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Adverse Inference About Adverse Inferences: Restructuring Juridical Roles for Responding to Evidence Tampering by Parties to Litigation

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ARTICLES

ADVERSE INFERENCES ABOUT ADVERSE INFERENCES: RESTRUCTURING JURIDICAL ROLES FOR RESPONDING TO EVIDENCE TAMPERING BY PARTIES TO LITIGATION

DALE A. NANCE*

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For at least two centuries, Anglo-American courts have responded to a party's evidence tampering by allowing the opponent to argue to jurors that they should draw an adverse inference against the offending party in deciding the merits of the case. This Article argues that the use of such inferences, and

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invitations to draw them, should be radically curtailed, not only because of the ambiguities and risks of prejudice that such inferences entail, but more importantly because they reflect and contribute to a confusion of roles in which the jury is enlisted to participate in the management of the pre-trial conduct of litigants with regard to evidence preservation, preparation, and selection. This management is properly the job of the judiciary, which has adequate tools for this purpose in the form of modernly available discovery sanctions such as issue preclusion and separate monetary awards. The judiciary should be encouraged, if not required, to substitute these alternative tools for adverse inferences by juries.

“[T]he law, in hatred of the spoiler, baffles the destroyer, and thwarts his iniquitous purpose, by indulging a presumption which supplies the lost proof, and thus defeats the wrong-doer by the very means he had so confidently employed to perpetuate the wrong.”

– *Pomeroy v. Benton*¹

“[P]roof must rest upon evidence and not upon its absence.”

– *Stocker v. Boston & Maine Railroad*²

INTRODUCTION

A litigant’s suppression, alteration, fabrication, or destruction of evidence poses a serious threat to the integrity of our system of adjudication.³ The law clearly cannot afford to ignore such activity, and a critically important question is what to do about such activity when it is detected. A considerable literature has developed concerning this issue, as the problems of evidentiary misconduct have become more pressing.⁴ This Article addresses one piece of that puzzle, discussing one particular set of remedies for evidence suppression, destruction, and other forms of evidentiary misconduct: adverse inferences made by jurors in reaction to evidence of tampering, arguments made by counsel designed to elicit such inferences, and jury instructions designed to authorize or even encourage such inferences. For convenience, I will refer to this set of

¹ 77 Mo. 64, 86 (1882).

² 151 A. 457, 459 (N.H. 1930).

³ The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence.

United States v. Nixon, 418 U.S. 683, 709 (1974).

⁴ See generally JAMIE S. GORELICK, STEPHEN MARZEN & LAWRENCE SOLUM, *DESTRUCTION OF EVIDENCE* (1989 & Supp. 2009); GREGORY P. JOSEPH, *SANCTIONS: THE FEDERAL LAW OF LITIGATION ABUSE* (4th ed. 2008); MARGARET M. KOESEL ET AL., *SPOILIATION OF EVIDENCE* (Daniel F. Gourash ed., 2000).

responses simply as the “adverse inference” response, and I will differentiate among inferences, arguments, and instructions only when necessary, because most of what I have to say does not depend on whether such an inference is encouraged by an argument or sanctioned by a jury instruction. Analysis of the problems entailed by such inferences leads to the following conclusion: the use of adverse inferences should be radically curtailed in favor of simpler remedies that are imposed by the court without the involvement of the jury.

The adverse inference response became entrenched in the common law at a time when very few tools of discovery were available.⁵ In such a system of litigation, there was little effective control over evidence tampering other than a party’s ability to point to the misconduct at trial and ask the trier of fact to take it into account.⁶ This response had, and continues to have, an obvious appeal, summarized in the following oft-quoted passage from Wigmore’s famous treatise:

It has always been understood – the inference, indeed, is one of the simplest in human experience – that a party’s *falsehood* or *other fraud* in the preparation and presentation of his cause, his fabrication or suppression of evidence by bribery or spoliation, and all similar conduct is receivable against him as an indication of his consciousness that his case is a weak or unfounded one; and from that consciousness may be inferred the fact itself of the cause’s lack of truth and merit. The inference thus does not necessarily apply to any specific fact in the cause, but operates, indefinitely though strongly, against the whole mass of alleged facts constituting his cause.⁷

But our system of litigation has changed dramatically over the last century. Discovery and disclosure obligations are expansive under modern rules of civil and criminal procedure.⁸ Furthermore, modern rules of evidence are generally more liberal in allowing the admission of relevant evidence.⁹ The question arises whether those changes warrant different responses to evidence tampering. I conclude that they do and that certain sanctions today associated with the regulation of discovery abuses should be the primary tools for responding to this kind of activity. This will require the clarification of the

⁵ See ROBERT WYNESS MILLAR, *CIVIL PROCEDURE OF THE TRIAL COURT IN HISTORICAL PERSPECTIVE* 201-28 (1952).

⁶ See GORELICK, MARZEN & SOLUM, *supra* note 4, § 1.3; Robert H. Stier, Jr., *Revisiting the Missing Witness Inference: Quieting the Loud Voice from the Empty Chair*, 44 MD. L. REV. 137, 138-43 (1985).

⁷ 2 JOHN H. WIGMORE, *EVIDENCE IN TRIALS AT COMMON LAW* § 278, at 133 (James H. Chadbourne ed., rev. ed. 1979).

⁸ See JACK H. FRIEDENTHAL, MARY KAY KANE & ARTHUR R. MILLER, *CIVIL PROCEDURE* § 7.1 (4th ed. 2005); 5 WAYNE R. LAFAVE ET AL., *CRIMINAL PROCEDURE* §§ 20.1-2 (3d ed. 2007).

⁹ The relevant liberalizations will be noted *infra* Part I.

respective roles of the judge and the trier of fact (which, for convenience, I will hereafter refer to simply as “the jury”).

There is no mistaking the fact that my proposal entails substantial change to prevailing litigation practices. Inevitably, many issues will need to be resolved if the law moves in the direction I suggest. I cannot here even attempt to answer all of the “But what about . . . ?” questions that will arise. I will, however, explain enough to show that the proposal, though fairly radical, is both workable and beneficial. Indeed, it pushes a trend that is already underway. My argument will proceed in four stages. First, I will elaborate my thesis in greater detail, emphasizing where things stand and briefly explaining the direction of the change that should be made. Second, I will explain in general terms both the difficulties in using adverse inferences to address evidence tampering and the source of those difficulties. Third, I will demonstrate the comparative superiority of alternative remedies, especially the remedy of issue preclusion. Fourth, I will discuss prevailing attitudes in civil and criminal litigation, criticizing the reasons that modern courts and commentators have given for using adverse inferences to deal with evidence tampering.

I. THE THESIS ELABORATED

Courts use adverse inferences in both civil and criminal cases to respond to a variety of forms of evidentiary misconduct by a party, including:

- (1) violating a subpoena or discovery order requiring the party to present or reveal unprivileged evidence to an opponent, or to submit to an inspection or examination of persons or things;
- (2) killing a witness, bribing or extorting a witness not to testify, or otherwise removing a witness, or secreting or destroying some tangible evidence subject to a duty of preservation and not subject to a valid claim of privilege;
- (3) suborning perjury, by threat or bribe, or tampering with or fabricating tangible evidence; or
- (4) violating a duty to disclose to the opposition or present at trial unprivileged, admissible evidence within a party’s control.¹⁰

There is no conventional name that covers all these diverse activities. For present purposes, they will be referred to collectively as “evidence tampering.”¹¹ With respect to category (4), one might question whether there

¹⁰ See 2 WIGMORE, *supra* note 7, §§ 278-80, at 285-91.

¹¹ This definition is intended to cover all forms of evidentiary misconduct during the course of litigation that have been subjected to the remedy of an adverse inference based on consciousness of a weak case. Cf. Chris William Sanchirico, *Evidence Tampering*, 53 DUKE L.J. 1215, 1218 n.4 (2004) (defining “evidence tampering” as covering “the full range of activities by which parties alter the natural evidentiary ‘emissions’ of the transactions and occurrences that may give rise to suit”).

is ever such a duty to disclose or present evidence, unless the evidence is covered by a valid subpoena or discovery order, in which case the matter would fall within category (1), or falls within the special duty to disclose exculpatory evidence imposed on the state in criminal cases.¹² I have argued elsewhere, however, that the best interpretation of our prevailing litigation practices posits that litigants, other than the accused in criminal cases, have a qualified obligation of the kind in (4) when discovery mechanisms available to the opponent are ineffective.¹³ Importantly, although the point is little noticed, the court may impose a case-specific obligation to present particular evidence on a party with peculiar access to such evidence as part of the management of the burden of production.¹⁴ In any event, if and when such a duty is imposed, a party's failure to honor it is a form of evidence tampering.

In some contexts, especially in categories (1) and (4), the evidentiary damage or deficiency is "reversible" in the sense that the tamperer can reverse course and make the evidence available to the opponent or to the court. In other contexts, the deficiency is practically irreversible. Throughout the following discussion, I assume that, unless the tampering is reversed, the opponent will suffer prejudice in the sense that there is reason to believe that the lost or missing information might well have significant impact upon the case.¹⁵ Further, I assume that all available preliminary steps – such as ordering disclosure or granting a continuance – have been taken to allow the opponent meaningful access to suppressed evidence, but to no avail.¹⁶

Under current practice, a party commonly argues to the jury that the opponent's act of tampering should be the basis for an adverse inference against that party. For example, a party may argue that the opponent's destruction of evidence shows that the lost evidence would have been unfavorable to the opponent and that the act of destruction reveals a guilty conscience. The argument might or might not be supported by a jury instruction. A typical instruction reads as follows:

¹² See *Brady v. Maryland*, 373 U.S. 83, 86-88 (1963) (holding that when the prosecutor suppresses "evidence favorable to the accused upon request" he violates the accused's due process rights where the evidence is material to guilt or innocence).

¹³ Dale A. Nance, *The Best Evidence Principle*, 73 IOWA L. REV. 227, 233-34 (1988).

¹⁴ See Dale A. Nance, *Evidential Completeness and the Burden of Proof*, 49 HASTINGS L.J. 621, 640-43 (1998). As explained below, so-called "missing evidence" or "missing witness" inferences usually make sense only when the court is willing to impose such an obligation. See *infra* notes 90-100 and accompanying text.

¹⁵ See KOESEL ET AL., *supra* note 4, at 34-35.

¹⁶ For example, when lost information can be retrieved by the expenditure of resources, a common remedy courts employ in civil cases is to require the tamperer to bear the costs of reconstructing the lost evidence. See, e.g., *Capellupo v. FMC Corp.*, 126 F.R.D. 545, 553-54 (D. Minn. 1989). The assumption here is that such steps are either unavailable or insufficient to eliminate the prejudice to the opponent or to achieve the law's goal of deterring evidence tampering.

If you should find that a party willfully [*suppressed*] [*hid*] [*destroyed*] evidence in order to prevent its being presented in this trial, you may consider such [*suppression*] [*hiding*] [*destruction*] in determining what inferences to draw from the evidence or facts in the case.¹⁷

Some commonly used jury instructions more directly state the inference to be drawn from the party's conduct:

If a party fails to produce evidence that is under that party's control and reasonably available to that party and not reasonably available to the adverse party, then you may infer that the evidence is unfavorable to the party who could have produced it and did not.¹⁸

Such an instruction specifically authorizes the jury to infer that the evidence not presented would, if presented, be adverse to the party in control thereof. But it is important to notice that the instruction does not preclude a broader inference of the kind described by Wigmore in the Introduction to this Article, indicating a party's consciousness of guilt, liability, or groundlessness of the claim as a whole.¹⁹ Of course, in a case where evidence is not lost but is instead fabricated, there can be no inference to the content of the lost evidence, and the only inference of importance, aside from the inference that the fabricated evidence is useless, is the more general one endorsed by Wigmore.

To be sure, some judicial opinions and several commentators have made fairly critical assessments of the use of adverse inferences.²⁰ Courts have expressed the most serious skepticism about the use of an adverse inference when the inference is to be drawn from the failure of a party to present *available* evidence at trial. This skepticism typically arises in cases, civil and criminal, where extant potential evidence is practically accessible by both parties. Nonetheless, the resulting rule is sometimes expressed more broadly, denying all "missing witness" inferences (or only missing witness jury instructions) in criminal (or civil) cases.²¹ In the context of a modern legal

¹⁷ 3 KEVIN O'MALLEY, JAY E. GRENIG & WILLIAM C. LEE, FEDERAL JURY PRACTICE AND INSTRUCTIONS § 104.27 (5th ed. 2000); *see also id.* § 105.10 (authorizing inference against party when a witness refuses to answer a proper question at trial).

¹⁸ *Id.* § 104.26; *see also id.* § 104.25 (authorizing an inference against a party for not calling a witness reasonably available to that party and not equally available to the opponent — a typical "missing witness" instruction).

¹⁹ *See supra* text accompanying note 7.

²⁰ *See, e.g.,* GORELICK, MARZEN & SOLUM, *supra* note 4, § 3.2; 2 MCCORMICK ON EVIDENCE §§ 264-65 (Kenneth S. Broun ed., 6th ed. 2006); 22 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE: EVIDENCE § 5178 (1978); Stier, *supra* note 6, at 145-56. To be sure, some commentators are more favorably disposed to the use of adverse inferences. *See, e.g.,* Richard Friedman, *Dealing with Evidentiary Deficiency*, 18 CARDOZO L. REV. 1961, 1963-65 (1997).

²¹ *See, e.g.,* Herbert v. Wal-Mart Stores, Inc., 911 F.2d 1044, 1048 (5th Cir. 1990) (proposing in dicta the rejection of missing witness inferences in federal civil trials); State v. Malave, 737 A.2d 442, 447-52 (Conn. 1999) (discussing the statutory abolition of missing

system – with extensive pre-trial disclosure and discovery mechanisms, no rule requiring parties to vouch for the credibility of their witnesses,²² and the option of asking the trial judge to call a dubious witness²³ – this trend is not surprising. And it is generally wholesome: as emphasized in the opinions manifesting this trend, the party who would otherwise request the adverse inference can, instead, simply call a witness whose testimony is expected to be adverse to the opponent, or else request that the court call the witness.²⁴ The

witness instructions in civil trials, abandoning such instructions in criminal trials, and discouraging prosecutorial arguments inviting an adverse inference against the accused); *State v. Brewer*, 505 A.2d 774, 776-77 (Me. 1985) (abandoning missing witness inferences in criminal trials); *State v. Caron*, 218 N.W.2d 197, 199-200 (Minn. 1974) (disallowing missing witness inferences against the accused); *Henderson v. State*, 367 So. 2d 1366, 1368 (Miss. 1979) (disallowing jury instructions authorizing an adverse inference from either party's failure to call a witness in criminal cases); *Ross v. State*, 803 P.2d 1104, 1105-06 (Nev. 1990) (disallowing missing witness inferences against the accused); *State v. Jefferson*, 353 A.2d 190, 197-99 (R.I. 1976) (prohibiting a prosecutor's comments suggesting a missing witness inference); *State v. Hammond*, 242 S.E.2d 411, 416 (S.C. 1978) (concluding that missing witness instructions are improper in civil and criminal trials, but recognizing that comment by counsel may be permitted); *State v. Tahair*, 772 A.2d 1079, 1086 (Vt. 2001) (disallowing missing witness instructions in criminal trials, but reserving question of whether counsel may invite the jury to draw an adverse inference); *Russell v. Commonwealth*, 223 S.E.2d 877, 879 (Va. 1976) (disallowing for criminal trials, but not civil trials, the use of missing witness instructions that state a presumption, but distinguishing permissive inferences).

²² See, e.g., FED. R. EVID. 607 advisory committee's note (rejecting the common-law rule that barred a party from impeaching its own witness).

²³ See, e.g., FED. R. EVID. 614 (authorizing the trial judge to call and interrogate a witness at the request of a party and permitting all parties to cross-examine such a witness).

²⁴ Some courts have misunderstood the relevance of the abolition of the voucher rule, thinking that it relates to the party against whom the inference is suggested. See, e.g., *Twin Island Dev. Corp. v. Winchester*, 512 A.2d 319, 326 (Me. 1986) (distinguishing, supposedly, *Brewer* and approving an adverse inference against the defendant in a civil case on account of the defendant's failure to testify, commenting cryptically that an inference is appropriate despite the fact that the "[d]efendant need not vouch for her witnesses"). Rather, the abolition of the voucher rule speaks to the options of the party inviting the inference: without a voucher rule, that party need not fear calling a witness, even a reluctant or hostile one, who might testify in a manner inconsistent with the witness's pre-trial commitments, in depositions or otherwise, because impeachment is always an option. See *Malave*, 737 A.2d at 448-49; *State v. Whitman*, 429 A.2d 203, 208-09 (Me. 1981) (Roberts, J., concurring) (anticipating *Brewer's* rejection of adverse inferences). Similarly, a party who thinks that a missing witness might testify favorably for that party, but who does not want to be associated with the witness's unsavory character, has the option of requesting the court to call the witness, in which case the party may cross-examine and impeach the witness if necessary. See FED. R. EVID. 614(a). Moreover, in many circumstances, the pre-trial statements of a testifying witness are even admissible "substantively," that is, to prove the truth of the matter asserted before trial, notwithstanding the hearsay rule. See FED. R. EVID. 801(d)(1). And, of course, a party does not even need to call a party-opponent as a

failure to do so undermines the argument for the adverse inference in the same way that the opponent's failure to call the witness suggests such an inference in the first place. Moreover, such failure – by both parties – creates entirely unnecessary ambiguity and uncertainty: calling the witness is the better alternative.

My proposal would eliminate adverse inferences, and thus the admissibility of evidence to support them, in the cases described above and a great many other situations. Indeed, I claim that the *only* context in which courts ought to allow adverse inferences arising from evidentiary misconduct – at least within the scope of what I have called evidence tampering – is when the inferences are employed against the accused in criminal trials, and then only in certain contexts.²⁵ This sole exception will seem odd to many: why would we employ a certain remedy *only* against the accused? Don't we usually want to accord the accused a favored position, and immunize him from remedies, like directed verdicts, that may be used against the prosecution or against civil parties?

Such a reaction, however, mistakes my position. I argue that, as to all parties other than the criminally accused, the remedy for intentional evidence tampering should be *issue preclusion*, which is generally at least as severe as an adverse inference. By issue preclusion, I mean the court's summary determination, against the tamperer, of ultimate or intermediate factual issues as to which the lost evidence significantly pertains. This preclusion might or might not lead to summary disposition of the case without trial.²⁶

The moral intuition here is simple to state. A party to litigation has a right to a determination on the merits only if that party follows the rules of litigation. These rules prohibit a party's tampering with potentially significant evidence.

witness in order to admit her pre-trial statements. See FED. R. EVID. 801(d)(2) advisory committee's note.

²⁵ Similar arguments would warrant the elimination of adverse inferences in the context of litigative misconduct not falling within the scope of evidence tampering as here defined, at least when committed by a party other than a criminal defendant. For example, a party's attempt to bribe the jury leads to similar inferences and problems. See MCCORMICK ON EVIDENCE, *supra* note 20, § 265, at 226-27 & n.11. But the present argument is focused on misconduct that distorts the evidence presented at trial.

²⁶ Preclusion might remove one element of the plaintiff's case (in favor of the plaintiff) but leave the other elements to be tried, or it might defeat only an affirmative defense, leaving triable the plaintiff's entire case-in-chief. Further, tampering might impact evidence relating to only one intermediate fact, *F*, that in turn is relevant to an ultimate fact, *U*, in such a way that, although an increase (or decrease) in the probability of *F* increases (or decreases) the probability of *U*, *F* being certainly true (or false) does not render *U* certainly true (or false), because the probability of *U* depends as well on other intermediate facts. Issue preclusion can, therefore, operate only on the intermediate fact, *F*, leaving the trier of fact free to accept or reject the ultimate fact, *U*. In that event, issue preclusion then would not entail a summary judgment or dismissal/default on any claim or defense; in a jury trial, it would entail an instruction to the jury that, in deciding whether the burden of persuasion relating to *U* has been satisfied, the jury should take *F* to be true (or false).

