of reasonable conduct because of (1) the authority accompanying widespread agreement, (2) the connection to individuals' actual practice, and (3) the "moral intuition" that it is unfair to punish someone for something everyone does).

307. KEETON ET AL., *supra* note 73, § 33, at 194.

308. *Id.*; *see also* Abraham, *supra* note 306, at 1800–01 (explaining that some customs are merely conventions while others are information-cost reducing practices, adopted to avoid investing the time or money to find a safer or more reasonable precaution).

309. KEETON ET AL., *supra* note 73, § 34, at 208.

310. *Id.*; Geistfeld, *supra* note 180, at 152 (describing the proportionality between the dutyholder's precautionary burden and the risk of injury). Geistfeld notes that application of the standard of care requires normative judgments about the conflicting interests in costs and threatened injury. *Id.* at 152–53. This becomes salient because the ultimate remedy is associated with the magnitude of loss in an individual case, while the standard of care is determined by the foreseeability of injuries as a category. *Id.* at 153. The result is an open question "whether the legal valuation of loss . . . which is applicable to all similarly situated actors, must equal (or be an unbiased estimator of) the amount of damages in a particular case." *Id.*

311. KEETON ET AL., *supra* note 73, § 34, at 209.

312. *Id.* at 209–10.

313. *Id.* at 210–12.

314. RESTATEMENT (SECOND) OF TORTS § 282 (1965). The Restatement explains:

> As the disproportion between risk and utility increases, there enters into the actor's conduct a degree of culpability which approaches and finally becomes indistinguishable from that which is shown by conduct intended to invade similar interests. Therefore, where this disproportion is great, there is a marked tendency to give the conduct a legal effect closely analogous to that given conduct which is intended to cause the resulting harm.

Id. § 282 cmt. e. In particular, the Restatement recognizes that recklessness has remained as a useful standard in particular circumstances, for example, in determining punitive damages or determining liability under a statute. *Id.* § 500. Although recklessness maintains an important role in modern tort law, it still lacks clear judicial interpretation and application. *See generally* Geoffrey Christopher Rapp, *The Wreckage of Recklessness*, 86 WASH. U. L. REV. 111 (2008).

and impracticable, and had great potential to create confusion about what conduct was required.[315]

iv. Proving Negligence: *Res Ipsa Loquitur*

In certain cases where the plaintiff's burden of proving negligence can only be met by circumstantial evidence, the doctrine of *res ipsa loquitur* applies. From the Latin for "the thing itself speaks," the doctrine permits a rebuttable presumption of negligence if the plaintiff proves specific prerequisites.[316] According to the Restatement, *res ipsa loquitur* only applies when (1) the event is of a kind that ordinarily does not occur in the absence of negligence, (2) other responsible causes, including the plaintiff's own conduct, are sufficiently eliminated by the evidence, and (3) the indicated negligence is within the scope of the defendant's duty to the plaintiff.[317]

Even prior to the early common law application of *res ipsa loquitur*,[318] English courts articulated evidentiary rules of presumptive negligence in cases where there was a risk of injustice resulting from an "information gap" between the plaintiff and defendant.[319] For example, a plaintiff injured in a stagecoach accident needed only to prove that the coach had overturned, and the owner's negligence would be implied.[320] The English court employed this evidentiary presumption to prevent a negligent defendant, who likely knew how the accident occurred, from blocking an innocent plaintiff from obtaining evidence to support his claim.[321]

In the development of modern tort law, the application of *res ipsa loquitur* represents an "intermediate zone" between a negligence standard that may otherwise deny relief to plaintiffs who lack sufficient proof of their claims, and a strict liability

315. KEETON ET AL., *supra* note 73, § 34, at 210; *see also* Holland v. Florida, 130 S. Ct 2549, 2567 (2010) (Alito, J., concurring) ("[I]t has aptly been said that gross negligence is ordinary negligence with a vituperative epithet added."); Edwin H. Byrd III, *Reflections on Willful, Wanton, Reckless, and Gross Negligence*, 48 LA. L. REV. 1383, 1394–95 (1988) (describing that in various jurisdictions gross negligence may equate to recklessness, and elsewhere recklessness may equate to willfulness); Rapp, *supra* note 314, at 116–17 (noting that the "spectrum" of negligence to intentionality has never been clearly defined and variously refers to morality, cost avoidance, or consequences).