A party who engages in such acts forfeits that right and should lose its case, or at least as much of it as the tampering affects.²⁷ This intuition is given expression, if somewhat hyperbolically, in the statement by the Missouri Supreme Court in *Pomeroy*, quoted at the beginning of this Article.²⁸ At the same time, by removing the jury from the administration of the problem, cases that go to trial can do so on the basis of the evidence that is presented; the jury need not worry about the absence of evidence arising from a party's misconduct in litigating the case. Thus, the core idea expressed by the New Hampshire Supreme Court in *Stocker* is also respected.²⁹ Although issue preclusion may serve to deter evidence tampering, and is certainly intended to do so, it is not so much a punishment as it is an effort to protect the integrity of the adjudicative system by refusing to submit cases to the jury when they have been inappropriately prepared.

Three important qualifications should be noted up front. First, issue preclusion should not apply to a judicial finding that a party has lied about the events being litigated, for to do so would obviate the very purpose of the trial. Assessing the credibility of witnesses at trial, with or without the assistance of experts, is a quintessential function of the trier of fact, and jurors are routinely told as much.³⁰ Furthermore, the use of prior inconsistent statements, including those of a party, is too much a part of an assessment of credibility to allow courts to preempt a determination on the merits based on the trial court's judgment that a party lied in a pre-trial statement – even one under oath.³¹ Subornation of perjury, however, is another matter entirely, as is perjury regarding the existence or location of other evidence of the litigated events.

A related qualification concerns cases in which the substantive right supporting a claim allegedly arises from a verbal act constituted by a document or other tangible thing, the authenticity of which is denied by an opponent.³² A simple example is a breach of written contract case in which the defendant claims that the writing is a fake. In such a case, the substantive issue is identical to the issue of evidence tampering, and assigning resolution of the

²⁷ See, e.g., *Carlucci v. Piper Aircraft Corp.*, 102 F.R.D. 472, 486 (S.D. Fla. 1984) (holding that the plaintiffs' intentional destruction of documents "eliminated plaintiffs' right to have their cases decided on the merits").

²⁸ *Pomeroy v. Benton*, 77 Mo. 64, 86 (1882).

²⁹ *Stocker v. Boston & Me. R.R.*, 151 A. 457, 459 (N.H. 1930).

³⁰ See, e.g., 3 O'MALLEY, GRENIG & LEE, *supra* note 17, § 105.01 (instructing jurors that they "are the sole judges of the credibility of the witnesses and the weight their testimony deserves").

³¹ See, e.g., *People v. Beyah*, 88 Cal. Rptr. 3d 829, 834 (Ct. App. 2009) (affirming, despite the trial court's use of a dubious "consciousness of guilt" instruction, a conviction obtained after the prosecution impeached the accused with alleged inconsistencies from his testimony at a pre-trial suppression hearing).

³² The concept of a "verbal act" is familiar from the law of hearsay: a verbal act is an utterance that changes the parties' legal relationship by creating an obligation or right. See MCCORMICK ON EVIDENCE, *supra* note 20, § 249, at 133-34.

dispute to the court would deprive the jury of its authority to decide the core contested issue between the parties. More importantly, the resolution of the issue does not involve the kind of inference process that Wigmore described, because there is no need for the jury to go beyond the inference that the document is a fake to the more general proposition that its proponent is conscious of wrongdoing. Once it is decided that the document is a fake, the inference process is over and the case may be decided.³³ The criticisms of conventional adverse inferences developed in the following Part will clarify the importance of this limited inference process.

The third qualification is peculiar to criminal cases. The accused (but not the prosecution) should be immune from issue preclusion for the same reason that we prohibit directed verdicts in favor of the prosecution: to protect both the accused's right to a jury trial³⁴ and the accused's right not to be convicted unless the prosecution establishes every essential element of the alleged offense beyond reasonable doubt.³⁵ The constitutional status of these rights argues against the idea that an accused can forfeit them by tampering with the evidence, as reprehensible as such conduct may be.³⁶ In the absence of issue preclusion, the adverse inference is the only viable solution for evidence tampering by the accused in many contexts.³⁷ This point is developed further hereafter.³⁸

³³ Quite different is a case in which the documents presented at trial are intended merely to represent the documents upon which the substantive right is based. See, e.g., *Seiler v. Lucasfilm, Ltd.*, 808 F.2d 1316, 1319-20 (9th Cir. 1986) (affirming summary judgment for the defendant based on the trial court's exclusion of secondary evidence of drawings upon which the claim was founded because the plaintiff lost or destroyed the originals in bad faith). In *Seiler*, the trial court found that the plaintiff had suppressed evidence of the original drawings. As will be argued below, issue preclusion is a more direct and honest remedy than excluding the plaintiff's principal evidence and then granting summary judgment. See *infra* notes 81-89 and accompanying text.

³⁴ See *United States v. Martin Linen Supply*, 430 U.S. 564, 572-73 (1977) (holding that a verdict may not be directed against the accused regardless of the strength of the evidence).

³⁵ See *In re Winship*, 397 U.S. 358, 364 (1970) (requiring proof beyond reasonable doubt as to every element of the prosecution's affirmative case).

³⁶ Losing the right to a determination on the merits is quite different, and obviously much more serious, than, for example, merely losing the right to exclude hearsay on Confrontation Clause grounds, *Giles v. California*, 128 S. Ct. 2678, 2693 (2008) (holding that forfeiture of the right to confront an unavailable witness requires a showing that the accused acted with the purpose of suppressing testimony from the witness), or even losing the right to present a defense witness, *Taylor v. Illinois*, 484 U.S. 400, 409 (1988) (affirming exclusion of a witness that the defense had not listed in advance, as required under state law, where the omission was motivated by a desire to gain a tactical advantage).

³⁷ This assumes, of course, that such an inference is not claimed to arise from the exercise of a valid privilege, such as the privilege against self-incrimination, which raises quite distinct issues. See PROPOSED FED. R. EVID. 513 advisory committee's note, reprinted in 56 F.R.D. 183, 260 (1972); 2 MCCORMICK ON EVIDENCE, *supra* note 20, § 264, at 224.

³⁸ See *infra* Part IV.B.2.

II. THE DIFFICULTIES WITH ADVERSE INFERENCES

As illustrated in the previous Part, there is no single inferential pattern that can be identified as quintessential in the great variety of cases involving evidence tampering that have occasioned adverse inferences. Still, there are a number of useful paradigms. Consider a simple case: a plaintiff sues in tort for damages caused by a defective product. In the context of a motion to enforce discovery, the trial judge determines that the plaintiff intentionally destroyed the allegedly defective product for the purpose of preventing its examination by the defense – a clear case of “bad faith” destruction. This destruction is irreversible. No reasonable expenditure of money and effort can recreate the product or the information that would be specially obtainable by inspection of the product, with one exception: the plaintiff is prepared to testify about the defective operation of the product that led to his injury.

Under standard rules of procedure, the trial judge may simply enter an order to the effect that the product must be taken not to have been defective. This is the remedy of issue preclusion.³⁹ An alternative remedy is to permit an adverse inference: the defendant argues to the jury, with or without the support of a jury instruction, that the jury should draw an inference against the plaintiff from the fact of destruction.⁴⁰ One can identify reasons that a judge might have for rejecting the issue preclusion remedy and selecting instead the option of allowing an adverse inference. I will return later to what those reasons might be.⁴¹ For now, I want to ask the following question: if an adverse inference is invited, what is a juror to do?

A. *Probative Value and Prejudicial Potential*

Suppose that, without regard to the information about destruction and the argument for an adverse inference, based solely on the plaintiff’s testimony about the injury and the defense’s evidence about the possibility of the injury

³⁹ See FED. R. CIV. P. 37(b)(2)(A)(ii). Functionally equivalent in this context is an order striking the pleading of the tamperor. See *id.* 37(b)(2)(A)(iii). However articulated, these sanctions will entail a preemptive termination of the litigation. See, e.g., *Silvestri v. Gen. Motors Corp.*, 271 F.3d 583, 594-95 (4th Cir. 2001); *DiDominico v. C&S Aeromatik Supplies, Inc.*, 682 N.Y.S.2d 452, 459-60 (App. Div. 1998). To be sure, the latter procedure preserves the theoretical possibility that the plaintiff may refile within the limitations period should the allegedly defective product (perhaps miraculously) reappear and, thus, be available for inspection by the defendant.

⁴⁰ See, e.g., *Beil v. Lakewood Eng’g & Mfg. Co.*, 15 F.3d 546, 552-53 (6th Cir. 1994) (rejecting a summary judgment in favor of an adverse inference on account of the plaintiff’s agent’s destruction of the instrumentality of harm); *Rodriguez v. Webb*, 680 A.2d 604, 607 (N.H. 1996) (affirming the use of an adverse inference against the defendant for the defendant’s fraudulent destruction of the instrumentality of the plaintiff’s injury).

⁴¹ See *infra* Part IV.A.1. Another remedy commonly encountered in such cases is to exclude the testimony offered by the tamperor about the allegedly defective operation or condition of the product. See FED. R. CIV. P. 37(b)(2)(B). The advantages and disadvantages of this remedy are discussed *infra* at notes 81-89 and accompanying text.

occurring as plaintiff claims, our juror estimates the odds that the product was defective at about 2:1, a probability of defect of about 67%. Now consider how the situation is changed once the juror learns of the evidence destruction and hears the defense argument and any supporting jury instruction. How is the juror to react to this new information?

The juror can, of course, reason that the plaintiff must have been trying to hide something. But what exactly does that involve? The jury is charged to decide whether, by a preponderance of the evidence, the product was defective. For simplicity, let us assume that no other issues in the case exist, and that we can model this as a determination of whether the probability of defect is greater than 50%.⁴² A juror certainly can react to this new information by reducing the probability of defect. But by how much? No matter how the juror approaches the problem, she cannot avoid a stark dilemma: she can only very roughly assess – one is right to say “speculate” about – the potential impact of the lost information.⁴³ Decidedly, this process must be epistemically inferior to the opportunity to consider the lost information. In any event, the assessment will matter to the outcome of the case for this juror only if the adverse inference is strong enough to reduce the probability of defect to 50% or less.

To be sure, there is another piece of information available to the jury; namely, that the plaintiff is the kind of person who is willing to engage in evidence tampering. This may well be the real source of the “indefinite” but “strong” inference to which Wigmore referred.⁴⁴ But what kind of inference is that? Is it simply the inference that the tamperer is a bad person, or at least the kind of person who would do bad things, from which the jury is to infer an increased likelihood that the plaintiff is lying about the product’s defect or that the claim is otherwise fabricated? If so, the inference would violate the character evidence rule, which prohibits an inference from a character trait to

⁴² Nothing in what follows hinges on this explicit quantification of the burden of persuasion; it is used merely for expository clarity. Of course, the difficulties involved in such quantification have been discussed at length elsewhere. For a useful point of entry into the debate, see D.H. Kaye, *Clarifying the Burden of Persuasion: What Bayesian Decision Rules Do and Do Not Do*, 3 INT’L J. OF EVIDENCE & PROOF 1 (1999). For a discussion of recent work on the subject, see Mike Redmayne, *Exploring the Proof Paradoxes*, 14 LEGAL THEORY 281 (2008).

⁴³ Occasionally, a court will try to maintain that the inference does not (and should not) involve speculation. See, e.g., *Felice v. Long Island R.R.*, 426 F.2d 192, 195 n.2 (2d Cir. 1970) (opining that the jury should not speculate about the content of a missing witness’s testimony, but rather should be allowed “to give the strongest weight to the evidence already in the case in favor of the other side, and which has not been, but might have been, effectively contradicted or explained by the absent witness” (citing *Seligson, Morris & Neuburger v. Fairbanks Whitney Corp.*, 257 N.Y.S.2d 706, 710 (App. Div. 1965))). But the jury is not, of course, required to give this “strongest” weight, and the court does not explain how the jury is to decide *to what extent* it will give other evidence the “strongest weight” without speculating about the potential testimony of the missing witness.

⁴⁴ See *supra* text accompanying note 7.

action in conformity therewith.⁴⁵ The conventional answer is that evidence of tampering need not violate the character evidence prohibition, because such evidence is (at least minimally) relevant to consciousness of the adverse nature of the evidence or of liability on the claim as a whole.⁴⁶ Even if the juror can avoid the improper propensity inference, however, there remains the problem of determining just how strong this independent inference by way of “knowledge” should be.

A plausible assumption is that many, if not most, jurors will answer the question posed to them not by reference to what they think about effects on the probability of defect, at least in part because of the difficulty just noted in assessing this directly, but rather by reference to the immorality of plaintiff’s behavior in destroying the evidence. If a juror views the plaintiff’s behavior as really awful, she will reduce the probability of defect by enough to insure that it is less than 50% and prefer a verdict for the defense. Conversely, if she believes that his behavior was not bad enough to warrant the plaintiff losing, she will leave the probability essentially where it was, at 67%, and prefer a verdict for the plaintiff. That is, the choice of verdict determines the probability assessment, rather than the other way around. What the juror is really doing in such a case is deciding whether the litigative conduct of the plaintiff warrants *increasing the burden of persuasion* to the point where, contrary to her initial inclination, the plaintiff will lose. It is an all-or-nothing choice, based on considerations largely, if not entirely, ancillary to the primary dispute.

There is, at this time, no empirical evidence clearly supporting this particular hypothesis, although evidence of “other bad acts” – that is, acts distinct from the act alleged in the litigation – have long been thought to have a powerful effect on the verdict, even in the face of limiting instructions that would seem to preclude such an effect.⁴⁷ But there is at least some longstanding authority on the more specific question at issue here. Revisions

⁴⁵ See FED. R. EVID. 404(b).

⁴⁶ *Id.* (evidence of other wrongs is not excluded by the rule if offered for other purposes such as to prove “knowledge”); see also *Tamme v. Commonwealth*, 973 S.W.2d 13, 29-32 (Ky. 1998) (affirming conviction despite the prosecution’s introduction of evidence that the defendant had suborned perjury by an alibi witness who was used to obtain a new trial but was not presented at the second trial). Of course, its relevance in this manner does not obviate the need to balance probative value against the risk of unfair prejudice or misleading the jury. See FED. R. EVID. 403. There are cases excluding evidence of tampering on such grounds. See 2 MCCORMICK ON EVIDENCE, *supra* note 20, § 265 n.17, at 228.

⁴⁷ See HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* 158-62 (1966) (reporting data showing the importance that both juries and judges attach to evidence of a prior criminal record); Roselle L. Wissler & Michael J. Saks, *On the Inefficacy of Limiting Instructions: When Jurors Use Prior Conviction Evidence to Decide on Guilt*, 9 LAW & HUM. BEHAV. 37, 37-47 (1985) (reporting and discussing experimental results showing that limiting instructions could not effectively confine the jurors to using the prior criminal record of the accused solely for impeachment purposes).

of McCormick's treatise put the matter quite succinctly when discussing the admissibility of the evidence of tampering:

A question may well be raised whether the relatively modest probative value of this species of evidence is not often outweighed by its prejudicial aspects. The litigant who would not like to have a stronger case must indeed be a rarity. It may well be that the real underpinning of the rule of admissibility is a desire to impose swift punishment, with a certain poetic justice, rather than concern over the niceties of proof.⁴⁸

This brief passage makes several related points. First, evidence tampering may well be done by individuals who, if the truth could be known, would be entitled to a favorable judgment. There are many reasons that people try to game the system, and some of those reasons are entirely consistent with being in the right on the merits. For example, a person who truly deserves to win may well believe, sometimes with good reason, that the available evidence (or even "the system") is stacked against him and that he can only win if he is willing to cut some procedural corners.⁴⁹ Thus, the inference from the tampering behavior is at least ambiguous, making it difficult for the juror to adjust probabilities sensibly. Second, evidence about one's litigative behavior constitutes "other bad acts" evidence, which raises the kinds of concerns around which the rules of character evidence are constructed, inviting the juror to reason that someone who suppresses evidence is more likely to be the kind of person who would be wrong on the merits. Finally – and this is the psychological hypothesis – the juror who accepts the adverse inference argument may well be imposing "poetic" justice, meaning a kind of justice that does not implement what the above passage somewhat cryptically calls "the niceties of proof." This poetic justice is achieved by adjusting the burden of persuasion to the detriment of the tamperer.⁵⁰

To be sure, there are those who question the entire enterprise of precluding character evidence. Some would argue that trials are almost always about character, and that effective limitations on arguments from character evidence are the exception rather than the rule.⁵¹ Be that as it may, the character

⁴⁸ 2 MCCORMICK ON EVIDENCE, *supra* note 20, § 265, at 228. This particular paragraph was not contained in the original treatise; it first appeared in the second edition, prepared after McCormick's death. See MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 273, at 661 (Edward W. Cleary ed., 2d ed. 1972).

⁴⁹ See, e.g., *McQueeney v. Wilmington Trust Co.*, 779 F.2d 916, 921-23 (3d Cir. 1985) (admitting evidence of plaintiff's fabrication of evidence, by subornation of perjury, in context where plaintiff's efforts to discover potentially corroborating witnesses known to the defense may well have been stonewalled during discovery).

⁵⁰ See Richard O. Lempert, *Modeling Relevance*, 75 MICH. L. REV. 1021, 1038-39 (1977).

⁵¹ Scholars have long wrestled with this phenomenon. An insightful series of articles appeared in a 1998 symposium. See generally Symposium, *Truth & Its Rivals: Evidence Reform and the Goals of Evidence Law*, 49 HASTINGS L.J. 289 (1998).

evidence rules are still with us. There is, moreover, something distinctive about the risk of prejudice in this context, something that makes evidence tampering quite different from other kinds of “bad acts” evidence. In the usual context of “bad acts” evidence, the actor’s alleged delict breaches a duty owed to some private person, not an official of the court. Evidence tampering is different in that it constitutes an attack upon the court itself, a breach of duty to the tribunal and, most especially, to the jury, whose task it is to reconstruct past events as well as it possibly can. By damaging the evidence that is available to the jury, the tamperor impedes that task, and one can well expect the jury to react to such an affront. The risk of prejudice is real, even if we are inclined to call it “poetic justice.”

B. *A Confusion of Juridical Roles*

The foregoing difficulties are symptomatic of a deep confusion, one that has gone largely unnoticed. Whether within the law or in other contexts, any situation that calls for decision-making under conditions of uncertainty poses two distinct problems. Here, I will call them the “evidence search problem” and the “final decision problem.”⁵² First, a decision-maker must decide when she has acquired enough evidence to make the final decision, and, when that has happened, she must make that final decision under the conditions of uncertainty that remain. Both of these problems pose what are essentially problems of practical optimization.⁵³ In the search context, a bit crudely put, one obtains evidence until the cost of acquisition exceeds the anticipated benefits of the search effort. In the final decision context, also crudely put, one

⁵² This distinction tracks another: the distinction between two senses of evidentiary “weight.” See Dale A. Nance, *The Weights of Evidence*, 5 *EPISTEME* 267, 267-69 (2008) (distinguishing between weight in the sense of the degree of completeness of the evidence and weight in the sense of the degree to which the available evidence favors one side or the other).