316. The precise procedural effect of *res ipsa loquitur* is itself the subject of some confusion across jurisdictions. RESTATEMENT (SECOND) OF TORTS § 328D cmt. a (1965); *see also* G. Gregg Webb, *The Law of Falling Objects:* Byrne v. Boadle *and the Birth of Res Ipsa Loquitur*, 59 STAN. L. REV. 1065, 1066 (2007) (describing the accepted interpretations of *res ipsa loquitur* to include a permissible inference of negligence, a rebuttable presumption of negligence, and an affirmative shift in the burden of proof).

317. RESTATEMENT (SECOND) OF TORTS § 328D (1965). Other formulations state that the doctrine applies only where (1) the defendant had exclusive control over the thing causing injury, (2) the accident would not ordinarily occur absent defendant's negligence, and (3) the plaintiff exercised due care. *See, e.g.*, Escola v. Coca Cola, 24 Cal. 2d 453, 457–58 (1944) (explaining the circumstances under which *res ipsa loquitur* doctrine applies).

318. The first use of the phrase *res ipsa loquitur* is commonly thought to be in Byrne v. Boadle, (1863) 159 Eng. Rep. 299 (Exch.); 2 H. & C. 722, where it was employed in favor of a plaintiff who had been injured by a barrel of flour that fell from defendant's second-story storeroom. Webb, *supra* note 316, at 1067.

319. Webb, *supra* note 316, at 1086.

320. *Id.*

321. *Id.*

standard that would heavily burden defendant businesses.[322] While the thrust of nineteenth century tort law predominantly favored the development of business, *res ipsa loquitur* favored plaintiffs by forcing defendants to disprove their fault instead of prevailing on a directed verdict.[323]

b. Sanctioning Negligent Spoliation

I now turn to how we might approach sanctioning the negligent destruction of relevant evidence. This approach would involve a single-step balancing of interests, incorporated through the applicable standard of care.[324] The interests of document holders are protected by the creation of a standard of care that emphasizes reasonableness, and a failure to act consistent with that standard of care will result in a sanction, protecting innocent adversaries.

i. Defining Negligent Spoliation

Negligent spoliation is an act or failure to act that creates an unreasonable risk that relevant evidence will be lost after the duty to preserve has attached. This definition should supplant the "degrees" of culpability currently employed by the courts.[325] They have proven to be impracticable in the spoliation context, just as they did in the tort context.[326] Instead, culpability should be based upon the relevant standard of care, which in turn is established by the character of the risk that relevant evidence will be lost.[327]

ii. Defining Unreasonable Risk

Negligent spoliation must require that the spoliating party destroy or fail to preserve evidence in the face of an unreasonable risk that relevant evidence will be lost. For the destructive act to be sanctionable, the risk must have been both recognizable and unreasonable,[328] as measured at the time of the destructive act or omission. In evaluating whether a risk that relevant evidence may be destroyed is "recognizable," the determining factors should take into account individual habits, the law, and customs related to the kind of documents at issue.[329] For example, the risk that relevant email could be destroyed is likely recognizable where individual employees are responsible for preserving them, because individuals frequently move or delete email.

322. *Id.* at 1105–06.

323. *Id.* at 1106–07.

324. See *supra* note 237 and accompanying text for an explanation of the single-step balancing of interests represented by the negligence standard of care.

325. See *supra* Part III.B.2 for a discussion of the degrees of culpability currently used by the court to describe discovery misconduct.

326. See *supra* notes 311–14 and accompanying text for a discussion of tort law's abandonment of degrees of negligence in favor of a single standard of reasonable care under the circumstances.

327. See *supra* notes 312–14 and accompanying text for a discussion of the proportionality between risk and care.

328. See *supra* notes 286–89 and accompanying text for an explanation of what makes risk recognizable and unreasonable.

329. See *supra* notes 286–87 and accompanying text for an explanation of what makes risk recognizable.

Accurate assessment of whether destruction is sanctionable under this approach depends on the parties and the courts being able to calculate whether the risk that relevant information would be destroyed was "unreasonable." In the tort context, the unreasonableness of risk is calculated by determining the gravity and probability of legal injury.[330] In the spoliation context, it may be relatively easy to calculate the probability that relevant evidence will be lost. For example, relevant evidence will surely be lost if an information management system automatically deletes documents, and key players are not put under a litigation hold.

Calculating the gravity of lost evidence is potentially a much more difficult task.[331] The gravity of destroying an individual piece of evidence is directly proportional to the importance of that evidence to the adversary. Estimating the importance of a particular document requires the document holder to speculate about how the adversary would use the evidence—that, in turn, requires knowledge of the adversary's claims or defenses, and litigation strategy. Ultimately, this evaluation process is a subjective determination by one party about a subjective determination of the adversary. This determination may become easier once a complaint is filed, but as described above, the duty to preserve attaches well before specific claims, defenses, or strategies are crystallized.[332] Therefore, depending on the timing of the destructive act, it may be difficult or impossible for the party to evaluate the "unreasonable" character of the risk that relevant evidence will be lost. However, an accurate characterization of the risk as it existed at the time of the destructive act is necessary for determining whether the destructive act itself was reasonable under the circumstances.[333]

iii. Defining Reasonable Care

Under this approach, spoliation should be sanctioned where the destroying party failed to act with reasonable care to prevent the destruction of relevant evidence. This standard should be measured by what a reasonable document holder would do in similar circumstances. For the standard of care to fairly reflect the balanced interests of litigants and courts, it must be based on a shared understanding of what reasonable care requires.[334] The difficulty is that technology innovates rapidly, and customs related to information management change as businesses adapt to those innovations. Moreover, there is predictable disparity between large data-producing entities that can afford cutting-edge technology for the identification, storage, and retrieval of relevant evidence, and smaller entities with more limited resources. As a result, there are challenges to establishing a standard of "reasonableness" that can be applied

330. See *supra* notes 293–96 and accompanying text for a discussion of the calculus of risk in the tort context.

331. See *supra* note 310 for a discussion of Geistfeld's critique of the standard of care, which incorporates normative values into the weighing of interests in the calculus of risk.

332. See *supra* Part III.B.1 for a discussion of the preservation obligation, its trigger and scope.

333. See *supra* notes 292–93 and accompanying text for a discussion explaining that cost or inconvenience may justify taking small risks, but not serious ones, and emphasizing the importance of accurately evaluating the magnitude of loss.

334. See *supra* notes 298–99, 304 for an explanation of the standard of care as a reflection of society's uniform agreement about standards of behavior.

consistently without becoming outdated. These challenges are complicated by the aforementioned difficulty in assessing the character of risk at the time documents are destroyed.[335]

iv. Problems of Proof

A difficult element of this approach is how to deal with burdens of proof. In the tort context, the doctrine of *res ipsa loquitur* was employed to relieve an injured plaintiff of some of the evidentiary burden of proving the defendant's negligence.[336] In the current spoliation regime, by contrast, presumptions are used to relieve a party of the evidentiary burden of proving its own injury—that is, that the destroyed evidence was relevant and/or prejudicial.[337] Although there is a common sense notion of fairness in prohibiting a party from benefitting from its own destruction, a presumption of relevance or prejudice can only be justified in some situations.

In the tort context, for example, rules restrict the application of *res ipsa loquitur* to particular circumstances where negligence probably occurred, and the defendant probably had knowledge of it, but no motivation to share that knowledge. [338] The presumption supplied that motivation. A similar justification can only be present in the spoliation context where the destroying party knew the contents of the destroyed data. Unlike stagecoaches, which do not overturn without negligence, documents may be destroyed during the course of routine retention practices, without any human considering their relevance to the litigation at issue. Applying a presumption of relevance or prejudice under those circumstances will not prompt the document holder to share what it knows about the documents' relevance, because it may not know anything at all. Instead of applying the presumption in circumstances where the destroying party had actual knowledge of the destroyed documents' contents, courts that employ presumptions examine the party's degree of culpability. Aside from the problematic practice of assigning "degrees" of negligence to a party's conduct, culpability cannot be substituted for knowledge of the documents' contents. Deviation from the standard of care reflects nothing more than a miscalculation of risk; that miscalculation is neither necessary nor sufficient for determining that the destroying party knew the contents of the document it destroyed.