⁵³ Nothing in the argument presented here depends heavily on this characterization, but to avoid confusion, I should say something about my use of the term “practical optimization.” First, it is used to differentiate these decisions from decisions that are indifferent to, or at least not dominated by, costs and benefits, such as decisions controlled by deontological norms (such as the rejection of torture). Second, it is normative: I do *not* mean to suggest that an accurate psychological *description* of the decision process for any given legal actor involves what decision theorists refer to as “unbounded rationality” (involving infinite calculation resources) or even “optimization under constraints,” though they may for various purposes be usefully modeled as if they do. For example, such decision processes may involve what is called “satisficing” by the use of “heuristics.” See GERD GIGERENZER, PETER M. TODD & THE ABC RESEARCH GROUP, *SIMPLE HEURISTICS THAT MAKE US SMART* 5-15 (1999). What matters is that such devices contribute to achieving a balance of benefits and costs that is no worse than can be obtained under any practically identifiable and available alternative, within any deontological constraints that may apply.

chooses so as to minimize the expected costs of errors, given the remaining uncertainty.⁵⁴

When the investigator and the decision-maker are the same person, these two problems may not be conspicuously separated. Legal adjudication, however, generally does separate these two problems and assign them to different actors in the legal system.⁵⁵ In an adversary system, the search problem is primarily handled by the parties, acting under obvious incentives, but qualified and supervised by the judiciary applying various rules of discovery, admissibility, and sufficiency.⁵⁶ In contrast, the final decision problem is assigned to the jury (or to a judge in a bench trial) under proof rules established beforehand and supervised by the trial judge. If the system works as it is intended to, the judiciary and the rules it administers will ensure that parties present to the jury a set of information that is optimized with respect to the search problem. That is, they will present all the practically useful and admissible information that is reasonably available to be presented. This will not, of course, eliminate all uncertainty, and the jury, then, must make the final decision under conditions of (not-reasonably-avoidable) uncertainty. Because any residual uncertainty is not reasonably avoidable, the jury need not consider questions of responsibility for sub-optimality in the solution to the search problem.

With this in mind, the central problem of adverse inferences comes into relief: they involve a confusion of roles. The jury is being assigned management of an issue that properly lies in the context of the search problem. When a party suppresses practically useful evidence, the resolution of the search problem has been rendered sub-optimal. That is a kind of problem that typically is, and should be, addressed by the judiciary, not by juries.⁵⁷ Many of the remedies, including issue preclusion, available to a trial judge in cases of discovery abuse illustrate how this can be done. To the extent that my behavioral hypothesis is true, when the problem is assigned to the jury instead,

⁵⁴ See John Kaplan, *Decision Theory and the Factfinding Process*, 20 STAN. L. REV. 1065, 1071-77 (1968). A more complete understanding takes into account the varying utilities of true positives and true negatives. See Nance, *supra* note 14, at 623.

⁵⁵ Cf. H.L. HO, A PHILOSOPHY OF EVIDENCE LAW 167-68 (2008) (opining that in both contexts, “[t]he intertwining of epistemic and ethical considerations here is complex and it is unclear that they are separable”).

⁵⁶ In Continental systems of adjudication, the parties have a reduced role in handling the search problem, but the final decision problem can still be separated from the evidence search problem by assigning responsibility for the two tasks to different magistrates. Even a single judge handling the entire case wears two distinct hats: the investigator and the decider. See John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823, 826-32 (1985) (describing how the judge proceeds with investigation until the point is reached that a decision can be made).

⁵⁷ See Nance, *supra* note 14, at 633-39 (identifying particular situations of sub-optimal search that cannot be properly addressed by jury adjustments of the odds or probabilities for ultimate material facts).

the jury is put in the awkward position of trying to manage it by doing something that, ordinarily, we do not want them to do – by adjusting the burden of persuasion to reflect their appraisal of the evidence tamperer's quite distinct, litigative behavior.⁵⁸

In response, one may well say that this modest conflation of roles can be a necessary expedient. After all, why is it carved in stone that the judge must manage the evidence search problem? Why is it that this task cannot be assigned to the jury, or at least shared with it, as a practical expedient in some contexts, risks of unfair prejudice notwithstanding? Why not, in particular, allow the jury to adjust the burden of persuasion to take into account evidence tampering by the parties?⁵⁹ To answer this question, one must articulate why it is that, ordinarily, we assign supervision of the search problem to judges rather than to juries.

⁵⁸ The matter can be conceptualized in a different way. In our defective product case, notwithstanding the evidence of the plaintiff's destruction of the product, a juror might believe the probability of defect still exceeds 50% yet decide in favor of defendant on the grounds that (a) the evidence is too *incomplete* to permit a verdict and (b) the plaintiff, as the party having the burden of persuasion, should bear responsibility for that incompleteness. This presumes (contrary to the assumption in the text) that the burden of persuasion requires something besides a probability of defect in excess of 50%, that it has a second component related to completeness of the evidence. Indeed, some scholars have argued in favor of this idea. *See, e.g.*, ALEX STEIN, FOUNDATIONS OF EVIDENCE LAW 80-106, 118-33 (2005) (arguing, however, that judges should have responsibility for applying the completeness portion of the burden). That this does not work can be inferred from the fact that one's intuition about the result changes if it were the defendant who destroyed the evidence; in that case, the plaintiff still bears the burden of persuasion, but a verdict for the defense on account of the incompleteness of the evidence is implausible. The incompleteness, by itself, should be no bar to a judgment for the party bearing the burden of persuasion if that party cannot rightly be expected to eliminate (or have avoided) the evidential deficiency. Further, shifting the burden of persuasion to the defendant, so that the jury finds (or the judge preemptively rules) for the plaintiff on account of the incompleteness, would be merely an ad hoc solution that only demonstrates the fact that a sanction is being imposed based on the parties' comparative responsibility for the incompleteness. And to the extent that the assignment of responsibility for the incompleteness is understood as a sanction, under this conceptualization the party that initially bears the burden of persuasion is immune from it, because responsibility for morally *neutral* incompleteness is already assigned to that party. A generalization of my point in regard to evidence tampering is that management of the completeness of evidence is properly a judicial task, part of the burden of production, not part of the burden of persuasion. *See* Dale A. Nance, *Allocating the Risk of Error: Its Role in the Theory of Evidence Law*, 13 LEGAL THEORY 129, 138-54 (2007).

⁵⁹ *Cf.* Erik Lillquist, *Recasting Reasonable Doubt: Decision Theory and the Virtues of Variability*, 36 U.C. DAVIS L. REV. 85 (2002) (discussing the ad hoc adjustment of the burden of persuasion in criminal cases to reflect a variety of considerations, but not specifically considering evidence tampering as such a consideration).

Obviously, supervision of discovery by a jury presents severe practical problems. How does one keep a jury convened throughout lengthy, pre-trial discovery? Similarly, how does one arrange to allow a jury to communicate its determinations about the adequacy of the evidence search at a time that allows the parties to respond meaningfully by adjusting what is presented at trial? Under current practice, to the extent the jury is involved in the process by its adverse inferences during deliberations, parties may never even know that such an inference has occurred, much less be able to anticipate it and respond to it.

But there is another, even more serious problem that is easily overlooked. It concerns the conditions that trigger the invitation for an adverse inference. By way of illustration, consider a different hypothetical: a murder case in which the evidence presented (without regard to the adverse inference) causes the juror to believe that the accused's guilt has been shown beyond reasonable doubt. The new information that is now thrown into the mix is that there is a percipient witness to the crime who has not testified and who is incarcerated in another state for a separate crime. The defense proposes to invite an adverse inference against the state. Under conventional doctrine in most courts, in order for the juror to accept this argument, it must be the case that the witness not presented is peculiarly available to the party against whom the inference is to be drawn.⁶⁰ Otherwise, once again, the party raising the argument may be expected simply to call the witness if the former believes that the witness would be helpful.⁶¹

It is not difficult to see the juror's problem: how is she to know whether the witness is reasonably accessible by the prosecution? Do states "lend" their inmates to other states to give testimony? What legal or political obstacles must be overcome to do this? And, assuming the witness is reasonably available to the prosecution, is the witness *also* reasonably available to the defense? What legal and factual issues affect defense access to the witness? Finally, what is a juror to make of the requirement that the witness be "peculiarly" within the power of a party for presentation? Shall we solve this problem by providing expert testimony that educates jurors about the litigation process? Surely these are the kinds of procedural matters about which the trial judge has a distinctly superior knowledge base, so much so that it is rather bizarre to think that a jury should resolve the questions of accessibility.⁶²

⁶⁰ An example of such a jury instruction:

If it is peculiarly within the power of either the government or the defense to produce a witness who could give relevant testimony on an issue in the case, failure to call that witness may give rise to an inference that this testimony would have been unfavorable to that party. No such conclusion should be drawn by you, however, with regard to a witness who is equally available to both parties or where the testimony of that witness would be merely cumulative.

1A O'MALLEY, GRENIG & LEE, *supra* note 17, § 14:15.

⁶¹ See *supra* notes 21-24 and accompanying text.

⁶² Similarly complex legal and factual inquiries arise in the context of determining whether a witness is unavailable to the prosecution at trial so as to render the witness's

Furthermore, resolution of such issues quite often involves setting policy about what must (and must not) be done in the preparation of cases for trial, and setting such policy is properly a matter for the judiciary and the legislature.

Much current practice implicitly recognizes the implications of this illustration. For example, in some courts, a party must seek permission from the court before inviting the jury to make an adverse inference, and the court is required to rule on many of the very issues that are then submitted to a jury.⁶³ And in most or all jurisdictions, the judiciary has found it necessary to develop a complex body of law on the question of whether to allow a party to invite the inference.⁶⁴ That is just what one would expect from the fact that the sanction is being used to set and enforce policy regarding trial preparation behavior. In any event, it would be a mistake to think that committing these evidence search problems to the jury avoids the proliferation of a more rigid body of law and allows the full flexibility of ad hoc judgment. The courts have found any such regime of largely ad hoc judgment to be unworkable, and rightly so.

These points generalize to other contexts, including disputes over civil discovery and disputes over the destruction of evidence in both civil and criminal cases. In many, and perhaps most, cases, the jury is in a much worse position than the judge to assess the comparative accessibility of evidence by the parties as well as the motives of parties and their counsel in taking various actions in preparation for trial.⁶⁵ Once again, it is properly a judicial responsibility, in conjunction with the legislature, to set and enforce policy with regard to trial preparation.

Consider, for example, the well-known case of *Lewy v. Remington Arms Co.*⁶⁶ In this case, defendant had destroyed documents related to similar previous complaints pursuant to a "document retention policy," and the trial judge had given the jury a standard form instruction: "If a party fails to produce evidence which is under his control and reasonably available to him and not reasonably available to the adverse party, then you may infer that the evidence is unfavorable to the party who could have produced it and did not."⁶⁷ On appeal of a verdict for the plaintiff, the appellate court instructed that adverse inference instructions should be used only after the trial court's careful consideration of three factors:

First, the court should determine whether Remington's record retention policy is reasonable considering the facts and circumstances surrounding

hearsay admissible; inquiries that are, of course, assigned entirely to the trial judge. See RICHARD D. FRIEDMAN, *THE ELEMENTS OF EVIDENCE* 361-64 (3d ed. 2004).

⁶³ See, e.g., *United States v. Martin*, 696 F.2d 49, 52 (6th Cir. 1983); *Simmons v. United States*, 444 A.2d 962, 963-64 (D.C. 1982).

⁶⁴ See *Stier*, *supra* note 6, at 145-51.

⁶⁵ See, e.g., *Gates Rubber Co. v. Bando Chem. Indus., Ltd.*, 167 F.R.D. 90, 106-07 (D. Colo. 1996).

⁶⁶ 836 F.2d 1104 (8th Cir. 1988).

⁶⁷ *Id.* at 1111.

the relevant documents. . . . Second, in making this determination the court may also consider whether lawsuits concerning the complaint or related complaints have been filed, the frequency of such complaints, and the magnitude of the complaints. . . .

Finally, the court should determine whether the document retention policy was instituted in bad faith.⁶⁸

Several features of this appellate guidance are worth noting: (a) the factors to be considered are the kind that a court would naturally consider in deciding on some discovery sanction other than an adverse inference; (b) the factors are barely hinted at in the jury instruction itself and the appellate court does not suggest that these factors are to be reconsidered by the jury pursuant to some modified jury instruction; and (c) the factors are especially suited to judicial assessment, rather than jury assessment, because they relate to a party's behavior in litigating this and other cases. Nevertheless, once given the task, the jury can hardly avoid thinking along these very lines in deciding whether to draw such an adverse inference. The confusion of roles practically calls out for disentanglement, yet there is no discussion in the opinion of alternative sanctions or the implications of those alternatives in terms of allocating and protecting appropriate roles.⁶⁹

⁶⁸ *Id.* at 1112.

⁶⁹ Submitting the question to jurors through the medium of formal, rebuttable presumptions, a suggestion that courts and commentators occasionally make for civil cases, only makes matters worse. *See, e.g., Clark Constr. Grp., Inc. v. Memphis*, 229 F.R.D. 131, 141 (W.D. Tenn. 2005) (employing an indecipherable "rebuttable presumption" against the tamperer that does not even begin to specify the respective roles of judge and jury in implementing the presumption); Donald H. Flanary, Jr. & Bruce M. Flowers, *Spoilation of Evidence: Let's Have a Rule in Response*, 60 DEF. COUNS. J. 553 (1993) (advocating a presumption, but failing to explain either exactly how it would work or why a presumption is to be preferred to the more conventionally accepted inference). Again, the source of the problem is the difficulty, indeed incoherence, of involving juries in the administration of presumptions. *See generally* Ronald J. Allen, *Presumptions in Civil Cases Reconsidered*, 66 IOWA L. REV. 843 (1981) (arguing that the traditional roles of the legislature and judiciary in assigning the burden of persuasion and both assigning and applying the burden of production are obscured by the label "presumption," with the result that the jury is mistakenly thought to have a role in deciding facts antecedent to the burden allocation decision). When submitted to a jury, at least in this context, the only presumptions that ought to be entertained are *conclusive* ones, the predicate facts for which are determined by the court without jury involvement. *See, e.g., Pressey v. Patterson*, 898 F.2d 1018, 1024 (5th Cir. 1990) (suggesting that the trial court, on remand, impose the sanction of "deeming" certain facts admitted by the tamperer); Nance, *supra* note 14, at 641-42, 651-52 (advocating the use of conclusive presumptions in dealing with problems of the incompleteness of evidence). To be sure, the matter is entirely different if the court employs a rebuttable presumption in the course of its own decision-making, as when a presumption of prejudice arises from particularly egregious acts of evidence tampering. *See GORELICK, MARZEN & SOLUM, supra* note 4, § 3.17. That is a presumption the jury need never and should never hear about.

Collectively, these considerations make a powerful case against the use of adverse inferences to deal with allegations of evidence tampering. If there is a problem of sub-optimality in the evidence search, a remedy should be fashioned by the judge, and it should not be one that calls upon the jury to make determinations about the accessibility of the evidence to the parties or about the relative blameworthiness of the parties' behavior in litigating the case. In essence, the problem with relying on adverse inferences to deal with problems of evidence tampering is that it involves judges avoiding what may be difficult questions by handing them over to the jury, a body with much less relevant experience and no proper authority to address those questions.

It should be emphasized that the conclusions reached here do not presuppose any particularly skeptical view of the competency of lay jurors to perform the tasks properly assigned to them. This is not part of some larger anti-jury agendum.⁷⁰ The jury is properly tasked to reconstruct the events being litigated; the trial judge is properly tasked, in part, to take such measures as are reasonable and necessary to assist and protect the jury in the performance of its task. The latter role entails controlling parties' attempts to game the system by manipulating evidence. Recognition of this responsibility connects with a similar principle: that evidence carrying potentially unfair prejudice need not have low probative value to be excluded if an alternative means exists, without any such potential, to achieve the legitimate result intended by introducing the evidence.⁷¹ Put in a nutshell, if "poetic justice" is to be done, it can be done, and should be done, by judges rather than juries.

III. REMOVING THE JURY FROM THE EVIDENCE MANAGEMENT TASK

If one concludes that, to the extent practicable, juries should not be involved in the task of setting and enforcing policy about the pre-trial behavior of parties in regard to evidence, then the question arises how, and with what tools, the court ought to pursue that task. In this Part, I will focus on the remedy of "issue preclusion," but also give brief attention to another evidentiary device: the exclusion of evidence offered by the tamperor. I will then consider the

⁷⁰ Cf. NEIL VIDMAR & VALÉRIE P. HANS, *AMERICAN JURIES: THE VERDICT* 9-10 (2007) ("If you learn anything from *American Juries*, it should be that, given the right environment, the proper tools, and the appropriate instructions, juries are reliable, fair, and accurate.").

⁷¹ This principle is but a modest extension of the principle confirmed by the Supreme Court in relation to the interpretation of the trial court's authority to exclude evidence under Federal Rule of Evidence 403. Rule 403 authorizes exclusion of evidence if its probative value is substantially outweighed by the risk of unfair prejudice or confusion of the issues, and the Supreme Court has made clear that, in applying this rule, the trial court is not only to compare the situation with and without the evidence to which objection is made, *ceteris paribus*, but also to compare the situation with such evidence to alternative presentations available to the proponent. See *Old Chief v. United States*, 519 U.S. 172, 178 (1997) (reversing a conviction because *unnecessarily* prejudicial evidence was admitted).

continuing role of the jury in assessing the adequacy and reliability of evidence that *is* introduced at trial.

A. *Issue Preclusion for Evidence Suppression*

In the context of evidence suppression – used here to refer collectively to the first three categories of tampering specified in Part I⁷² – consider what a judge can and should do by way of issue preclusion. The court considers the material factual issues in the case that are most directly related to the evidence suppression and rules summarily on those facts in favor of the non-suppressing party. As already mentioned, this may or may not result in summary judgment, dismissal, or default. If it does not, the trial proceeds with the summarily determined facts taken as true (or false). The jury can be shielded from the matter entirely by removing the foreclosed facts from the list of ultimately decisive facts tendered for their consideration, or they may be told of the importance of those facts by including them in such a list, but relieved of the necessity of determining them by being instructed how they are to find with respect to those facts. Either way, the matter is relatively simple and clean.⁷³

The advantages of such a procedure can be illustrated by examining an important Supreme Court decision. In *Jaffee v. Redmond*,⁷⁴ the Court recognized the existence of a privilege in federal courts for confidential communications between a psychotherapist and his or her patient. The ruling arose in the context of an action against a police officer and her governmental employer for violation of constitutional rights by the use of excessive force resulting in death. For our purposes, the interesting aspect of this case is how it came before the Court. During discovery, the trial court rejected the privilege claim and ordered disclosure of the interview notes of the municipal social worker providing psychotherapy to the defendant police officer. The notes were not released and the trial judge had to decide how to address this defiance of the court's authority. It chose to send the case to trial with a jury instruction advising the jury that the refusal to turn over the notes had "no legal justification" and that the jury was "entitled to presume that the contents of the notes would be unfavorable" to the defendants.⁷⁵ The instruction did not *require* the jury to make such a presumption, nor did it give them any guidance for determining whether to do so or, if they did, for determining *how* unfavorable to the defense they should take the notes to be. The confusion here is manifest. As it happened, the jury returned a verdict for the plaintiff, which was successfully appealed.

⁷² See *supra* text accompanying note 10.

⁷³ To be sure, the matter is not quite so simple if the judge decides *not* to impose a sanction. The question then arises whether parties are to be permitted to invite the jury to do so. This question is taken up below. See *infra* Part III.C.

⁷⁴ 518 U.S. 1, 15 (1996).

⁷⁵ *Jaffee v. Redmond*, 51 F.3d 1346, 1351-52 n.9 (7th Cir. 1995).

Now consider what would have happened had the trial judge, instead of using an adverse inference instruction, simply entered an order that the defendant police officer would be deemed to have used excessive force on account of the refusal of discovery. There would have been no need for a trial, other than one to determine damages if no interlocutory appeal occurred, and the defendants would not have been positioned to entertain the possibility that the jury would engage in nullification of the trial judge's determination that there was no privilege. On the inevitable appeal, when the Supreme Court reversed the trial court's ruling relating to the existence of a privilege, the case would have gone back to the trial court for its first trial on liability, rather than its second, and indeed a trial on liability might no longer have been necessary at all, depending on the strength of the remaining admissible evidence. The efficiency gains of such an approach are obvious. Less obvious, but no less real, are the benefits to the jury in not ever having to consider the question of nullification or to speculate about the strength of the inference, if any, to be drawn from the defendant's epistemically ambiguous refusal to disclose the contents of the notes.