v. Relationship to Current Spoliation Doctrine

This approach describes the analysis that should supplant the current determination of negligent "culpability" under current spoliation analysis. Because the negligence determination is concerned with risk, not consequences, a separate finding of prejudice to the adversary would still be required under this approach. However, this approach requires adjustments from the current thinking about "negligent"

335. See *supra* note 310 for a commentary explaining the importance of being able to measure the magnitude of loss.

336. See *supra* Part IV.B.2.a.iv for a discussion of *res ipsa loquitur*.

337. See *supra* Part III.B.3.b for a discussion of the rebuttable presumptions of relevance and prejudice and when they are currently employed.

338. See *supra* note 322–23 and accompanying text for a justification of *res ipsa loquitur* on this basis.

spoliation.[339] Most importantly, this approach emphasizes that risk must be the touchstone of negligence. Current spoliation cases focus too much on the conduct of the alleged spoliator, without analyzing the probability and character of the risk—as it existed at the time the alleged spoliator acted or failed to act—that relevant evidence would be lost.[340] When the court simply declares that actions, such as failure to issue a written litigation hold, are negligent as a matter of law, it eviscerates the crucial role that appreciable risk plays in evaluating the reasonableness of the actor's conduct.

As described above, using this approach places a challenging burden on parties and the court. A standard of reasonable care in preservation practices presupposes (1) that document holders can accurately evaluate both the probability that relevant evidence will be destroyed and the gravity of making the evidence unavailable, and (2) that there exists some common understanding of the appropriate measures that must be taken once that evaluation is made. Because it will be difficult for document holders to make an accurate evaluation of risk prior to the filing of a complaint, this approach creates uncertainty about appropriate prelitigation preservation practices. That uncertainty is further complicated by the rapid development of technology, which undermines the stability of any definition of reasonable care. In the face of those uncertainties, the court must make an ex post evaluation of the party's preservation practices. While there is general agreement that preservation efforts should (but are not required to) be proportional to the value of the anticipated litigation,[341] this analysis shows the challenge of determining what proportionality requires at the prelitigation stage.

3. Strict Liability

A third balancing approach would be to sanction parties who destroy relevant evidence, regardless of whether the destruction was done intentionally or in deviation from the requisite standard of care. As discussed below, in the tort context, there are special circumstances under which liability attaches without fault. A closer examination of those circumstances reveals that applying this approach in the spoliation context would require the adoption of weighty policy determinations in the name of fairness and deterrence.

a. Tort Liability Without Fault

In certain circumstances, a defendant will be strictly liable in tort, even in the absence of an intentional act or a failure to exercise due care.[342] Strict liability is imposed most commonly upon individuals for harm caused by abnormally dangerous

339. See Part III.B.2.b for a discussion of negligence as applied in current spoliation analysis.

340. *See, e.g.*, Pension Comm. of Univ. of Montreal Pension Plan v. Banc of Am. Sec., L.L.C., 685 F. Supp. 2d 456, 477 (S.D.N.Y. 2010) ("Almost all plaintiffs' pre-2005 conduct . . . is best characterized as either grossly negligent or negligent because they failed to execute a comprehensive search for documents and/or failed to sufficiently supervise or monitor their employees' document collection.").

341. *See* SEDONA CONFERENCE, *supra* note 28, at 33 (explaining that parties should not be required to undertake "heroic" efforts to preserve evidence at costs disproportionate to the value of the litigation).

342. KEETON ET AL., *supra* note 73, § 75, at 536.

activities[343] and defective products.[344] The traditional justifications for strict liability are fairness and deterrence.