Fortunately, one can find the occasional case that explains a preference for issue preclusion over an adverse inference. For example, in *Telectron, Inc. v. Overhead Door Corp.*,⁷⁶ the trial court imposed default upon a defendant that willfully destroyed relevant documents.⁷⁷ In the course of its opinion, the trial court made unusually insightful comments about the inadequacy of "lesser sanctions," among which was the adverse inference. The court's reasoning bears quotation:

We have considered as an alternative evidentiary sanction permitting evidence of [Overhead Door's] obstructive conduct to be adduced at trial. This measure would be woefully inadequate in the context of this case, however, for four reasons. First, the Plaintiff here would be compelled to litigate its claims without the aid of possibly dispositive evidence, and the fact-finder would correspondingly be denied the opportunity to evaluate the merits of the case in light of all relevant evidence. Second, the sanction would leave too much to fortuity, since we can only speculate as to the significance which a jury might attach to evidence of willful document destruction in the context of a complex and protracted antitrust case. Third, in a case such as this, where evidence pertaining to the disputed document destruction is so varied and abundant, there is the very real risk that the destruction issue may consume the jury's attention at trial, diverting their focus from the underlying substantive issues.⁷⁸

⁷⁶ 116 F.R.D. 107 (S.D. Fla. 1987).

⁷⁷ *Id.* at 140.

⁷⁸ *Id.* at 136. The court's fourth reason is taken up later. *See infra* text accompanying note 126.

Here we observe sophistication about the proper role of the jury that is lacking in so many judicial opinions, such as the one in *Lewy*.⁷⁹ True, the court's reference to "fortuity" in jury decision-making might be understood as a (largely groundless) criticism of the uncertainty of jury decision-making generally. Perhaps that is what the court intended. But in the context of the comments about distracting the jury from its proper focus on the merits of the case, this reference to fortuity should instead be understood to reflect the fact that the jury is being called upon to set and enforce policy about the pre-trial litigative conduct of parties, a matter about which the jury lacks the expertise and authority of the judiciary, and a task that the jury is not even directly charged to undertake. Issue preclusion avoids these complications entirely.

There are other benefits of issue preclusion. For one, there is no need for litigants to explain in front of the jury pre-trial decisions about what evidence to search for, preserve, disclose, or present at trial: explanations that might necessitate revealing attorney-client communications or work product. This can and should be managed outside the jury's hearing.⁸⁰ In addition, when evidence tampering is done by the attorney without the client's involvement, there is an important benefit to clients and to the legal system in streamlining the resulting malpractice litigation. If the matter of evidence tampering is submitted to a jury as an adverse inference, it will often be difficult, if not impossible, to discern whether evidence tampering, and thus malpractice, was found to have occurred; that determination is buried in the determination on the merits. By contrast, when a judicial determination of tampering becomes the basis of sanctions, the malpractice action should be subject to issue preclusion on the question of whether the attorney's actions constituted a breach of duty. Even if there is no formal preclusion, the explicitness of the judge's determination will be a clear message that will encourage settlement of the malpractice claim. To be sure, these are ancillary benefits. Again, the most important benefit of eschewing adverse inferences is that it avoids distracting jurors in the underlying litigation into making decisions about the

⁷⁹ See *supra* notes 66-69 and accompanying text.

⁸⁰ Edward Imwinkelried has recently proposed that a proponent's knowing offer of inadmissible evidence be the basis of an explicit adverse inference supported by a jury instruction. See Edward J. Imwinkelried, *Poetic Justice in Punishing the Evidentiary Misdeed of Knowingly Proffering Inadmissible Evidence*, 7 INT'L COMMENT. ON EVIDENCE Issue 1, art. 6, 2009, at 2. At this point, it should be clear why I disagree with such an approach and prefer that the law employ judicially managed responses to this problem. But in the course of his argument, Professor Imwinkelried does propose the useful idea of allowing the consideration of otherwise privileged information (attorney-client communications or work product) in preliminary hearings without effecting a waiver if and when the matter is then submitted to a jury. *Id.* at 6. This idea actually works better under an approach that does not submit adverse inferences to the jury at all, because then there is no pressure to waive these privileges at trial in an attempt to explain away the evidentiary misconduct. See *id.* at 16-20.

rights and wrongs of litigation, and allows them instead to concentrate on deciding the merits of those cases properly submitted to them.

A remedy that, in practical effects, often amounts to the same thing as issue preclusion is to exclude some or all of the evidence offered by the tamperor on the matter to which the lost evidence relates.⁸¹ Such a remedy will often result in summary judgment against the tamperor.⁸² If not coupled with an adverse inference, this attempt at achieving corrective justice at least eliminates the jury's need to assess availability of missing evidence and blameworthiness of the tamperor; the judge has already done that.⁸³ In comparison to issue preclusion, however, it has the rather undesirable property of masking a solution to the evidence search problem in a determination on the merits that is, from an epistemic point of view, arbitrarily skewed because it entails excluding evidence that, by hypothesis, is otherwise admissible.⁸⁴ This is all the more troublesome if the exclusion does not result in summary judgment

⁸¹ See, e.g., FED. R. CIV. P. 37(b)(2)(B); FED. R. CRIM. P. 16(d)(2).

⁸² See KOESEL ET AL., *supra* note 4, at 42-45.

⁸³ See, e.g., *Fire Ins. Exch. v. Zenith Radio Corp.*, 747 P.2d 911, 914 (Nev. 1987) (affirming summary judgment after exclusion of evidence and noting the superiority of this procedure over the alternative of sending the case to trial with an adverse inference).

⁸⁴ The matter may be otherwise when a finding of tampering leads to the forfeiture of an otherwise valid objection, in which case the sanction is not *exclusion*, but rather *admission* of relevant evidence. See, e.g., FED. R. EVID. 804(b)(6) (providing for the forfeiture of a hearsay objection when the declarant is unavailable due to the wrongdoing of the objecting party). This sanction may be inadequate as a response, but it need not be epistemically arbitrary, depending on the theory of the hearsay rule itself. If hearsay is excluded because jurors cannot assess the value of hearsay evidence well, the forfeiture would be epistemically arbitrary; the jurors' ability to handle declarations that have not been subject to oath and cross-examination is not improved just because a party has rendered the declarant unavailable. But if hearsay is excluded to discourage evidence tampering by encouraging parties to present hearsay declarants to testify at trial, that message is pointless when the opponent of the hearsay has prevented the declarant's appearance. In that case, the goal of frustrating the tamperor's efforts harmonizes with the goal of optimizing the evidence before the jury. See generally Dale A. Nance, *Understanding Responses to Hearsay: An Extension of the Comparative Analysis*, 76 MINN. L. REV. 459 (1992).

and a trial is required.⁸⁵ Issue preclusion is more honest and, by reducing the need for trials, more efficient as well.⁸⁶

For example, in an Ohio case, *Transamerica Insurance Group v. Maytag, Inc.*,⁸⁷ the trial court dismissed a complaint because of the plaintiff's destruction of important tangible evidence that was the subject of the litigation, but the appellate court reversed on the ground that dismissal was too severe.⁸⁸ The appellate court remanded, however, with instructions that clearly suggested it would be appropriate to exclude the plaintiff's evidence and then grant summary judgment to the defendant. What was to be gained by this procedure is not explained in the opinion: if dismissal is too harsh, so is the exclusion of evidence that entails summary judgment. Even if the plaintiff

⁸⁵ See, e.g., *Dillon v. Nissan Motor Co.*, 986 F.2d 263, 265 (8th Cir. 1993) (affirming judgment on a jury verdict for the defense after the trial court had excluded a principal expert witness for the plaintiff and given a jury instruction in support of adverse inference arguments by defense counsel). If the case goes to trial, moreover, there is the risk that judicial exclusion of evidence, by thwarting jurors' expectations, may invite speculative inferences, not about the evidence suppressed by the party, but about the evidence suppressed by the judge. See Steven A. Saltzburg, *A Special Aspect of Relevance: Countering Negative Inferences Associated with the Absence of Evidence*, 66 CAL. L. REV. 1011, 1011 (1978).

⁸⁶ To be sure, exclusion is often invoked when a party, rather than suppressing evidence potentially favorable to an opponent, simply does not disclose evidence that it intends to offer at trial when under an obligation to do so; as a sanction, the non-disclosed evidence is excluded when subsequently offered at trial. See, e.g., *Banks v. Hill*, 978 So. 2d 663, 664 (Miss. 2008). First, it might seem that this situation would not involve any loss of evidence were it not for the judicial sanction itself. This assumption, however, neglects the loss of counter-evidence that the opponent would be able to develop if pre-trial disclosure were effectuated. Second, it might seem that, in this context, exclusion of the non-disclosing party's evidence is the only meaningful sanction anyway, for a practice of imposing more serious sanctions, including issue preclusion, would simply result in the party's imposing exclusion on itself by not offering previously undisclosed evidence that would trigger the more serious sanction. This assumption, however, neglects the fact that the party will choose not to disclose only if there is a perceived positive chance that the non-disclosure will be ruled at trial not to have been a violation of its duty; if that probability is zero, then it does not matter whether the sanction is evidence exclusion or issue preclusion – either way the evidence will be disclosed and there will be no occasion to apply the sanction. If the probability is not zero, then issue preclusion provides a stronger incentive to disclose than mere exclusion of the previously non-disclosed evidence at trial. On the other hand, counsel might choose not to disclose under a good faith belief that the evidence will not be presented at trial, and issue preclusion might then be too harsh a penalty for having made an inaccurate prediction. The bottom line: exclusion as a sanction is less problematic in this context than when used as a sanction for suppression of evidence favorable to an opponent.

⁸⁷ 650 N.E.2d 169 (Ohio Ct. App. 1994).

⁸⁸ *Id.* at 206.

could somehow have avoided summary judgment (and directed verdict), the resulting trial would likely have been farcical.⁸⁹

Of course, it should be acknowledged – and will be discussed further below – that there are many other lesser sanctions that can be employed to address evidence suppression. The present focus on issue preclusion is driven by the assumption of bad faith in the conduct of the tamperer. This assumption is relaxed in Part IV.

B. *Issue Preclusion for Failure to Present Evidence*

With regard to the fourth category of evidence tampering, the matter is rather different. In the context of evidence suppression – destruction, manipulation, violation of a discovery order, and so forth – the act of suppression itself identifies the party upon whom the sanction should be imposed, whether that sanction be issue preclusion, an adverse inference, exclusion of evidence, or monetary penalties. When the problem is simply missing evidence – evidence that is extant and admissible but not presented at trial – a policy or rule is required to assign responsibility for the absence of the evidence, if responsibility is to be imposed at all. Unfortunately, the law of missing evidence inferences has been of two minds in this regard.

On its own terms, the inference should operate against the party that is likely to be damaged if the evidence is brought into court; the adverse inference is intended to substitute, however poorly, for the missing evidence. From this perspective, much of the conventional law on adverse inferences is confused. Consider, for example, the classic formulation in a leading decision by the Supreme Court: “[I]f a party has it peculiarly within his power to produce witnesses whose testimony would elucidate the transaction, the fact that he does not do it creates the presumption that the testimony, if produced, would be unfavorable.”⁹⁰ Rather than focusing on which party has “peculiar” access to the evidence, a logical adverse inference in this context (in a world with a voucher rule and other limiting features of the common law of evidence) requires only two conditions be met: (1) that the party against whom it is to be drawn has access to the evidence (regardless of whether the opponent does also); and (2) that, before one learns that the witness will not be called, the witness would be expected to give testimony favorable to the party against whom the inference is to be drawn, usually because of circumstances indicating bias. Case law is split on the appropriate predicates for an inference: some – exemplified by the Supreme Court’s formulation – focus

⁸⁹ See Nance, *supra* note 14, at 640-43 (arguing that the exclusionary remedy makes sense in the context of evidence suppression only as an inducement not to suppress evidence and only under limited conditions, as when the excluded evidence is largely redundant or derivative of the information that would be provided by the evidence that has been lost).

⁹⁰ Graves v. United States, 150 U.S. 118, 121 (1893).

entirely on the relative conditions of party access, while others focus on the presumptive bias of the potential witness.⁹¹

Some courts have attempted to reconcile (or ignore) this split by merging the two theories into one, invoking a notion of “pragmatic availability” and ruling that a missing witness inference may be drawn when it is shown “either that the witness is physically available only to the opponent *or* that the witness has the type of relationship with the opposing party that pragmatically renders his testimony unavailable to the [] party [requesting the inference].”⁹² But the focus on presumptive bias is no longer justifiable, at least in a system of litigation with liberal rules of discovery and admissibility. That is the lesson to be derived from those modern cases that have rejected the use of missing witness inferences.⁹³ Some other courts, while not explicitly rejecting adverse inferences, have now effectively limited their use to situations in which the proponent of the inference cannot require the witness to testify, regardless of the witness’s relationship to the parties and thus any presumptive bias.⁹⁴

In a short but prescient article published in 1984, Joseph Livermore correctly concluded that in the great bulk of cases the probative value of the adverse inference is too weak and ambiguous to work as the inferential tool it is supposed to be and that, to the extent the adverse inference makes any sense, it makes sense only as a sanction. That is, it serves as a tool to enforce the presentation of missing evidence, based on the court’s (or legislature’s) judgment that such evidence ought to be presented (by someone).⁹⁵ This reconceptualization of what is happening when a court permits or endorses an adverse inference places the situation within the fourth category of evidence tampering detailed in Part I of this Article, in which a duty is imposed to

⁹¹ See 2 MCCORMICK ON EVIDENCE, *supra* note 20, § 264, at 221-22.

⁹² *Chi. Coll. of Osteopathic Med. v. George A. Fuller Co.*, 719 F.2d 1335, 1353-54 (7th Cir. 1983) (emphasis added) (suggesting that *both* parties should have been allowed to argue an adverse inference from the failure to call a possibly disgruntled former employee of one of the parties). One can tell that something is seriously wrong when each party argues to the jury, with the judge sitting idly by, that an inference should be drawn against the other party in such a context.

⁹³ See *supra* notes 21-24 and accompanying text.

⁹⁴ See, e.g., *Stockton E. Water Dist. v. United States*, 76 Fed. Cl. 497, 504-06 (2007) (rejecting an adverse inference against the defendant for failure to call the defendant’s employees as witnesses); *Repecki v. Home Depot USA*, 942 F. Supp. 126, 129 (E.D.N.Y. 1996) (nominally applying New York law and rejecting an adverse inference against plaintiff construction contractor for failure to call plaintiff’s client, an eyewitness to the accident); *Bereano v. State Ethics Comm’n*, 944 A.2d 538, 551-55 (Md. 2008) (rejecting an adverse inference against a lobbyist from the failure of the lobbyist’s client to testify concerning the terms of the representation).

⁹⁵ Joseph M. Livermore, *Absent Evidence*, 26 ARIZ. L. REV. 27, 28-29, 40 (1984).

disclose or present evidence that does not arise from a valid subpoena or discovery request or from the ordinary burden of production in the case.⁹⁶

From this perspective, a focus on the *comparative* accessibility of the missing evidence to the parties makes more sense. For example, if the court is committed to requiring that the missing evidence be presented, then, arguably, the burden should fall on the party with superior access to the evidence on a “least cost producer” theory, in order to minimize litigation costs.⁹⁷ On the other hand, given the expansion of discovery, the elimination of the voucher rule, and the liberalization in the admissibility of pre-trial statements of witnesses, one can argue, and some courts have accepted, that there is no need to impose the burden on either party, except in those unusual situations in which missing evidence remains in the *exclusive* control of one side of the dispute or when the trial judge wants to override the joint decision of the parties not to present certain evidence without invoking the court’s authority to call witnesses *sua sponte*.⁹⁸

Somewhat surprisingly, Professor Livermore failed to take the next step, that is, rejecting the use of adverse inferences even for the purpose of imposing and enforcing such a duty to present evidence. Taking that step involves recognizing that it is the responsibility of the judiciary, not the jury, to manage the evidence search problem, and that using adverse inferences not only injects risks of confusion and prejudice, but also improperly delegates much of the management of that task to the jury. Perhaps Livermore did not see clearly an alternative means of enforcement. With the benefit of the present discussion of discovery sanctions in suppression cases, the alternative is easier to contemplate. Once it is posited that the court is imposing an obligation to present evidence and selecting the party to bear that burden, based on whatever considerations of the parties’ comparative access that make sense in the context, then the remedy for failure to produce the evidence required may legitimately entail issue preclusion, just as in the case of evidence suppression.

⁹⁶ See *supra* notes 12-14 and accompanying text. By “ordinary burden of production” I refer to the idea that a burden of production is placed on a party when the evidence is not persuasive enough to permit a reasonable juror to decide the case in that party’s favor under the applicable standard of proof. The burden discussed in the text is more “retail” and can be encountered even when the evidence *would* permit the jury to conclude by the standard of proof in the burdened party’s favor. See Nance, *supra* note 14, at 625 (articulating the thesis that the burden of production should be understood as having a second component extending beyond the ordinary understanding related to plausible inferences).

⁹⁷ See, e.g., Friedman, *supra* note 20, at 1963.

⁹⁸ See *supra* notes 21-24 and accompanying text. Although trial judges have the authority to call witnesses in an adversary system, see, e.g., FED. R. EVID. 614, it is not part of the institutional culture to do so. See generally John C. Reitz, *Why We Probably Cannot Adopt the German Advantage in Civil Procedure*, 75 IOWA L. REV. 987 (1990).

Again, with that shift come simplicity and the avoidance of risks of confusion and prejudice.⁹⁹

Thus, if the judge in our hypothetical murder case concludes that the witness incarcerated in another state likely possesses useful information and can incarceratedly be produced by the prosecution but not by the defense (or, alternatively, can be produced by the prosecution more easily than by the defense), then the judge ought to order the prosecution either to call the witness to testify or at least to make the witness available for the defense to call. The court need not, and should not, be concerned with determining which side of the case the missing witness would be expected to support, either before or after learning that the prosecution does not intend to call the witness. If the prosecution fails to comply, then the judge should enter an appropriate order of issue preclusion against the government, which may well result in a judgment of acquittal. If, on the other hand, the prosecution complies, then there is no question of an adverse inference at trial. And if the judge determines that the witness is reasonably available (or, alternatively, equally available) to the defense as well as the prosecution, then neither party should benefit from an issue preclusion, an adverse inference against the other, or any other procedural sanction. In any event, the jury is not involved in the evidence search problem but remains focused on the final decision problem, if they are called upon to make a decision at all.¹⁰⁰

C. *Legitimate Argument About the Inadequacy of Evidence Presented*

As we have seen, if adverse inferences are to be eschewed, issue preclusion and other sanctions not involving the jury can be used to handle the evidence search problem. The judge should do what is necessary so that the jury can be instructed that they should assume that all evidence that can reasonably be presented has been, and that they need not speculate about the significance of any evidence they might take to be missing because of a party's misconduct in preparing and litigating the case. Such an instruction is not without precedent. Consider the critical portion of the jury instruction affirmed in *Stocker*:

⁹⁹ Among the benefits of simplicity is the elimination of the potential for unpleasant surprise that litigants can experience when they incorrectly anticipate what courts, sometimes appellate courts acting long after trial, will think about the question of whether the witness is so related to a party as to render the witness presumptively biased against, and thus "pragmatically" unavailable to, the opposition. *See, e.g., Bereano*, 944 A.2d at 554 (reversing judgment that improperly relied on an adverse inference against a lobbyist for failing to call lobbyist's client, majority and dissent disagreeing over whether the client was "practically" unavailable to the opponent ethics commission's staff); *State v. Montgomery*, 183 P.3d 267, 278 (Wash. 2008) (reversing conviction in part because trial court gave a missing witness instruction with respect to defendant's landlord, opining that landlord could not be considered peculiarly under defendant's control).

¹⁰⁰ The conditions of accessibility that ought to apply in civil and criminal cases will be explored further *infra* Part IV.

[Y]ou may take it for granted that all of the available evidence material and favorable to either side has been placed before you by one side or the other, so that you . . . are as well informed and in as good a position to decide the case correctly as any jury could be.¹⁰¹

This instruction makes perfect sense provided the trial judge has taken such steps as are reasonable and necessary to assure that the stated conditions are true.¹⁰²

But an important objection must now be addressed. If the court *rejects* a motion for sanctions based on alleged evidence tampering by a party (or no such motion is made), the question will arise whether the allegedly aggrieved party is entitled to take a “second (or alternative) bite at the apple” by arguing the same issue before the jury. Ordinarily, the point of the foregoing arguments is that the answer must be: “No, such a claim must be made to the judge, not the jury.” Can we live with such a result? The argument will be made that, when issue preclusion is denied, or some lesser sanction leaves factual issues to be tried, the aggrieved (non-tampering) party ought to have some recourse to the jury.

In thinking about this issue, it is important to recognize what an instruction like the one in *Stocker*, and more generally a strict “no second bite” policy, would still allow. Most importantly, a party would still be allowed to point to deficiencies in the evidence supporting an opponent’s theory of the case. Counsel would still be able to observe that a fact endorsed by the opponent is unsupported or poorly supported by the evidence before the court, or that the parties’ investigation has not ruled out alternative hypotheses about the events being litigated.¹⁰³ What they would not be allowed to do is to identify some

¹⁰¹ *Stocker v. Boston & Me. R.R.*, 151 A. 457, 457-58 (N.H. 1930).

¹⁰² The present thesis is limited to evidentiary misconduct in the course of litigation, where control by counsel and the judiciary, as well as the informational and policy-making asymmetry between the judge and the jury, is highest. This requires one to distinguish between “litigative” and “non-litigative” conduct. For example, a party’s conduct during the commission of a crime or delict might also destroy evidence. That conduct might be the basis for an adverse inference. For a discussion of the problem of drawing and implementing the line between litigative and non-litigative conduct, see Nance, *supra* note 14, at 652-58. Administering this line drawing is a cost, to be sure, but it is one that is incurred under present law anyway because courts must already draw the line between those kinds of misconduct that will result in sanctions that do not require jury assessments and those that result in adverse inferences implemented by juries.

¹⁰³ The issue of the exclusion of alternative hypotheses is particularly important in criminal cases, where it is not uncommon for the defense to argue that law enforcement officials did not pursue investigations that might have led to exculpatory evidence. See, e.g., JAMES NEFF, *THE WRONG MAN* 134, 136-37, 143-44 (2001) (observing that the defense strategy in the first trial of Dr. Sam Sheppard, for the murder of his wife, was to “attack the entire police investigation itself,” and summarizing the cross-examination of prosecution experts about tests that were not conducted and theories that were not investigated, at least as far as the defense and the court were aware).

particular potential witness or tangible thing, known or claimed to exist or to have existed, and argue or suggest that significance attaches to the fact that the opponent has destroyed or withheld that witness or thing from the court. Such an argument is almost always intended to elicit the inference that the opponent is hiding something from the jury.¹⁰⁴ Nor would counsel be permitted to argue that the opponent should be *punished* for its failure to investigate thoroughly, insofar as punishment goes beyond merely finding that the evidence presented does not support the opponent's claims.

More subtly, jurors could still reason, and counsel could still argue, in hypothetical form based on the absence of certain evidence: "If proposition *P* were true, one would see evidence *E*; evidence *E* is not present, so proposition *P* must not be true."¹⁰⁵ In fact, telling jurors that they need not speculate that the absence of *E* in court arises from the fact that *E*, although once or now extant, has been suppressed or withheld by a party, facilitates such hypothetical arguments. To be sure, the judge should not allow such argument or reasoning if the judge determines that, unbeknownst to the jury, evidence *E* *does* exist, as when *E* has been ruled inadmissible. Putting that possibility aside, a party who would *benefit* by a finding that *P* is true would remain free to show, if it can be shown, that *E* did once exist but was, for example, destroyed before trial. In any event, the question of fault in the loss of *E* need not and should not be considered by the jury, and they should be told as much. It is the attempt to draw an inference from the suggestion of fault or strategic ploy that ought to be disallowed, because responsibility for dealing with that properly lies with the court.¹⁰⁶

Consider a simple insurance dispute. The plaintiff asserts that the defendant insurance company has not paid on a covered loss and supports this assertion with plaintiff's testimony. The defendant asserts that full payment was made and supports this assertion with the testimony of the relevant claims adjuster. Plaintiff has no other evidence to show that the payment was *not* made. The defendant also offers no other evidence that payment *was* made. In such a situation, plaintiff might argue, and the jury could quite reasonably infer, that

¹⁰⁴ See *United States v. Young*, 463 F.2d 934, 944 n.19 (D.C. Cir. 1972) (noting that any comment by counsel that a witness was not called ordinarily involves an argument that the jury may infer the testimony of the witness would be adverse to the party opponent). In the context of *Young*, it was known, identified witnesses (relatives of a friend of the accused) whose absence the prosecutor commented on, not simply a hypothetical witness, as in: "If a witness to the events existed, you would expect him or her to be called; consequently, you may infer that there was no witness to the events." *Id.* at 943.

¹⁰⁵ I want to thank Craig Callen for emphasizing this point in conversations about my thesis.

¹⁰⁶ These abstract propositions are already a part of our practices, as illustrated (albeit imperfectly) by case law that considers what inferences may be argued and drawn in contexts where an adverse inference from tampering is disallowed. See, e.g., *State v. Malave*, 737 A.2d 442, 452 (Conn. 1999); see also *infra* notes 204-09 and accompanying text.

had payment been made, the insurer would very likely have kept some kind of record thereof, which would be produced at trial. This inference does not entail any assumption that either party has committed evidence tampering.¹⁰⁷ It does not require, and should not involve, any jury instruction on the matter.¹⁰⁸ Of course, if light could be shed on the matter by the examination of the financial records of either or both parties, a court might insist on the presentation of such evidence by imposing a burden of production as described in the preceding Section.¹⁰⁹ But if the court does not do so, the jury will remain free to utilize the inference described.

Now consider a more complicated case. Suppose a rape case in which the accused claims that the allegation of rape is fabricated but does not claim that the alleged victim consented. At trial, the prosecution does not present DNA or other biological evidence matching the accused to traces left at the scene of the crime. This lack of evidence could be attributable to a number of potential circumstances, but for simplicity let us assume here that the following are the only two possibilities that are plausible in context:

- (A) such material was gathered, but it was lost by the government before the samples could be analyzed; or
- (B) no such biological material could be found by the police.¹¹⁰

Under the approach suggested here, aside from simply arguing that the other evidence in the case does not eliminate reasonable doubt, the defense in such a case has two options.

- (1) The defense could argue *to the court* that, because (A) is true, the prosecution's case must be dismissed (or some other sanction applied that does not require jury assessments) for violation of a duty with regard to the preparation of the case. Whether the court will accept this argument will depend not only upon whether the court determines that explanation (A) is true,¹¹¹ but also upon whether, under the applicable facts and law, (A) would constitute a violation of a duty sanctionable in some way.¹¹²

¹⁰⁷ Of course, one of the parties may have committed perjury, but as indicated above, a trial judge's conclusion that perjury has occurred should not be the occasion for any judicial sanction that interferes with the jury's opportunity to decide the merits of the case. See *supra* notes 30-31 and accompanying text.

¹⁰⁸ As suggested above, defendant would be free to try to show that the want of documentary support for its position arises from a fire that destroyed company records. If the evidence for this is overwhelming, then the judge could bar argument for the adverse inference and even instruct the jury not to draw it.

¹⁰⁹ See *supra* notes 95-100 and accompanying text.

¹¹⁰ One might argue that reasonable doubt exists whenever such forensic science evidence is missing, regardless of the explanation for its absence. This position, however, cannot be sustained. See *supra* note 58.

¹¹¹ To the extent that courts focus on the issue, they usually apply a "preponderance of the evidence" standard to such factual issues, but for the more severe sanctions, like dismissal and default, a "clear and convincing evidence" standard is sometimes employed.

(2) If the defense makes no such argument to the court or the argument is rejected, and the case goes to trial, the defense could argue *to the jury* that the absence of biological material, as explained in (B), renders the case subject to reasonable doubt, thus warranting acquittal based on the hypothetical reasoning suggested above: if the rape took place, one would expect to find biological traces, but none were found.¹¹³

What the defense may *not* do is argue *to the jury* that, because the explanation is (A), the government should be punished for its failures or that the jury should infer that the evidence derived from the biological material, were it presented, would be favorable to the accused.¹¹⁴

Given the availability of these alternative arguments, the “no second bite” principle is quite defensible in most contexts. However, it is important to remember that assessments of the credibility of witnesses and authenticity of tangible evidence would continue to be the primary responsibility of the jury.¹¹⁵ This presents what is perhaps the most difficult challenge in terms of removing the jury from the evidence management task. Insofar as tampering affects the reliability of evidence that *is* presented, evidence of tampering might be admitted, subject to the exercise of the usual judicial discretion. Allegations of subornation of perjury, for example, will present this problem

See GORELICK, MARZEN & SOLUM, *supra* note 4, § 3.23. It is not surprising that the standard would be adjusted based on the blameworthiness of the act of tampering alleged. See Dale A. Nance, *Civility and the Burden of Proof*, 17 HARV. J.L. & PUB. POL’Y 647, 670-71 (1994).

¹¹² See, e.g., *Arizona v. Youngblood*, 488 U.S. 51, 58 (1988) (rejecting proposition that the state’s negligent destruction of evidence violates the due process guarantee, requiring governmental “bad faith” as a condition of relief). For further discussion on remedies for a party that loses evidence, see *infra* Part IV.B.1. In the example above, there is a possibility of issue preclusion that would not result in dismissal or directed verdict: if the court finds that negligent destruction occurred and that such destruction is sanctionable, then the court might limit the sanction to an instruction that the jury should assume the test results would be exculpatory. See *supra* note 26.

¹¹³ Of course, the government could attempt to anticipate or rebut the argument or inference in (2) with evidence that the biological material was collected but lost before it could be analyzed, or with evidence that rape could have occurred without leaving collectible biological material from the perpetrator.

¹¹⁴ In a comparable civil case, a judge’s factual determination that such evidence *was* destroyed, whether or not such destruction is sanctioned in some way, might properly be taken to preclude an argument as in (2), but the jury might need to be informed of the loss anyway in order to deflect their uninvited inferences of the same kind.

¹¹⁵ When evidence tampering is the very subject of the litigation – for example, in a prosecution for obstruction of justice, or in a will contest involving allegations of forgery – this point is obvious enough. What is discussed in this Section, however, is the situation in which testimony or tangible evidence is not the very matter being litigated, but is simply evidentially related to some other material issue.

starkly.¹¹⁶ Even if a judge finds, for example, against the claim that a party purchased the testimony of a particular witness, there may still be a substantial probability that this was done, and the opponent arguably ought to be able to make such a case to the jury, so that the jury can take this possibility into account in giving appropriate weight to that testimony.

Even so, courts would need to guard this point of entry carefully, lest it become an exception that swallows the rule. Admission would be subject to the exercise of the usual judicial discretion, which should be employed, for example, to prevent arguments that are nothing other than assertions of an opponent's consciousness of a weak case.¹¹⁷ It is just that kind of "indefinite but strong" inference – to paraphrase Wigmore¹¹⁸ – that invites serious problems. And, if evidence of tampering is admitted, the jury could be informed of the court's ruling on the tampering motion, and be instructed that they may not infer adversely to the allegedly tampering party or otherwise attempt to punish the alleged tamperer beyond using the information to assess the credibility of other evidence that is admitted.¹¹⁹

The matter is especially pressing in regard to the accused's right to present exculpatory evidence, which has constitutional status and may require that the defense be given the opportunity to present evidence of tampering by law enforcement officials relevant to the credibility of witnesses.¹²⁰ Nonetheless,

¹¹⁶ Sometimes, discovery of the possibility of perjury will result in the withdrawal of the allegedly perjured testimony by the party accused of subornation. *See, e.g., McQueeney v. Wilmington Trust Co.*, 779 F.2d 916, 921-22 (3d Cir. 1985) (reversing trial court's refusal to admit evidence of plaintiff's attempted subornation of perjury, even though plaintiff chose not to call the witness in question). This raises the question, which I will not attempt to answer here, whether the court should impose any evidentiary sanction (issue preclusion, adverse inference, or something else) when the moving party has suffered no prejudice. The trial court in *McQueeney* thought not, but the appellate court disagreed. Once one rejects the idea of allowing the jury to do "poetic justice," the answer to that question depends, at least in part, on whether the absence of prejudice renders sanctions purely punitive, thus triggering due process requirements. *See Nance, supra* note 14, at 639-50 (explaining that many remedies intended to deter evidence suppression can and ought to be understood as "protective" (of the court) rather than "punitive").

¹¹⁷ *See* FED. R. EVID. 403.

¹¹⁸ *See supra* text accompanying note 7.

¹¹⁹ A number of alternative rules can be imagined between the strictest "no second bite" rule and the weakest restriction of Rule 403. For example, the proponent could be allowed to go to the jury with the information about tampering only when a motion for sanctions has been made and denied and admission is constitutionally required. *Cf.* FED. R. EVID. 412(b)(1)(C). Or the proponent could be allowed to go to the jury with the information about tampering only when a motion for sanctions has been made and denied but the judge nonetheless finds substantial evidence of tampering, the probative value of which with regard to the reliability of other evidence admitted outweighs the risks of prejudicial misuse described above. *Cf. id.* 609(a)(1).

¹²⁰ *Compare* *Lego v. Twomey*, 404 U.S. 477, 483-84 (1972) (holding that the accused is not entitled to have a jury decide the question of voluntariness of a confession), *with* *Crane*

because the rationale for excluding evidence of tampering lies in its unfavorable balance of probative value as against the potential for prejudice and distraction, it is likely that even a criminal defendant will have some difficulty overriding the exclusion, unless the probative value of the tampering evidence with respect to the reliability of offered evidence is substantial.¹²¹ And in that case, it is likely that the trial judge will have imposed sanctions against the prosecution anyway. The appropriate resolution will depend, in part, on the standard of proof with which courts determine the matter of tampering on a motion for sanctions.¹²² The higher that burden is set, the more difficult it should be to deny the defense an opportunity to argue the matter before the jury. Nonetheless, even in criminal cases the jury should be instructed not to use evidence of tampering to punish the prosecution, or to draw some inference about the prosecutor's confidence in the strength of the case, but only to assess the credibility of the evidence presented.

IV. REASSESSING THE GROUNDS FOR INSTITUTIONAL INERTIA

The discussion in the previous Parts has been general, drawing on examples from civil and criminal litigation and focusing on arguments that apply more or less the same in the two contexts.¹²³ In this Part, I address some important considerations arising out of the case law of these very different procedural systems. The main task here is to address the arguments that appear in case law and commentary in support of the continued use of adverse inferences. The reader will not be surprised at this point to learn that, in my opinion, these arguments are not strong enough to withstand the force of the criticisms developed in the previous Parts. Nevertheless, reviewing them does allow us to develop a more complete picture of the issues surrounding evidence tampering.

v. Kentucky, 476 U.S. 683, 689-91 (1986) (holding that the defense is entitled to present to the jury evidence concerning the voluntariness and thus reliability of a confession even though the trial court has held the confession to have been voluntary and therefore admissible). It is worth noting, however, that the Court in *Crane* emphasized that "neither the Supreme Court of Kentucky in its opinion, nor respondent in its argument to this Court, has advanced any rational justification for the wholesale exclusion of this body of potentially exculpatory evidence." *Id.* at 691. On a case-by-case basis, such a rationale will not be difficult to find.

¹²¹ See, e.g., *Holmes v. South Carolina*, 547 U.S. 319, 329-31 (2006) (reversing the exclusion of evidence offered by the accused when based on the assumption that the prosecution's evidence is strong, but confirming that evidence offered by the accused may be excluded in an appropriate exercise of Rule 403). See generally EDWARD J. IMWINKELRIED & NORMAN M. GARLAND, *EXCULPATORY EVIDENCE* chs. 2, 8, 9 (3d ed. 2004).

¹²² See *supra* note 111.

¹²³ The examples used so far have avoided evidence tampering by the accused in criminal cases, however, because this clearly must be treated separately.

A. *Adverse Inferences in Civil Cases*

I begin with civil cases, where the use of adverse inferences remains very common. Because the issues are somewhat distinct, the discussion once again is divided between the context of evidence suppression and that of failure to present evidence.

1. Evidence Suppression: Unconvincing Reasons to Invoke the Adverse Inference

In cases that discuss the matter at all, the most consistently recurring rationale for preferring an adverse inference to issue preclusion in the context of evidence suppression is that there is a need for sanctions that are *less severe* than default or dismissal.¹²⁴ The obvious idea here, though rarely elaborated, is that instructing a jury that they *may* infer a proposition to be true is less severe than instructing them that they *must* take that proposition as true or simply granting dismissal, default, or summary judgment. But this argument poses several serious difficulties.

First, there is the question of whether an adverse inference really is less severe than issue preclusion. In theory, if a juror accepts that the conditions warranting an adverse inference are present, she might nonetheless adjust the probability of a material fact, but not by enough to change her verdict preference. As suggested above, however, this probably misconceives the decision that the juror will often make. She is not likely to be interested in the probability of the material fact, but only the probability and blameworthiness of the act of evidence tampering. If the evidence about these matters is strong enough that a judge would be willing to order issue preclusion were the adverse inference sanction off the table, then it is unlikely the juror will see the matter differently. If she does, it is likely to be because she has not understood the problem of access to evidence as well as the judge, which means that her response, while potentially less (or more) severe, is inappropriately so.

Second, to the extent my behavioral hypothesis is wrong, and jurors are able and willing to make rational adjustments to the probability of material facts without confounding, prejudicial inferences, there remains the normative question: why *should* a court choose a less severe sanction than issue preclusion? After all, if a party acts in bad faith to suppress evidence, what reason is there to impose a *less* severe sanction than one that, in the great majority of cases, will put the tamperor in no worse position than he would have been in had he not suppressed the evidence? A Holmesian "bad man" will discount the pain of the remedy by the probability of being detected; if the tamperor estimates the probability of being detected as smaller than the probability that his case would be lost if the evidence were not suppressed,

¹²⁴ See, e.g., *ABC Home Health Servs., Inc. v. IBM Corp.*, 158 F.R.D. 180, 183 (S.D. Ga. 1994); *Capellupo v. FMC Corp.*, 126 F.R.D. 545, 552-54 (D. Minn. 1989); *Trevino v. Ortega*, 969 S.W.2d 950, 952, 955-61 (Tex. 1998) (rejecting the "spoliation tort" and canvassing the alternatives). See generally KOESEL ET AL., *supra* note 4, at 32-48.

then tampering may become "rational" in a narrowly instrumental sense of that term, even with issue preclusion as the remedy. The temptation to think in this way is all the greater if a less severe sanction is employed such that the tamperor might not lose even upon detection.¹²⁵ This is the fourth reason given in the *Telectron* case for rejecting the use of an adverse inference:

Fourth and finally, merely allowing the destruction issue to be explored at trial is unlikely to serve as an effective deterrent against similar wrongdoing in the future. If the putative destroyer of discoverable documents were ever to believe that his actions, at worst, would only result in the presentation before a jury of evidence surrounding the obstruction, you might well conclude that an unfavorable inference as to document destruction would be less detrimental than allowing certain evidence to be presented at trial. We have observed that a key purpose of Rule 37 sanctions must be "to insure the integrity of the discovery process." A sanction which invites the unscrupulous litigant to embark upon such a cynical calculus cannot be seen as meeting this requirement.¹²⁶

Consequently, the principal reason articulated in the opinions for the need to have recourse to a less severe sanction than dismissal or default is the variability in the blameworthiness of the tamperor.¹²⁷ Certainly, evidence tampering occurs on a continuum of scienter or fault. But *how*, exactly, should that matter? Negligent destruction of evidence might well call for a less severe sanction than issue preclusion, but using adverse inferences for this purpose is particularly inapt. The inference that the party is hiding something fails when the party acts without the intention to do so, a point long recognized in cases

¹²⁵ See Charles Nesson, *Incentives to Spoliate Evidence in Civil Litigation: The Need for Vigorous Judicial Action*, 13 CARDOZO L. REV. 793, 795 (1991). The same point shows why it is a mistake to think that, in the context of bad faith tampering, it is enough to take steps that will eliminate the prejudice to the disadvantaged party, for example, by compensating that party for the costs involved in reconstructing the content of destroyed documents. See, e.g., *Capellupo*, 126 F.R.D. at 552-54 (contemplating adverse inferences in addition to an order to pay reconstruction costs, as well as double the litigation costs associated with obtaining relief from the bad faith evidence tampering).