In the first view, strict liability is fair in the sense that an entity which carries on (for example) an abnormally dangerous activity should "pay its way" by compensating any party injured by that activity.[345] The law tolerates the abnormally dangerous activity because it may be socially useful, but requires that the actor, who profits from the activity, bear the cost of the resulting injury rather than an innocent victim.[346] The actor is also in a position to decrease the burden of costs by increasing the price of goods or services related to the abnormally dangerous activity.[347] By contrast, without strict liability, the injured party may bear all associated costs alone. In these circumstances, strict liability is fair because it is imposed "upon the party best able to shoulder it."[348]

An alternative justification for strict liability is that it deters more undesirable conduct than negligence liability alone, by increasing the threat of liability for that conduct.[349] The idea is that potential defendants will take steps to make the activity safer, or avoid it altogether, to reduce the costs associated with strict liability. Some commentators, however, question whether strict liability is capable of—or effective at—deterring injuries, because in a strict liability regime there is little incentive to allocate any additional resources to safety measures.[350] Defendants must pay the cost of accidents even where the burden of precaution outweighs potential damages.[351] Therefore, in some circumstances it is more effective for the potential defendant to simply absorb the cost of injuries than to increase safety measures. This is especially true where insurance is available to ease the administrative costs associated with litigation.[352] But Judge Posner argues that strict liability may nevertheless be successful in deterring accidents by incentivizing behavior, not through increased safety measures, but rather by changing the nature of the activity that incurs liability.[353]

343. RESTATEMENT (SECOND) OF TORTS § 519 (1977). Strict liability is also imposed upon individuals for harm caused by the livestock they keep. *Id.* §§ 504–05, 518.

344. RESTATEMENT (SECOND) OF TORTS § 402A (1965).

345. KEETON ET AL., *supra* note 73, § 75, at 536.

346. *Id.* at 537.

347. *See id.* (explaining that the defendant can administer the unusual risk associated with his activity by passing it on to the public).

348. *Id.*

349. Steven Shavell, *Strict Liability Versus Negligence*, 9 J. LEGAL STUD. 1, 2–3 (1980); *see also* Gary T. Schwartz, *Reality in the Economic Analysis of Tort Law: Does Tort Law Really Deter?*, 42 UCLA L. REV. 377, 381 (1994) (describing the basic deterrence claim of tort liability).

350. *See, e.g.*, Richard Posner, *The Learned Hand Formula for Determining Liability*, *in* TORT LAW: CASES AND ECONOMIC ANALYSIS 1, 5–8 (1982) (explaining that strict liability will only deter behavior "where the cost of avoiding the accident . . . is less than the expected accident cost"); *see also* Schwartz, *supra* note 349, at 381–82 (summarizing critiques of all tort liability's deterrence of accidents).

351. Posner, *supra* note 350, at 5–8.

352. *See* KEETON ET AL., *supra* note 73, § 82, at 585 (discussing the nature of liability insurance and its impact on the development of tort law).

353. Posner, *supra* note 350, at 5–8.

b. Sanctioning Spoliation Without Fault

Courts could decide, as they did in the tort context, that policy demands sanctions attach to the destruction of relevant evidence, regardless of the fault of the destroying party. The party alleging spoliation would be required to prove only that evidence was destroyed which would have been helpful to that party's claims or defenses. Under this approach, the balancing of the parties' interests occurs, again, in a single step, through the creation of the standard.[354] A strict approach represents a policy determination that prejudice to the nonspoliating party outweighs the interests of the document holder.

i. Justifying Strict Sanctions

Strict liability for destruction of electronic evidence does not fit cleanly with either the justice or deterrence justifications that apply in the tort context.[355] It is not clear that strictly sanctioning electronic spoliation will promote fairness. At first blush, it seems fairer to sanction the party who was in a better position to guard against the loss of evidence in the first place, instead of leaving the opposing party with the burden of attempting to prove its case without evidence. But this explanation presumes that the document holder has the information necessary to determine the scope of evidence that must be preserved. Where the merit—or even existence—of the underlying claims and defenses are still the subject of dispute, it is a dubious assertion that the document holder is in a "better position" to shoulder the burden of a sanction.[356] Additionally, where evidence is destroyed as the result of a routine document retention policy, it is not clear that the spoliating party is engaging in "abnormal" or risky conduct for which it should "pay its way."[357] Moreover, in the tort context, the monetary costs incurred through strict liability for damages can be passed along to the public through, for example, increased prices for goods and services. The spoliation rules apply to plaintiffs and defendants alike, some of whom will not have customers to whom costs could be shifted. Nor is it clear that the consuming public should bear some portion of increased costs for a company's internal information management.