¹²⁶ *Telectron, Inc. v. Overhead Door Corp.*, 116 F.R.D. 107, 136 (S.D. Fla. 1987) (citation omitted).

¹²⁷ See authorities cited *supra* note 124. Another reason offered is the variability in the extent of prejudice the opponent suffers. But issue preclusion and other remedies, like monetary sanctions, obviously can be adjusted appropriately to deal with this. To the extent that issue preclusion is narrowly tailored, applying only to some intermediate fact, see *supra* note 26, it might be less severe than an adverse inference, given the latter's potential for unfair prejudice affecting the tamperor's entire case. Issue preclusion's capacity for precision, while retaining the flexibility for partial summary judgment, default or dismissal, must count as a decided advantage.

and commentary.¹²⁸ Thus, using adverse inferences to provide a less severe sanction for negligent destruction entails accepting something like my psychological assumption that what the juror is really doing is modifying the burden of persuasion as a penalty for the party's negligence. Unless we are prepared to accept the legitimacy of such action and re-craft our jury instructions to reflect this special role, one must look elsewhere for a "less severe" sanction in the context of negligent destruction.¹²⁹ Fortunately, options are not difficult to find. For example, there is the option of imposing a monetary sanction payable to the disadvantaged party, which does not require any jury involvement.¹³⁰

This point is reinforced by examining those opinions that do allow adverse inferences in the context of negligent destruction of evidence. Here, many courts, in effect, acknowledge that the inference does not rest on the accepted logic, because the evidence of tampering does not rationally influence the juror's assessment of the probability of a material fact. As one treatise on the

¹²⁸ John MacArthur Maguire & Robert C. Vincent, *Admissions Implied from Spoliation or Related Conduct*, 45 YALE L.J. 226, 231-35 (1935); see also 2 MCCORMICK ON EVIDENCE, *supra* note 20, § 265, at 228. One might argue that a party's negligent failure to preserve evidence suggests that the evidence was *not favorable* to that party; otherwise, the party would be inclined to take greater care to preserve it. See GORELICK, MARZEN & SOLUM, *supra* note 4, § 2.8. But at best, this only places the lost evidence within a class that includes both evidence favorable to the opponent and (the presumably much larger subclass of) evidence helpful to neither party. The inference from negligence to a loss of evidence helpful to the opponent typically is, therefore, a decidedly weak and ambiguous one.

¹²⁹ Imagine what such an instruction would have to look like:

You are instructed that, if you find that a party has negligently destroyed evidence relevant to this case, you may take this into account in deciding how strong the other evidence presented in the case must be in order to support a verdict for the party bearing the burden of proof.

This hardly seems like a solution that will be widely adopted, if only because of the potential for confusion, "double counting" if the judge has imposed other sanctions unknown to the jury, and the possibility that the jury will override the judge's determination that the destruction was merely negligent. This is not to say that an adjustment of the burden of persuasion ought never to be allowed, even implicitly. For further discussion of the point, see Nance, *supra* note 14, at 658-59, which gives qualified endorsement to the idea that the jury could consider bad faith or negligent destruction of evidence occurring outside the context of litigation in applying flexible standards of proof.

¹³⁰ See, e.g., *Turner v. Hudson Transit Lines, Inc.*, 142 F.R.D. 68, 77-79 (S.D.N.Y. 1991) (imposing monetary sanctions to redress negligent destruction of evidence). There is also the less useful option of relegating the disadvantaged opponent to an expensive and time-consuming separate action in tort. Compare Ariel Porat & Alex Stein, *Liability for Uncertainty: Making Evidential Damage Actionable*, 18 CARDOZO L. REV. 1891, 1895-96 (1997) (advocating tort liability for damaging evidence), with Friedman, *supra* note 20, at 1979-80 (arguing that remedies intrinsic to the litigation of the primary claim are more efficient than a distinct cause of action in tort, at least when the destruction is caused by a party to the litigation). The acceptance of a distinct spoliation tort varies considerably among jurisdictions. See generally GORELICK, MARZEN & SOLUM, *supra* note 4, ch. 4.

matter observes, these courts reason, nonetheless, that "the need to deter and punish spoliation is a sufficient basis for giving the instruction."¹³¹ But what is the source of the contemplated deterrence and punishment, if it is not to be found in the jury's rational adjustments of the probability of material facts? All that is left is adjustment to the burden of persuasion (or pretextual adjustments to the probability of the material facts that are, in truth, simply a substitute for the former).¹³²

Courts sometimes confuse the deterrent and protective functions of sanctions with the almost invariably ephemeral goal of eliminating the unknowable evidential damage resulting from negligent destruction of evidence. For example, a court may speak of "restoring the evidential balance" caused by the loss of evidence, without explaining what "evidential balance" means or how permitting a jury to irrationally infer adversely to the tamperer serves such a purpose, except by serendipity.¹³³ Some commentators have suggested that the adverse inference is an attempt to do corrective justice that does not serve to facilitate the accurate determination of facts, but rather to define the conditions under which a fair judgment is rendered.¹³⁴ This argument serves to separate the procedure of allowing an inference from the question of whether the inference is appropriate as a tool for improving accuracy. This may be a way to characterize those decisions that allow adverse inferences in the context of negligent destruction, but it begs the question of why such a procedure should be chosen when there are ample alternatives that do not contemplate increasing the risk of inaccurate fact-finding and that do not rely on the jury to assess whether the pre-trial evidence-handling techniques were negligent. To be sure, this inclination to extend the adverse inference to negligent destruction is certainly understandable, for the

¹³¹ See KOESEL ET AL., *supra* note 4, at 37.

¹³² A few courts have accepted the argument that the destruction of an (otherwise valuable) instrumentality of harm is relevant to show that the instrumentality was defective or dangerous when destroyed (else why would something of economic value be destroyed?). See, e.g., *Anderson v. Litzenberg*, 694 A.2d 150, 156 (Md. Ct. Spec. App. 1997). This basis for an inference is actually unrelated to fault in regard to the evidential character of the thing destroyed, and though possibly viable in some cases, it poses serious questions under the rule excluding evidence of subsequent remedial measures. Cf. *Rodriguez v. Webb*, 680 A.2d 604, 606-07 (N.H. 1996) (rejecting the use of an adverse inference in the absence of fraudulent intent, but affirming the use of an adverse inference where the jury could reasonably have believed that the destruction was fraudulent). Importantly, the court in *Rodriguez* also observed that the defendant, who claimed to have destroyed the instrumentality in order to avoid future injury, did not raise an issue under Rule 407 of the New Hampshire Rules of Evidence. *Id.*

¹³³ *Turner*, 142 F.R.D. at 74-76 (analogizing an adverse inference to the exclusion of the tamperer's evidence). As already noted, the exclusionary remedy suffers from the same kind of problem. See *supra* notes 81-89 and accompanying text.

¹³⁴ See, e.g., GORELICK, MARZEN & SOLUM, *supra* note 4, §§ 2.3, 2.8 (distinguishing between factual truth and "courtroom truth").

harm to the integrity of the adjudicative system often warrants some kind of response – just not *this* one.

To summarize, as a gross generalization about an enormously varied body of case law, courts today tend to reserve issue preclusion to the most serious cases – cases of *very* bad faith – and employ adverse inferences in less serious cases that still involve bad faith, intentional and knowing tampering,¹³⁵ and, for some courts, even negligence. This response is too weak in many serious cases, rests upon assumptions about legitimate inferences that are false in other, less serious cases, and ultimately conflates the roles of judge and jury in all cases employing adverse inferences. In contrast, my suggestion would extend issue preclusion to all cases of bad faith and, quite plausibly, to many cases of gross negligence as well.¹³⁶ To be sure, a gradation of punishment is still possible, because other sanctions can be added in particularly egregious cases. For example, issue preclusion can be extended from one issue, that to which the lost evidence relates, to the entire case, resulting in dismissal or default.¹³⁷ Alternatively, monetary sanctions can be imposed separately from, and thus in addition to, issue preclusion.¹³⁸

Of course, there may be other reasons for choosing an adverse inference as the remedy besides the quest for a proportionately severe sanction. The only one that has any real plausibility is that, at least in some contexts, a court might feel limited by procedural rules that remove issue preclusion from the arsenal of responses. For example, there is some dispute about whether issue preclusion and the other remedies permitted by Rule 37(b) of the Federal Rules of Civil Procedure are available if the irreversible destruction of evidence occurs before a valid court order to enforce discovery has issued, especially when the destruction occurs before the litigation is initiated. Many courts have

¹³⁵ Some courts differentiate between bad faith destruction of evidence and intentional and knowing destruction, although the distinction remains murky. *See, e.g.*, *Nation-Wide Check Corp. v. Forest Hills Distribs., Inc.*, 692 F.2d 214, 217 (1st Cir. 1982) (affirming an adverse inference from “purposeful” acts in “knowing disregard” of the plaintiff’s claims). *See generally* GORELICK, MARZEN & SOLUM, *supra* note 4, § 3.11.

¹³⁶ Precedent exists for the remedy of issue preclusion, and even a resulting dismissal or default, based on negligent destruction of a key piece of evidence. *See, e.g.*, *Thiele v. Oddy’s Auto & Marine, Inc.*, 906 F. Supp. 158, 161-63 (W.D.N.Y. 1995).

¹³⁷ *See* FED. R. CIV. P. 37(b)(2)(C); *see also, e.g.*, *Am. Cash Card Corp. v. AT&T Corp.*, 184 F.R.D. 521, 524 (S.D.N.Y. 1999). Other illustrative cases are discussed in KOESEL ET AL., *supra* note 4, at 45-47.

¹³⁸ *See, e.g.*, *Carlucci v. Piper Aircraft Corp.*, 102 F.R.D. 472, 488-90 (S.D. Fla. 1984) (imposing default judgment and assessing attorney’s fees and costs against the defendant for the destruction of documents). In imposing sanctions, a court must be careful not to be sufficiently punitive as to trigger the due process protections associated with criminal trials. *See, e.g.*, *Bush Ranch, Inc. v. E.I. DuPont de Nemours & Co.*, 918 F. Supp. 1524, 1557-58 (M.D. Ga. 1995) (imposing, in a civil trial, unconditional monetary sanctions payable to the court), *rev’d*, 99 F.3d 363, 368-69 (11th Cir. 1996) (holding that the due process protections of a criminal trial would be required in a civil suit for such a sanction to be imposed).

held that they are available even under such circumstances, pursuant to either the court's inherent authority or a discovery order entered after the act of destruction, but other courts have been operating on a contrary assumption.¹³⁹ The former is the better-reasoned view.¹⁴⁰ In any event, to the extent that this problem of judicial authority is the explanation for a perceived need to take recourse in adverse inferences, the situation calls for clarification or change in the procedural rules rather than recourse to a remedy that is so poorly suited to the task.

2. The Missing-but-Available Evidence Problem Revisited

Although there are signs of increasing judicial skepticism, most courts continue to allow adverse inferences in civil cases based on a party's failure to present an available witness or tangible evidence. A panel of the Fifth Circuit has proposed in dicta the rejection of missing witness inferences in federal civil trials,¹⁴¹ and at least some lower courts in that circuit seem to be following that lead.¹⁴² So far, however, no other appellate court has moved so boldly, at least in civil cases, perhaps because of a sense that some response is necessary in those unusual cases where, despite liberal discovery, only one party has access to the evidence that is missing.¹⁴³

One oft-cited commentator, Robert Stier, who is harshly critical of prevailing doctrine allowing adverse inferences from the failure to present available evidence, nonetheless argues for the retention of such inferences, albeit in a much weakened form.¹⁴⁴ Stier's arguments for retaining adverse inferences, while more substantial than what one finds in judicial opinions, are ultimately unconvincing.

¹³⁹ See Sanchirico, *supra* note 11, at 1262-66, 1272-73.

¹⁴⁰ See GORELICK, MARZEN & SOLUM, *supra* note 4, §§ 3.4-6.

¹⁴¹ See *Herbert v. Wal-Mart Stores, Inc.* 911 F.2d 1044, 1048 (5th Cir. 1990). At least one state legislature has moved in this direction. See CONN. GEN. STAT. § 52-216c (1998) (abolishing missing witness instructions in civil cases, but permitting arguments by counsel that would invite such inferences).

¹⁴² See, e.g., *Parks v. Miss. Dep't of Transp.*, No. 1:04CV240, 2006 U.S. Dist. LEXIS 75723, at *6-*7 (N.D. Miss. Oct. 16, 2006). The matter continues to be controversial, however, even in the Fifth Circuit. See, e.g., *Streber v. Comm'r*, 138 F.3d 216, 218, 221-22, 227 (5th Cir. 1998) (ignoring *Herbert* but still rejecting, over a dissent, an adverse inference from the failure of the taxpayer to call the attorney in a case involving an advice-of-counsel claim).

¹⁴³ Courts have also expressed reservations, if not always carefully thought through, about litigation that is not conducted under the liberal rules of discovery and admissibility that characterize ordinary civil litigation in the federal courts. See, e.g., *Burdine v. Johnson*, 262 F.3d 336, 366 n.10 (5th Cir. 2001) (Barksdale, J., dissenting) (arguing for an adverse inference against a criminal defendant for his failure to testify in a state habeas proceeding under review in a federal habeas proceeding).

¹⁴⁴ See Stier, *supra* note 6, at 157-59, 166-75.

First, he argues that the inference generally passes the test of relevance even when the missing evidence is available to both sides.¹⁴⁵ That may be true, but the reason for rejecting the inference is not that a party's failure to present the evidence is irrelevant. Rather, it is that the probative value of the omission is almost always too weak and ambiguous in comparison to its potential for prejudicial inferences and its distracting invitation for the jury to undertake an evidence management task that is rightly assigned to the judiciary. Once again, the better legal response to the omission is to allow the opponent to present the evidence.¹⁴⁶

Stier's second argument is a policy argument, namely, that complete elimination of the adverse inference would create incentives for wasteful discovery practices because a party would then find it necessary to depose presumably hostile witnesses in order to determine whether they possess helpful information.¹⁴⁷ This argument seems quite implausible. The party will *want* to depose such presumably hostile but apparently knowledgeable witnesses in order to nail down their testimony, both to avoid surprise at trial and to facilitate settlement by better gauging the relative strength of the parties' cases. Indeed, one would question the judgment of an attorney who did not do so, whether or not adverse inferences are permitted.

¹⁴⁵ What Stier actually claims is that, given that the inference is appropriate under conventional doctrine in the majority of courts only when (a) the opponent has exclusive access to the evidence and (b) the evidence would be supposed to "naturally" favor the opponent (say, because of bias), *see id.* at 145-48, the fact that modern civil discovery essentially negates the first condition does not negate the second condition, and that satisfying the second condition is sufficient under the conventional rationale. *Id.* at 157-58. Of course, since the stated conditions are conjunct, satisfying the second but not the first condition does not sustain the inference on the conventional rationale. Perhaps, however, Stier meant to assert that the conditions are (or should be) disjoint, that satisfying either condition is sufficient to warrant an adverse inference, as a matter of policy if not legal doctrine. In any event, I have interpreted Stier to be arguing that the inference is logically relevant even though both parties have access to the missing evidence, provided that the inference is invited as to a party who would be naturally favored by the missing evidence.

¹⁴⁶ *See supra* notes 21-24 and accompanying text. One could also interpret the relevant passage in Stier's article as arguing that adverse inferences are sufficiently probative so as to be worth the risks of prejudice and confusion. But Stier makes no real case for this, and it is generally inconsistent with his critique of prevailing practices. More importantly, Stier does not contemplate any alternative means of regulating the missing evidence problem, such as the use of issue preclusion advocated here, so he seems to be arguing only that adverse inferences are better than nothing. In fact, however, his proposal amounts to nothing, in this sense, because he proposes such a mild adverse inference instruction that, according to Stier, it amounts to telling the jury "that all the relevant and useful information is before the jury." Stier, *supra* note 6, at 171. That is not unlike what is proposed here, except that I endorse, in appropriate cases, the use of sanctions like issue preclusion *in place of adverse inferences* in order to make sure that such an instruction to the jury tells them something that is likely to be true. *See supra* text accompanying note 101.

¹⁴⁷ Stier, *supra* note 6, at 158.

Finally, Stier argues that rejecting the inference when both sides have access to the evidence would generate controversies over the availability of the evidence that would need to be resolved by the judge and, ultimately, the jury, and that resolving these controversies is an unnecessary cost.¹⁴⁸ The problem with this argument is that no version of the conditions under which an adverse inference is to be allowed, including the one favored by Stier, avoids this problem; not surprisingly, all presuppose that the party against whom the inference is invited must have reasonable access to the evidence in question.¹⁴⁹ The important point here is this: if determinations of availability must be made, they should be made by the judge, who has superior knowledge and experience to assess this particular question; the accuracy of such assessment is improved and the costs of such assessment are reduced if the issue is not repeated in front of the jury.

As discussed above, the law on adverse inferences from missing but available evidence is deeply conflicted.¹⁵⁰ The suggestion here is that the law should be purified – removing its focus on anticipating which way the evidence would cut if it were presented, but retaining its focus on enforcing a requirement, when appropriate, that the evidence be presented to speak for itself. That done, the trial judge would need to address two questions when such an issue arises. First, is it important that the particular missing evidence be presented to the jury? When both parties have access to it, usually the answer will be “No,” and having access requires nothing more than being physically and legally able to put the evidence before the jury, unless the financial cost of doing so is disproportionate to the nature of the controversy.¹⁵¹ (An exceptional case would occur when the judge believes the evidence might well be important to the jury yet neither party has an incentive to produce it.¹⁵²) On the other hand, when access is truly unilateral, despite the availability of liberal discovery devices, then the presumption ought to be in favor of requiring presentation unless a satisfactory explanation is given by the party with control of the evidence for neither presenting it nor making it available to the opponent.¹⁵³

¹⁴⁸ *Id.* at 158-59.

¹⁴⁹ *Id.* at 147-48, 170.

¹⁵⁰ See *supra* notes 90-100 and accompanying text.

¹⁵¹ See *Herbert v. Wal-Mart Stores, Inc.*, 911 F.2d 1044, 1048 (5th Cir. 1990); see also cases cited *supra* note 94.

¹⁵² See MIRJAN DAMAŠKA, EVIDENCE LAW ADRIFT 98-101 (1997) (arguing that adversarial presentation of evidence underutilizes “neutral” information that does not clearly favor one side or the other).

¹⁵³ Cf. *United States v. Funds Held in Name or for Benefit of Wetterer*, 17 F. Supp. 2d 161, 185-86 (E.D.N.Y. 1998) (rejecting an adverse inference against the holders of certain accounts for their failure to call the beneficiary thereof; accepting as an excuse for non-appearance the fact that the beneficiary was a resident of Guatemala who feared being arrested upon entry into the United States to testify), *rev'd on other grounds*, 210 F.3d 96 (2d Cir. 2000).

Having decided to require presentation, the second question must be addressed: upon which party should the burden of presenting the evidence fall? In civil cases, the court should impose a burden to produce missing but important evidence, evidence that the court has decided the jury should consider, upon the party that can obtain and present the evidence with the least cost. There is no reason to favor one party over the other in this respect, and using a “least cost producer” standard serves to keep to a minimum the cost of obtaining the missing evidence. Of course, in the presumably unusual civil case when the missing evidence is within the exclusive control of one party, then the burden should fall upon that party. Conversely, in the case where the court cannot discern a difference in the acquisition costs of plaintiff and defendant – which may not be that unusual in practice – it is appropriate to default to imposing the burden of production on the party bearing the burden of persuasion on the issue.¹⁵⁴

In any event, if the court chooses to impose no burden of production on either party as to the witness in question – and this should be the most common resolution of the issue – adverse inferences should be precluded. On the other hand, if a burden of production is imposed, but the missing evidence is not presented, issue preclusion ordinarily should follow. Either way, the jury is not asked to resolve the matter.

B. *Adverse Inferences in Criminal Cases*

The problems inherent in the use of adverse inferences are present in criminal cases as well. Fortunately, current practice in criminal cases diverges less from the present proposal. The analysis varies, because of the obvious asymmetry between prosecution and defense.

1. Evidence Tampering by the Prosecution

When it is discovered that prosecutors or other law enforcement officials have violated due process guarantees by failing to disclose exculpatory evidence, the remedy of choice is compelled disclosure or, if trial has already resulted in a conviction, retrial with the missing evidence made available to the accused.¹⁵⁵ One can, of course, question whether these remedies provide adequate deterrence of prosecutorial misconduct, and whether issue preclusion ought to be taken more seriously as a remedy in cases of flagrant violation, but at least the standard remedies do not require the jury to struggle with determining whether the prosecution has violated appropriate litigational norms nor with how to adjust the probability of guilt or the measure of the burden of persuasion as a consequence of such a violation. Similarly, when the prosecution has destroyed material evidence in violation of federal or state constitutional requirements, the courts tend to impose dismissal or the

¹⁵⁴ See Nance, *supra* note 14, at 643.

¹⁵⁵ See *California v. Trombetta*, 467 U.S. 479, 486-87 (1984) (distinguishing reversible from irreversible tampering).

exclusion of related prosecution evidence, at least when they take any remedial action at all.¹⁵⁶ For the reasons articulated above, the better practice is to impose issue preclusion, and some courts do in fact specify that procedure.¹⁵⁷

Even in situations involving violations of non-constitutional disclosure or preservation requirements, adverse inferences are not preferred.¹⁵⁸ When the problem can be rectified before trial by disclosure, or even during trial by continuance, to do so is the obvious judicial preference. Otherwise, more common than the use of an adverse inference is the exclusion of prosecution evidence directly relating to the non-disclosure.¹⁵⁹ As already noted, skewing the evidence in favor of the accused in this way has the virtue of not involving the jury directly in assessing the prosecutorial misconduct, but it has the disadvantage of depriving the jury of what is, by hypothesis, useful evidence, thus introducing unnecessary arbitrariness into the verdict.¹⁶⁰

Nevertheless, some jurisdictions employ adverse inferences as a remedy for violations of the state's constitutional or non-constitutional duties to preserve evidence, especially when the state's action cannot be characterized as involving "bad faith."¹⁶¹ This practice suffers from all the same problems that appear in civil cases and should be curtailed. To be sure, the inferences sometimes have a mandatory character unlike the traditional form: jurors (or other fact-finders) may be told to assume that the lost evidence *would* have

¹⁵⁶ *Id.* at 486-91; *see also* 6 LAFAVE ET AL., *supra* note 8, § 24.3(e) & nn.129-36, at 386-88 (noting, however, that in some cases of negligent or accidental destruction constituting a violation of state law, courts have employed adverse inferences).

¹⁵⁷ *See, e.g.*, *United States v. Ramirez*, 174 F.3d 584, 589 (5th Cir. 1999) (holding that the proper remedy for the government's intentional or negligent destruction of tape recordings must be dismissal of the indictment "because a new trial cannot remedy the government's nondisclosure," that is, even if an adverse inference were allowed at retrial); *United States v. Cooper*, 983 F.2d 928, 931-32 (9th Cir. 1993) (holding that the appropriate remedy in a bad faith destruction case was dismissal of the indictment and specifically rejecting the prosecution's proposal to submit the matter to the jury with instructions to assume the truth of certain defense claims).

¹⁵⁸ *See generally* GORELICK, MARZEN & SOLUM, *supra* note 4, ch. 6. Marzen and Solum suggest that this reluctance to employ adverse inferences may arise from the unwillingness of judges to tell jurors of the "disturbing possibility" that law enforcement officials might be framing innocent defendants. *Id.* § 6.3, at 209.

¹⁵⁹ *See* 5 LAFAVE ET AL., *supra* note 8, § 20.6(b).

¹⁶⁰ *See supra* notes 81-89 and accompanying text.

¹⁶¹ *See, e.g.*, *State v. Serna*, 787 P.2d 1056, 1060 (Ariz. 1990); *State v. Hartsfield*, 681 N.W.2d 626, 630 (Iowa 2004); *Estep v. Commonwealth*, 64 S.W.3d 805, 810 (Ky. 2002); *see also* *Arizona v. Youngblood*, 488 U.S. 51, 59-60 (1988) (Stevens, J., concurring) (emphasizing that one reason to reject the defendant's due process claim, based on negligent destruction of evidence by the state, was that the trial court had given a permissive adverse inference instruction to the jury that returned a conviction).

been favorable to the accused.¹⁶² This removes the necessity for the jury to assess the conditions triggering the adverse inference; that decision has been made by the judiciary, and properly so. However, there is still the problem of how much to adjust the probabilities involved: just how favorable is “favorable”? To the extent that my psychological hypothesis is correct, there will be little left for the jury to do, and the result is very nearly the same as the issue preclusion recommended here, with one conspicuous exception. The prosecution may hope for jury nullification of litigation norms that the instruction is intended to reinforce. As with adverse inferences, the jurors might be tempted to ignore the procedural impropriety and to convict someone they believe to be guilty. Although understandable from the point of view of the jury, that possibility hardly seems to be an advantage of the practice, if we really care about the litigation norms in question, and issue preclusion would tend to minimize the risk of nullification.

In contrast, adverse inferences against the prosecution have been fairly common in the modern era when the prosecution has failed to call a witness or present evidence available to the prosecution, the existence of which has become known to the accused.¹⁶³ As already noted, the discernible recent trend is to reject such inferences, but the cases manifesting that trend invariably involve evidence that is reasonably available to both parties, and the implication is that there is no problem of lost information that the adversarial response cannot solve.¹⁶⁴ This, however, will not always be the case. Situations can arise in which the prosecution has exclusive or substantially superior access to missing evidence. Once again, when a remedy is required, issue preclusion should be preferred to adverse inferences. Moreover, unlike civil cases, the immunity from the production burden that the accused should enjoy makes it inappropriate to invoke a “least cost producer” theory to *avoid* imposing a burden on the prosecution when the missing evidence is available to both sides; a burden should fall on the accused (in the form of an adverse inference, rather than issue preclusion) only when the accused has *exclusive* access to the missing evidence, unless the missing evidence relates to a true affirmative defense, as discussed more fully below.

¹⁶² See, e.g., *Thorne v. Dep’t of Pub. Safety*, 774 P.2d 1326, 1331-32 (Alaska 1989) (mandating a conclusive presumption as the remedy for a state’s destruction of a videotape in violation of the state constitution, which does not require a showing of bad faith). *But see* *Johnson v. Commonwealth*, 892 S.W.2d 558, 561 (Ky. 1994) (rejecting defendant’s proposed conclusive presumption in favor of permissive adverse inference).

¹⁶³ See, e.g., *United States v. Mahone*, 537 F.2d 922, 926-28 (7th Cir. 1976) (approving the use of an adverse inference from the government’s failure to call an arresting officer as a witness); *United States v. Latimer*, 511 F.2d 498, 502-03 (10th Cir. 1975) (approving the use of an adverse inference from the government’s failure either to present surveillance photographs or to explain their non-presentation).

¹⁶⁴ See *supra* notes 21-24 and accompanying text.

A good illustration concerns the absence of testimony by an informer, when any governmental claim of privilege is rejected.¹⁶⁵ Some cases follow the present recommendation, putting the prosecution to a choice between presenting the informant at trial (or at least making the informant available for the defense to call) or accepting issue preclusion (and potentially dismissal).¹⁶⁶ Admirably, such cases do not contemplate the possibility of the trial proceeding to verdict using an adverse inference against the government, and occasional decisions make clear that such inferences will not suffice.¹⁶⁷ On the other hand, cases utilizing an adverse inference do occur.¹⁶⁸ A perusal of cases raising the issue of an adverse inference finds that the courts are utilizing a variety of entirely plausible factors in deciding whether to impose a sanction or remedy for the prosecution's failure to produce the informant; the problem is not so much with the factors being considered or even how they are weighed, as it is with the remedy being applied.¹⁶⁹

Another important illustration concerns use immunity. A potential witness exercising the privilege against self-incrimination can be compelled to testify by grant of immunity. Functionally, this makes such a witness available to the government but not the defense, because of the government's control over the granting of immunity.¹⁷⁰ Many jurisdictions nonetheless preclude the defense from invoking an adverse inference, treating the government's discretion as if it were a true and weighty privilege, one that can be exercised without review by the courts or negative consequences for the government, despite its interference with truth-finding.¹⁷¹ The premise is deeply problematic. Rejecting it, some courts have responded to the unfairness and truth-defeating

¹⁶⁵ Once again, the question of drawing inferences from the exercise of valid privileges is beyond the scope of the present discussion. See *supra* note 37.

¹⁶⁶ See, e.g., *Roviaro v. United States*, 353 U.S. 53, 60-61 (1957) (holding against the government's claim of privilege for an informer's identity and observing that, in the absence of a valid privilege, the prosecution must choose between disclosing the informer's identity and dismissing the prosecution); *United States v. Tornabene*, 687 F.2d 312, 315-16 (9th Cir. 1982) (reversing a conviction because of the government's failure to take reasonable efforts to produce an informant whose presence had been requested by the defense).

¹⁶⁷ See, e.g., *United States v. Tucker*, 552 F.2d 202, 211 (7th Cir. 1977) (reversing a conviction despite the trial court's employment of an adverse inference against the government for failure to produce the informant).

¹⁶⁸ See, e.g., *People v. Taylor*, 413 N.Y.S.2d 571, 576 (Sup. Ct. 1979) (holding that the state had a duty in the particular case to present an informant, breach of which should be remedied by a jury instruction permitting the jury to infer that the informant's testimony "would not support" the evidence adduced by the state).

¹⁶⁹ See generally Allen Stephens, Annotation, *Adverse Presumption or Inference Based on State's Failure to Produce or Examine Informant in Criminal Prosecution - Modern Cases*, 80 A.L.R.4th 547 (1990).

¹⁷⁰ See, e.g., *United States v. Salerno*, 937 F.2d 797, 805 (2d Cir. 1991), *rev'd on other grounds*, 505 U.S. 317 (1992).

¹⁷¹ See, e.g., *United States v. Myerson*, 18 F.3d 153, 158-59 (2d Cir. 1994).

potential of this regime by expanding the ability of the defense to insist on the immunization of its witnesses; when the request is granted, the government must comply or else dismiss the prosecution, or so much of it as might be affected by the lost witness's testimony.¹⁷² This is the right direction for the law to take.

Unfortunately, the conditions some of these courts have placed upon the defense being able to obtain such relief are unnecessarily onerous, and the relief does not extend to all situations in which the witness plausibly might provide exculpatory testimony. Most problematically, some courts require a showing by the defense that "the government has engaged in discriminatory use of immunity to gain a tactical advantage or, through its own overreaching, has forced the witness to invoke the Fifth Amendment."¹⁷³ Without going into a detailed analysis here, suffice it to say that this requirement has proved a very high hurdle for the defense to surmount.¹⁷⁴ As a consequence, these courts are faced with the question of whether to allow an adverse inference against the prosecution in contexts in which the defense request for immunity is denied. There is indication that this is possible when the government has failed to immunize a witness who would be likely to give exculpatory testimony.¹⁷⁵ This is an understandable but unhappy development. The gap should be closed: courts should either grant use immunity (and this should be more liberally allowed) or else deny the defense any remedy. In any event, the jury should not be placed in the position of having to review the considerations that go into deciding about the availability of the witness to the prosecution and to the defense, and to speculate about the likely impact of such testimony were it to be given.¹⁷⁶

Finally, it should be reiterated that, even if my suggestions are implemented, when the accused is unable to obtain relief from the trial judge on account of alleged prosecutorial evidence tampering, the accused retains the option of attacking the adequacy of the evidence that is presented to the jury, whether by motion for directed verdict of acquittal or by argument to the jury.

¹⁷² See, e.g., *United States v. Lord*, 711 F.2d 887, 889-92 (9th Cir. 1983); *United States v. Burns*, 684 F.2d 1066, 1077 (2d Cir. 1982); *Gov't of V.I. v. Smith*, 615 F.2d 964, 969 (3d Cir. 1980).

¹⁷³ *Burns*, 684 F.2d at 1077.

¹⁷⁴ See Reid H. Weingarten & Brian M. Heberlig, *The Defense Witness Immunity Doctrine: The Time Has Come to Give It Strength to Address Prosecutorial Overreaching*, 43 AM. CRIM. L. REV. 1189, 1192 (2006).

¹⁷⁵ See *Myerson*, 18 F.3d at 160 (rejecting an adverse inference where exculpatory testimony was unlikely, but stating that "in the absence of circumstances that indicate the government has failed to immunize an exculpatory witness, a district court does not abuse its discretion by refusing to give a missing witness charge").

¹⁷⁶ Cf. Weingarten & Heberlig, *supra* note 174, at 1199-201 (arguing that, under the present regime, the use of adverse inferences is necessary, but acknowledging that it is a decidedly unhappy situation because of the difficulties faced by the jury in deciding whether and how to draw such an inference).

Furthermore, when the prosecution's evidence tampering affects the reliability of evidence that is presented, the accused has a weighty interest, supported by constitutional norms, in being able to attack the prosecution's case before the jury, provided that the defense does not argue merely for a consciousness of a weak case on the part of the prosecutor or law enforcement officers.¹⁷⁷ These qualifications speak to those situations in which the accused claims to have been intentionally framed or to have been adversely affected by shoddy police work. If the defense plausibly asserts that the state is out to frame him, it may be of little solace, to the accused or the public, to be told that the jury need not consider the matter because a judge has found the claim to be without merit. But the jury's role can and ought to be limited to assessing the strength of the evidence against the accused, carefully avoiding the imposition of punishment on the state or governmental officials for their alleged evidential misconduct. If the officials are to be punished, that ought not to take the form of a jury's acquitting a guilty defendant.

2. Evidence Tampering by the Defense

When it is found that the defense engaged in evidence tampering, once again current practice depends heavily upon whether the tampering is effectively reversed. If so, trial is allowed to proceed, perhaps with an adverse inference; if not, then either exclusion of defense evidence or an adverse inference against the accused tends to be the norm.¹⁷⁸ Because of the constitutional limitations noted earlier,¹⁷⁹ adverse inferences must be preferred to issue preclusion in this context.¹⁸⁰ That is not to say, however, that the rules regarding such inferences cannot be improved, and courts obviously should be cautious in allowing or encouraging these inferences.¹⁸¹

¹⁷⁷ These distinctions have been articulated in a previous section of this Article. See *supra* Part III.C.

¹⁷⁸ Numerous cases exemplifying the use of adverse inferences can be found in the standard treatises. See, e.g., 2 MCCORMICK ON EVIDENCE, *supra* note 20, §§ 264, 265; 1A O'MALLEY, GRENIG & LEE, *supra* note 17, § 14:13 (providing form instruction authorizing adverse inference against the accused for failure to obey court order to provide handwriting exemplar or perform other acts relevant to identification).

¹⁷⁹ See *supra* notes 34-36 and accompanying text.

¹⁸⁰ Because of the double jeopardy prohibition, the option of retrial may be unavailable when the defendant's tampering is not discovered until after an acquittal, and the option of excluding defense evidence may run afoul of the accused's right to present a defense, especially if it is applied outside the context of failures by the defense to make required disclosures of anticipated defense witnesses. See 5 LAFAYETTE ET AL., *supra* note 8, § 20.6(c).

¹⁸¹ Just as the independent spoliation tort is typically an inadequate remedy for a civil party's evidence tampering, criminal prosecution for obstruction of justice and related crimes committed by someone accused of another crime, though sometimes theoretically available, is usually a less than satisfactory remedy. See GORELICK, MARZEN & SOLUM, *supra* note 4, § 5.1. On the other hand, before permitting an adverse inference, the trial judge ought to consider the viability of the alternative remedy of invoking a sentence

There is a special problem with inviting inferences based on the failure of the accused to present available evidence. The accepted constitutional principle is that the accused is under no obligation to present evidence at all, except as to genuine affirmative defenses.¹⁸² Some courts seem to have taken this to imply that no adverse inference can ever be drawn against the accused for failure to present extant evidence, except again in the possible context of true affirmative defenses.¹⁸³ To be sure, these decisions generally also rely on some of the non-constitutional arguments against adverse inferences adumbrated here, and it is difficult to discern how important the constitutional argument is to the result. Moreover, some suggest that the constitutional dimension arises only from jury instructions encouraging an adverse inference, not from the jury's inference itself or even from prosecutors' comments that invite such an inference.¹⁸⁴ Finally, just because the accused has no legal duty to present a witness or other evidence – which certainly forecloses issue preclusion as a sanction for breach of duty – does not mean that an inference cannot be drawn from the accused's failure to present such evidence; legitimate choices may have embarrassing evidential consequences, at least when the choice falls outside the ambit of a recognized privilege.¹⁸⁵ On the other hand, the privilege against self-incrimination is a doctrine in flux and may yet become a broad privilege of the accused not to be pressured, even unintentionally, by the use of an adverse inference to produce evidence that might be self-incriminating.¹⁸⁶

enhancement under provisions like the Federal Sentencing Guidelines. *See* *United States v. Booker*, 543 U.S. 220, 273 (2005) (Stevens, J., dissenting in part) (claiming that the Court would have found no constitutional infirmity arising from a judicial finding of obstruction of justice as part of the sentence enhancement otherwise ruled unconstitutional in the case).

¹⁸² *See, e.g.*, COMM. ON FED. JURY INSTRUCTIONS OF THE SEVENTH CIRCUIT, FEDERAL CRIMINAL JURY INSTRUCTIONS OF THE SEVENTH CIRCUIT § 3.24, at 52-53 (1999) (discouraging the use of missing witness instructions in general and endorsing, for those unusual circumstances where one is appropriate, an instruction that reminds jurors that “the law does not impose on a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence”); COMM. ON PATTERN CRIMINAL JURY INSTRUCTIONS, FIRST CIRCUIT, PATTERN JURY INSTRUCTIONS (CRIMINAL CASES) § 2.11, at 31-32 (1998).

¹⁸³ *See* *State v. Brewer*, 505 A.2d 774, 777 (Me. 1985); *State v. Caron*, 218 N.W.2d 197, 200 (Minn. 1974); *Ross v. State*, 803 P.2d 1104, 1105-06 (Nev. 1990); *State v. Jefferson*, 353 A.2d 190, 199 (R.I. 1976).