At the same time, it is not clear that strictly sanctioning spoliation would deter future instances of spoliation.[358] Where the cost of preserving evidence in future cases outweighs the potential costs of the sanction that will be incurred (a calculation that will be difficult to predict), it is in the party's best interest to accept the sanction rather than preserve additional evidence. There remains, however, the possibility that strictly sanctioning spoliation may deter future acts by encouraging parties to change the way they preserve evidence.[359] Such changes may involve investing in new or additional

354. See *supra* note 237 for a discussion of the single-step balancing represented by a strict liability standard.

355. See *supra* Part IV.B.3.a for a discussion of the justifications for strict liability in the tort context.

356. See *supra* note 348 and accompanying text for a discussion of the justification of strict liability based on the ability of the actor to better shoulder the loss.

357. See *supra* notes 345–47 and accompanying text for a discussion of an alternate justification of strict liability based on the notion that an actor who engages in risky conduct should pay its way through liability.

358. See *supra* note 349 and accompanying text for a discussion of this justification of strict liability.

359. See *supra* note 353 and accompanying text for Judge Posner's argument that strict liability may deter accidents by encouraging parties to change the way they engage in dangerous activities.

technology that meets the entities' litigation needs. This begs the question of whether it is socially desirable to encourage private entities to prioritize their litigation needs over their other business needs.

ii. Relationship to Current Spoliation Doctrine

This approach aligns with the practice of jurisdictions that permit dismissal or adverse inference sanctions where there is severe prejudice to the nonspoliating party, even absent evidence of culpability on the part of the spoliator.[360] The problem with this approach is that its application depends, not on the nature of the document holder's information management system, but on the nature of the lost evidence. As discussed above, an *ex ante* evaluation of the gravity of destroying any particular piece of evidence may be incredibly difficult, particularly prior to the filing of a complaint. As a result, to be "safe" from sanctions, private parties must protect all data as if its loss will result in severe prejudice.

By contrast, in the tort context, strict liability is justified based on the nature of the defendant's activities—their dangerousness or their profitability—allowing the defendant to understand, before he acts, that *in undertaking those activities* he exposes himself to liability for any resulting injury.[361] Because the current application of "strict" sanctions leads to inefficient preservation choices, courts should instead either apply strict sanctions wholesale, thereby allowing parties to invest in more expansive document preserving practices, or courts should not apply severe sanctions at all in the absence of either an intentional or negligent act or omission, even where severe prejudice results.

C. Choosing an Approach

Having described three distinct approaches for consistently identifying sanctionable spoliation, the task becomes selecting an approach. It has been said that the duty to preserve evidence is one owed to the court, not the adversary.[362] The court represents society's interests in the administration of justice. To that end, we should apply the approach that best promotes society's interests in controlling the destruction of evidence.

Importantly, society's interests are manifold, and they change over time. Prior to the anticipation of litigation, clearly, there is no need for the administration of justice, and private parties should be free to retain or destroy data in accordance with their private goals. Once litigation is reasonably anticipated, parties' private interests do not immediately disappear. Rather, they must accommodate society's interest in the administration of justice by preserving data related to the dispute. While important, this interest is still vague and undifferentiated.[363] Once litigation actually begins, and the

360. See *supra* notes 138–39 and accompanying text for a discussion of jurisdictions that impose sanctions absent a significant showing of culpability.

361. See *supra* note 346 and accompanying text for a discussion of these requirements for strict liability.

362. *E.g.*, Victor Stanley, Inc. v. Creative Pipe, Inc., 269 F.R.D. 497, 525 (D. Md. 2010).

363. This lack of clarity is reflected by the imprecise contours of the scope of preservation, as discussed in *supra* note 53 and accompanying text.

relevant claims between the parties crystallize, the need for specific evidence is readily identifiable and immediate. Understood this way, it is clear that our interest in controlling the destruction of evidence is not static. Rather, it grows and clarifies as litigation becomes more certain.[364] A destructive act presents a lesser or greater intrusion on society's interests depending on when the act occurs. Therefore, the court should adopt standards for spoliation sanctions that are commensurate with the strength of the court's interest at the time of the destruction of evidence.

Where the alleged destruction occurred prior to the filing of a complaint, sanctions should only be ordered for intentional spoliation.[365] A party that anticipates litigation often makes preservation decisions with only vague information about what data will be relevant and with no opposing party or judge from whom to seek clarification.[366] A party's choices reflect judgments made in light of the specific facts and data at issue. The intentionality approach ensures that the court will engage in a similar fact-specific analysis. A negligence approach would compare the party's conduct with a hypothetical standard of reasonableness. Instead, the court applying the intentionality approach compares the party's actual justifications for destruction that was substantially certain, with the resulting prejudice.[367] In this way, the intentionality standard provides greater deference to the document holder—deference that is appropriate in light of the court's more remote interest in a dispute that is only anticipated.

The court should be permitted to sanction a party's negligent spoliation only where the destructive act occurs after a complaint is filed.[368] At this point, parties are better situated to evaluate the risk that relevant evidence will be lost. They also have resources for self-help, by conferring with the opposing party or seeking guidance from a presiding judge. As a result, the risks attendant to the negligence approach are somewhat mitigated after a complaint is filed.[369] Moreover, a judicially imposed standard of care is justified, because the court has a stronger interest in controlling the availability of evidence in a case properly before it.

By applying different approaches to destruction that occurs before and after the filing of a complaint, the court recognizes the dynamic nature of its interest in controlling spoliation. While overpreservation of electronically stored information creates a risk that future litigants or consumers at large will ultimately bear the costs of organizations' private inefficiencies,[370] insufficient preservation will unacceptably

364. See *supra* notes 8–15 for a discussion of the importance of the integrity of the judicial system. See *supra* Part III.D.3 for a discussion of the costs to the judicial system resulting from increased motions practice related to spoliation.

365. See *supra* Part IV.B.1.b for a discussion of intentional spoliation.

366. *See* Meeting Notes, *supra* note 154, at 8–10 (providing a narrative from counsel concerned that prelitigation preservation decisions must be made without consultation with an adversary).

367. See *supra* Part IV.B.1.b.ii for a discussion of the factors relevant to determining whether intentional spoliation is sanctionable.

368. See *supra* Part IV.B.2.b. for a discussion of negligent spoliation.

369. See *supra* Part IV.B.2.b.v for a discussion of the challenges associated with applying the negligence approach.

370. See *supra* Part III.D.2 for a discussion of the costs litigants incur as a result of uncertain preservation and spoliation standards.

compromise the courts' ability to promote truth and justice. The filing of a complaint triggers the court's heightened interest in preserving the integrity of the judicial process and, therefore, justifies the application of a stricter standard of care.

V. CONCLUSION

Spoliation doctrine is in jurisprudential disarray. It lacks the firm footing that was provided by a world where evidence existed only tangibly, and which did not disappear unless someone destroyed it. Struggling to adapt old rules to new technologies, courts disagree about how to evaluate the conduct of the individuals responsible for preserving information and the interests of the opponents who are denied its use in litigation.[371] These disagreements have resulted in conflicting rules across jurisdictions, leaving parties uncertain about their rights and obligations, while at the same time increasing the already exorbitant costs of participating in civil litigation.[372]

Tort law can guide us back to firm ground. Fundamentally, tort law has developed rules and principles for balancing the legally protected interests of individuals in a manner that benefits society as a whole.[373] Drawing from tort law's rich analytical history, we can reorganize the principles behind spoliation doctrine so that they serve functional, predictable ends. Careful examination of those principles suggests that sanctions for prelitigation destruction of evidence should be limited to intentional spoliation, while sanctions for negligent spoliation should only be permitted where destruction occurs after the filing of a complaint. This approach will allow parties to order their primary conduct in a way that benefits society as a whole and allows courts to get back to the just, speedy, and inexpensive resolution of disputes.

371. See *supra* Part III.B and III.C for a discussion of the current jurisprudence of sanctionable conduct and corresponding remedies.

372. See *supra* Part III.D for a description of the unintended consequences resulting from uncertainty in this area of law.

373. See *supra* Section IV for an overview of tort principles and policies.