¹⁸⁴ *See* *State v. Tahair*, 772 A.2d 1079, 1086-87 (Vt. 2001); *Russell v. Commonwealth*, 223 S.E.2d 877, 879 (Va. 1976).

¹⁸⁵ *See, e.g.*, *State v. Malave*, 737 A.2d 442, 451 (Conn. 1999) (disallowing adverse inferences relying principally on non-constitutional arguments and adding constitutional concerns as a matter of “policy,” but rejecting the constitutional argument as such).

¹⁸⁶ *Compare* *Griffin v. California*, 380 U.S. 609, 612 n.4 (1965) (barring comment on the accused's failure to testify), *with* *United States v. Hubbell*, 530 U.S. 27, 42 (2000) (barring use of subpoena *duces tecum* directed at the accused to conduct “fishing expedition” to find inculpatory evidence), *and id.* at 49-56 (Thomas & Scalia, JJ., concurring) (proposing to

Putting aside the possibility of such constitutional developments, the laudable modern trend to deny "missing witness" inferences, when the witness in question is not the accused, derives from non-constitutional considerations that apply only in contexts in which the witness is available to the prosecution and the adversarial response is therefore adequate to deal with the problem. To be sure, the mere fact that the potential witness is related to the accused or otherwise might be expected to favor the defense should not render the witness unavailable to the prosecution and thus warrant an adverse inference against the accused.¹⁸⁷ To think it should is to fall back into the mistaken framework of trying to anticipate which side will be favored by the contemplated testimony.¹⁸⁸ On the other hand, one can easily imagine cases in which the prosecution can show that (a) an important witness to the events being litigated exists (or at least is claimed by the defense to exist), (b) the prosecution has exhausted its efforts to identify and locate this witness, and (c) the accused knows the identity or whereabouts of the witness but has not divulged such information.¹⁸⁹ An adverse inference should be allowed in such a case if the surrounding circumstances do not suggest a good reason, compatible with innocence, for not revealing the whereabouts of the witness.¹⁹⁰

extend the privilege to protecting against the compelled production not just of incriminating testimony by the accused, but rather of any incriminating evidence).

¹⁸⁷ Some cases have begun to respect this principle. See criminal cases cited *supra* note 21. But there are still many that do not. See Allen Stephens, Annotation, *Adverse Presumption or Inference Based on Party's Failure to Produce or Examine Family Member Other than Spouse - Modern Cases*, 80 A.L.R.4th 337, §§ 3-14, at 347-73 (1990); Allen Stephens, Annotation, *Adverse Presumption or Inference Based on Party's Failure to Produce or Examine Friend - Modern Cases*, 79 A.L.R.4th 779, §§ 3-6, at 788-821 (1990).

¹⁸⁸ See *supra* notes 90-100 and accompanying text.

¹⁸⁹ See, e.g., *State v. Hillstrom*, 150 P. 935, 939 (Utah 1915) (holding that the evidence was sufficient to support a conviction for murder in connection with a robbery, emphasizing that the defendant's only explanation of his gunshot wound referred to a controversy with an unnamed man over an unnamed woman). A more complicated example involves rules preventing a witness from testifying against his or her spouse in a criminal trial. Whether an adverse inference should be allowed in such a context may depend on whether the jurisdiction considers this a privilege rule (as opposed to a rule of competency) and whether it accepts the rule that no comment is allowed on the valid exercise of a privilege. Compare *State v. Spears*, 300 P.2d 551, 561-62 (Wyo. 1956) (holding that it is legitimate for a prosecutor to comment on the defendant's failure to call his wife because the wife was a competent witness on behalf of her husband but an incompetent witness on behalf of the state), with *Commonwealth v. Moore*, 309 A.2d 569, 570-71 (Pa. 1973) (holding that the purpose of a spousal incompetency rule would be defeated if a missing witness inference were allowed).

¹⁹⁰ See FED. R. EVID. 403 (authorizing the court to exclude relevant evidence the probative value of which is substantially outweighed by the risk of misleading the jury or wasting time). Based on the risks of prejudice and confusion, one might plausibly take the stronger position that adverse inferences should *never* be allowed against the accused as to missing but extant evidence available to be called. See, e.g., *Livermore*, *supra* note 95, at

These points are nicely illustrated by a Maryland case. In *Robinson v. State*,¹⁹¹ the defendant, tried for theft of an automobile, testified that someone else had given him permission to use the car.¹⁹² Before trial, and initially at trial, the defendant identified the alleged bailor simply as a friend named Alvin but would not provide his last name or his location.¹⁹³ Defendant explained his refusal to more fully identify the bailor by stating that he lived in an environment where one might be shot for identifying a friend as a criminal perpetrator.¹⁹⁴ The prosecution understandably requested, and the trial court gave, a missing witness instruction, stating that the jury could find that because the defendant failed to produce the witness, the witness's testimony would have been unfavorable to the defendant.¹⁹⁵ The Maryland Court of Appeals affirmed the ensuing conviction, rejecting the argument made by the defense that the witness, if called, would have claimed his privilege not to testify.¹⁹⁶ The court opined that, in the conditions of the case, such an exercise of privilege would in no way harm the defendant's case because it would suggest that the witness was the one who had stolen the automobile. A dissenting opinion disagreed on the ground that the jury might instead infer, for example, that the two men had been confederates in crime.¹⁹⁷

To this point in the analysis, the court employed the correct framework, regardless of who (as between majority and dissent) was right on the question of prejudice to the defendant. But one fact is troubling. At trial, the defendant was threatened with contempt, at which point he reversed course, naming his friend as one Alvin Johnson and indicating that he knew Alvin well and, in particular, knew where Alvin worked.¹⁹⁸ This raised the question of why the police did not use this new information to locate Alvin and determine whether the defendant's account was corroborated. That in turn suggests that an adverse inference was inappropriate because Alvin was available to be called by the prosecution if his potential testimony contradicted the defendant's testimony.¹⁹⁹ This issue was abandoned on appeal to the high court, having

33. But if we are to allow such inferences in the context of evidence *destruction* by the accused, it is difficult to see how a distinction can be drawn between evidence that is destroyed and evidence that is exclusively available to, but withheld by, the defense.

¹⁹¹ 554 A.2d 395 (Md. 1989).

¹⁹² *Id.* at 397.

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Id.* at 396.

¹⁹⁶ *Id.* at 397-401.

¹⁹⁷ *Id.* at 401-04 (Adkins, J., dissenting).

¹⁹⁸ *Id.* at 397, 400 (majority opinion).

¹⁹⁹ Nominally, the court employed a version of the adverse inference rule that bars its use if the witness is "equally available" to both sides. *Id.* at 397. One might infer from this that if the witness is *more readily* available to the defense than the prosecution, an adverse inference could be used. But that is not the way one should interpret "equally available" in this context: equal availability defeats the use of the inference, but easier availability to the

been resolved at the intermediate court of appeals on the ground that "defendant possessed exclusive knowledge concerning the witness and his whereabouts up to the moment he testified at trial."²⁰⁰ Presumably, the significance of this fact lies in the belief that the prosecution could not have pursued such an investigation at that late date, with the trial already well underway. If that belief is accurate, then the witness was never reasonably available to the prosecution, at least for that trial. This problem must be a common enough occurrence because the defense is rarely, if ever, required to disclose in advance of trial the identity of potential witnesses that the defense does not intend to call.²⁰¹ Unfortunately, reported cases do not discuss the important question of whether the prosecution can gain access to the witness *during* trial in time to present the witness in rebuttal. There is much to be said in favor of Professor Livermore's view that, "[i]f the prosecutor's frustration is to be assuaged, it can be done by a short continuance so that he can find those who might corroborate and offer them if he finds doing so advantageous."²⁰²

Finally, whenever an adverse inference against the accused is held impermissible, whether under conventional practice or the suggestions made here, the question arises what kinds of comments *may* be made about the absence of evidence. The problem is essentially the same as discussed above in connection with a regime in which the alternative to an inference might be another possible sanction.²⁰³

In a generally thorough and insightful opinion, the Supreme Court of Connecticut tried to articulate the relevant distinctions as applied to prosecutorial arguments, but it did not get them quite right.²⁰⁴ The court disapproved missing-witness adverse inferences against the accused in criminal cases, relying primarily on the capacity of the prosecution to call

defense does not warrant its use. In the circumstances of *Robinson*, either the witness was reasonably available to the defense or he was not (we cannot be sure). If he was not, no adverse inference should be allowed; if he was reasonably available to the defense, then he was also reasonably available to the prosecution (i.e., "equally available"), and for that reason the adverse inference should not be allowed. This is unlike civil cases, where the sanction (whether an adverse inference, issue preclusion, or something else) arguably should be placed on the "least cost producer." Things might be different if the witness's testimony relates solely to an affirmative defense, upon which the defense bears a burden of production as well as the burden of persuasion. Cf. *State v. Parker*, 417 N.W.2d 643, 647 (Minn. 1988) (distinguishing prosecution's case from affirmative defenses and suggesting that an adverse inference is permissible with regard to the latter).

²⁰⁰ *Robinson*, 554 A.2d at 401 n.8.

²⁰¹ See 5 LAFAYETTE ET AL., *supra* note 8, § 20.5(e); see also *People v. Macana*, 639 N.E.2d 13, 16 (N.Y. 1994) (affirming adverse inference against the defendant for failure to produce his father as a witness, when defendant first testified at trial that the weapon involved belonged to, and was used by, his father).

²⁰² See Livermore, *supra* note 95, at 33.

²⁰³ See *supra* notes 104-14 and accompanying text.

²⁰⁴ *State v. Malave*, 737 A.2d 442, 452 (Conn. 1999).

witnesses whose testimony would be adverse to the accused.²⁰⁵ The court noted, however, that the prosecution should be allowed to point to gaps or weaknesses in the evidence supporting defense claims.²⁰⁶ Specifically, the court opined that the prosecutor should be allowed to note the weakness of testimony corroborating the defendant's alibi, so long as the prosecutor does not suggest that responsibility for this deficiency in the evidence lies in a strategic choice by the defense.²⁰⁷

So far, so good. But the Connecticut court also would allow the prosecutor to point to the absence of a named individual claimed in defense testimony to have been present at a time that would permit that individual to corroborate the alibi.²⁰⁸ This is a mistake. There would be no point to make that additional argument other than to suggest that failure to call the named individual was due to the awareness by the defense that she would not corroborate the alibi. And this, if believed by the prosecution, should result in the prosecution calling the witness or requesting the court to do so, as the court had already acknowledged.²⁰⁹ The court's confusion is further indicated by its dicta that comment on the absence of the witness would be *inappropriate* when the potentially corroborating witness was *unavailable* to be called.²¹⁰ This mistakenly slides back into the conventional framework that the court had properly rejected: the availability of the witness matters if one is trying to draw

²⁰⁵ The language of the opinion makes clear that the same prohibition applies to invitations by the defense to draw adverse inferences against the state. *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Id.* This case is unlike *Robinson* in that there is good reason to believe that the prosecution could have gained access to the missing alibi witness before trial. As in federal cases, Connecticut requires the defense to give advance notice of alibi witnesses whom the defense intends to call. CONN. R. SUP. COURT § 40-21 (2010). While the defense did call alibi witnesses, the missing witness issue arose because there was another person present at the time and place of the alibi, a person who could corroborate or deny the accused's alibi but was not called by the defense. *Malave*, 737 A.2d at 445. Presumably, however, the police could have contacted the alibi witnesses disclosed in advance by the defense, or persons otherwise known to the prosecution, and gained access through them to the other potential alibi witness that was not called by the defense. There is no discussion of the matter in the opinion.

²⁰⁸ *Malave*, 737 A.2d at 452.

²⁰⁹ The court tries to explain away this conflict in the following terms:

It may be true, of course, that the implicit point of such argument would be to attempt to persuade the jury to infer that the witness, if produced, likely would have provided testimony adverse to the opposing party. . . . We nevertheless believe that, for criminal cases, it is the sounder policy for counsel, whether the prosecutor or defense counsel, to avoid *explicit* reference to such an inference.

Id. at 452 n.16 (emphasis added). But it is hardly adequate to say that the prosecutor can make comments that are intended to invite the adverse inference and that in fact cause the jury to draw such an inference so long as neither the judge nor the prosecutor *explicitly* invites the jury to do so.

²¹⁰ *Id.* at 452.

an adverse inference from failure to call her; in contrast, the unavailability of the potential witness does nothing to cure the weakness in the defendant's evidence supporting the claimed alibi. Whether she was available or not, the defense had only weak evidence supporting the alibi, or so the argument would go, and that is all that the prosecution should be allowed to argue.²¹¹

In summary, the unavailability of issue preclusion against the accused, at least with respect to elements of the prosecution's case-in-chief, means that adverse inferences, for all their difficulties, must continue to be permitted. But appropriate caution in the employment of such inferences entails restricting them to cases of evidence suppression by the accused (categories (1)-(3) of evidence tampering²¹²) and to the withholding of evidence in the exclusive control of the accused. In all such contexts, the difficulties of adverse inferences in terms of ambiguities of inference and potential prejudice require an unusually restrictive application of judicial discretion.²¹³

CONCLUSION: LOOKING BACK AND LOOKING AHEAD

In a leading case from 1846, two years before New York's progressive adoption of the Field Code, the United States Supreme Court considered the use of an adverse inference against a private claimant in a forfeiture proceeding involving allegedly false statements made by the claimant to reduce the amount of his import taxes.²¹⁴ It seems the government was unable to obtain the original, or admissible copies, of important documents in the possession of the claimant that would provide evidence of the true value of the

²¹¹ The careful reader might wonder why this is not a situation in which the prosecution should be allowed to use the hypothetical argument described earlier: if proposition *P* were true, one would see evidence *E*; evidence *E* is not present, so proposition *P* must not be true. See *supra* text accompanying note 105. The problem with using this argument in this context is that one must be precise about what constitutes the proposition, *P*, and the expected evidence, *E*. In this context, the argument would have to be this: if the unnamed individual's potential testimony would support defendant's alibi (*P*), then one would expect the defense to present her corroborating testimony (*E*). But in light of the availability of the potential witnesses to the prosecution, the same argument can be made against the state: if the unnamed individual's potential testimony would disconfirm the defendant's alibi (*P*), then one would expect the prosecution to present her disconfirming testimony (*E*). In other words, the absence of corroborating or disconfirming testimony from the named individual is hopelessly ambiguous, suggesting that the individual may not have been in a position either to confirm or to disconfirm the alibi.

²¹² See *supra* Part I.

²¹³ It might well be advisable to incorporate a "reverse 403" standard that would make the use of adverse inferences against the accused impermissible unless the probative value thereof, in context, outweighs (or substantially outweighs) the risks of prejudice to the accused or misleading the jury. Cf. FED. R. EVID. 609(a)(1) (requiring that, for certain criminal convictions to be admitted to impeach the accused, their probative value must outweigh the risk of prejudice).

²¹⁴ *Clifton v. United States*, 45 U.S. (4 How.) 242, 247 (1846).

imported goods. So instead, the government served notice upon the claimant to produce the documents at trial. When the claimant failed to produce the documents, the government argued an adverse inference against the claimant, which was supported by a jury instruction.²¹⁵ The Supreme Court affirmed this procedure, invoking the general principle that “the best evidence of disputed facts must be produced of which the nature of the case will admit,” and concluding that, even where the force of that principle does not require exclusion of “secondary” evidence in favor of “primary evidence” (as in the case of the hearsay rule or the rule requiring the original of a document), the force of the principle supports a presumption against the non-producer of evidence in his possession that is “stronger” than that which he presents at trial.²¹⁶

Such a procedure made sense in a system of litigation with limited discovery, and thus limited discovery sanctions; one that perceived the trial judge’s role as largely limited to that of referee. In the present era, with substantially increased judicial oversight of the preparation of cases for trial, and the development of powerful discovery sanctions, the practice is less coherent with institutional arrangements. It is not surprising that courts and commentators in the modern era have leveled strong criticisms at the practice. It has become something of a procedural anachronism. Yet the inertia of past practices has combined with what some may regard as a reluctance on the part of trial courts to shoulder the task of supervising litigative misconduct to permit the survival of the adverse inference.²¹⁷ It is time to press the insight that some courts have attained and to curtail the use of adverse inferences. This does nothing to belittle the principle that the Supreme Court affirmed in 1846. Rather, it refines its application by adjusting it to the context of new institutional realities.

There remains the question of how the elimination of adverse inferences as a remedy for evidence tampering, except in the narrow categories I have indicated, would be received by the judiciary, especially trial judges. That is,

²¹⁵ The exact reason for recourse to an adverse inference is unclear. On the one hand, the common law was “a system which gave no general right to require production, even at trial, of documents in the possession of the opposite party.” MILLAR, *supra* note 5, at 219. On the other hand, there was a procedure for discovery through a separate bill in equity. That procedure, however, was cumbersome and full of restrictions, which led to various modest statutory reforms during the early nineteenth century. *Id.* at 221-23. Even at the time of *Clifton*, the federal courts benefitted from a statute allowing parties to demand production of documents at trial and even specifying dismissal or default as the penalty for non-compliance, but it was premised on satisfying the same onerous conditions required for pre-trial discovery by way of a bill in equity. See *Carpenter v. Winn*, 221 U.S. 533, 536 (1911).

²¹⁶ *Clifton*, 45 U.S. (4 How.) at 247-48. On this “best evidence” principle, see generally Nance, *supra* note 13.

²¹⁷ See, e.g., *Herbert v. Wal-Mart Stores, Inc.*, 911 F.2d 1044, 1046, 1048 (5th Cir. 1990) (calling the missing witness rule an “anachronism” that has been applied by federal courts “reflexively”).

suppose that a legislature or the highest appellate court in a jurisdiction were to endorse my position.²¹⁸ How would trial judges react? Since my proposal would eliminate adverse inferences in most contexts, the question is what trial judges would do in those cases where, under the current regime, they would allow or encourage an adverse inference. Would such judges then shift to using other sanctions for evidence tampering, or would they simply ignore claims of tampering altogether? If the former, would they shift to sanctions weaker than adverse inferences, or would they be willing to impose issue preclusion in accordance with my recommendation?

If trial judges were to react by simply giving a pass to evidence tampering, then the loss of deterrence might well be more important than the benefits of simplifying the jury's task and improving the rationality and accuracy of particular verdicts. But if trial judges were to react by invoking substantial alternative sanctions in those cases where, under the current regime, they would be inclined to use adverse inferences, then the calculus of social benefit tends to tip in the other direction. One should hope to see an increased use of issue preclusion, and it would be important, in the course of eliminating the adverse inference, to emphasize the advantages of that alternative sanction. One interesting device for doing so would be for the court or legislature to specify that previous precedents endorsing or applying an adverse inference for evidence suppression, except those involving inferences against the accused, should be taken henceforth as persuasive authority for the use of issue preclusion in comparable cases.²¹⁹ This would tend to dissuade trial courts from withdrawing from the management of evidence tampering.

Even if restriction on the use of adverse inferences is not achieved by comprehensive legislation or broadly stated common-law rule-making, one can at least contemplate that the arguments presented here will encourage courts to continue and even accelerate the trend away from using such inferences to control evidence tampering by parties. If coupled with an increased use of issue preclusion or other serious sanctions for evidence tampering, our trials would then be much cleaner, if somewhat less frequent. Neither consequence is to be feared. Indeed, the legal profession owes no less to the citizens who serve on the nation's juries.

²¹⁸ Illustrative judicial innovation has been noted already. *See supra* note 21. There is also precedent for broad legislative restrictions on the use of adverse inferences. *See, e.g.*, CONN. GEN. STAT. ANN. § 52-216c (West 2005) (abolishing missing witness instructions in civil cases).

²¹⁹ This approach will not work for problems of a failure to present evidence because of the continuing tendency of courts to overuse of the adverse inference in that context. As we have seen, in many cases where an adverse inference is currently allowed, no remedy or response is appropriate at all, other than allowing the opponent to present the missing evidence.