

DETECTING OBSTRUCTION OF JUSTICE EFFICIENTLY: THE IMPACT OF *ARTHUR ANDERSEN* AND THE SARBANES-OXLEY ACT

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INTRODUCTION

Recent changes to the law governing the obstruction of justice have coincided with a string of highly visible prosecutions, including those of Martha Stewart,¹ Frank Quattrone,² and I. Lewis “Scooter” Libby, Jr.³ Among such prosecutions, that of the accounting firm Arthur Andersen LLP is foremost in legal significance. From the start, the government and Arthur Andersen disputed how the jury would be instructed as to the meaning of key elements of the crime of obstructing justice. The Supreme Court ultimately decided the dispute in an opinion that rejected the trial judge’s instructions, but otherwise left unanswered questions regarding the precise meaning of the crime’s key elements.⁴

After Andersen’s indictment but prior to the Supreme Court’s ruling, Congress enacted the Sarbanes-Oxley Act of 2002.⁵ Sarbanes-Oxley created new obstruction crimes,⁶ significantly broadening the reach of laws criminalizing obstruction of justice. In part, this legal change was a direct response to the difficulties in

* J.D., New York University School of Law, 2007; A.B., Princeton University, 2003. Special thanks to Professor Jennifer Arlen for her tireless and insightful feedback. An earlier version of this Note was awarded the New York University Law and Economics Prize in 2007.

1. See *United States v. Stewart*, 433 F.3d 273 (2d Cir. 2006); see also Daniel C. Richman & William J. Stuntz, *Al Capone’s Revenge: An Essay on the Political Economy of Pretextual Prosecution*, 105 COLUM. L. REV. 583, 588–90 (2005) (discussing the decision to charge Stewart with obstruction of justice rather than insider trading).

2. See *United States v. Quattrone*, 441 F.3d 153 (2d Cir. 2006); see also Andrew Ross Sorkin, *Star Banker, With Future, Emerges Free*, N.Y. TIMES, Aug. 23, 2006, at C1.

3. See David Johnston & Richard W. Stevenson, *The Leak Inquiry: The Overview; Cheney Aide Charged with Lying in Leak Case*, N.Y. TIMES, Oct. 29, 2005, at A1; Neil A. Lewis, *Libby, Ex-Cheney Aide, Guilty of Lying in C.I.A. Leak Case*, N.Y. TIMES, Mar. 7, 2007, at A1.

4. See *Arthur Andersen LLP v. United States*, 544 U.S. 696 (2005).

5. Pub. L. No. 107-204, 116 Stat. 745 (2002) (codified in scattered sections of 11, 15, 18, 28 and 29 U.S.C. (2000 & Supp. IV 2004)).

6. See *id.* § 802 (codified at 18 U.S.C. § 1519 (2000 & Supp. IV 2004)); *id.* § 1102 (codified at 18 U.S.C. § 1512(c) (2000 & Supp. IV 2004)).

the Andersen prosecution; the elements Congress fortified with these new crimes were precisely those that prosecutors had the most difficulty proving.⁷

The dynamic state of the law governing obstruction is in part a function of the difficulty of implementing efficient deterrents to obstruction of justice. Defendants have a natural incentive to destroy damaging evidence in their possession, and many will do so unless adequately deterred by laws criminalizing such activities. Setting efficient incentives in provisions governing obstruction of justice is thus crucial to the enforcement of other criminal laws; conversely, the consequences of inefficiency may be extraordinarily far-reaching.

The stakes of document destruction are high, and a simple, aggressive, “get tough” approach—whether through broad definitions of crimes, harsh penalties, or increased enforcement—has intuitive appeal. However, laws punishing obstruction of justice will be most effective if they instead reflect a nuanced approach. The goal of such legislation is simple: to encourage those who have evidence of an underlying crime to retain it.

However, if the government were to pursue that goal too aggressively, too many unintended and inefficient consequences would result. For example, if the law sweeps too broadly and defendants face criminal penalties for destroying evidence regardless of whether they know of its relevance to a crime, defendants who unknowingly dispose of such documents will face unjustifiably harsh penalties. In order to avoid liability, nobody would throw anything away. While encouraging companies to store a “smoking gun” is clearly cost-effective, encouraging them to store haystacks—simply because a needle may be inside—may not be. Obstruction law must balance these concerns. To operate efficiently, it must ensure that actors have an incentive to keep what they know could be evidence of a crime, but are not afraid to destroy documents in the normal course of business. If it can do this, obstruction law will further the efficient deterrence and punishment of underlying crimes without imposing inefficient additional costs on those possessing access to legally relevant information.

Just as a broadly worded statute is an inefficient way to increase deterrence, stricter enforcement and harsher penalties may create undesirable inefficiencies. While stricter enforcement may help the government detect more violations, an enforcement-based strat-

7. See JULIE R. O’SULLIVAN, *FEDERAL WHITE COLLAR CRIME, CASES AND MATERIALS* 383 (2003).

egy may be relatively costly—perhaps more costly than is worthwhile. As for penalties, if penalties for obstruction are low relative to penalties for an underlying crime, an individual will be willing to risk prosecution for obstruction if she thinks destroying evidence will reduce the possibility she will be found guilty of the underlying crime. However, increasing penalties may not increase deterrence. With respect to individuals, for instance, the same actor who commits an underlying crime is typically the person best positioned to cover it up. As a result, merely increasing penalties for obstruction may not deter such conduct, and may instead encourage greater efforts to cover up the cover-up.⁸ A more nuanced approach to setting sanctions could avoid some of these undesirable inefficiencies.

Moreover, individuals respond differently to high sanctions for obstruction than do corporations. Increased penalties may be more effective when the actor positioned to cover up a crime is not the one who committed it, as Arthur Andersen was positioned to cover up Enron's crimes. A harsher penalty for obstruction may have made Arthur Andersen more reluctant to help Enron cover up its crimes because, had Andersen not obstructed justice, it would not have been liable for any of Enron's underlying crimes. Increasing penalties for obstruction would make it harder for the Enrons of the world to enlist others' help in covering up their crimes. Again, nuance is crucial.

To advocate nuance is not to advocate a weak approach. Economic analysis shows that successful obstruction of justice can undermine the efficiency of law enforcement in a way that other crimes cannot. The premise of the economic analysis of criminal law is that each crime is associated with an expected punishment, determined by the relationship between the probability of detection and the attendant sanction (if caught). In theory, prospective offenders will evaluate their own expected gains and losses associated with a given crime and act accordingly. To encourage optimal behavior, the government should set the expected punishment to exceed the gains to lawbreakers from inefficient lawbreaking, but to

8. See Chris William Sanchirico, *Detection Avoidance*, 81 N.Y.U. L. REV. 1331, 1338–39 (2006). Instead, Professor Sanchirico argues, it is more effective to increase deterrence by structuring the law well, for example by using a “technological” approach to raise the cost of detection avoidance and make such efforts less productive. For instance, evidentiary procedure can make obstruction of justice (and perjury) more difficult by exploiting the difficulties that criminals may have in coordinating stories and cooperating with each other during an investigation.

fall below the gains associated with efficient breach.⁹ Then, only inefficient behavior will be deterred.¹⁰ However, this model assumes that the probability of detection is exogenous, dependent only on the government's enforcement efforts.¹¹ In reality, the probability of detection is endogenous, because most who have committed a crime will consider acting to avoid detection, thereby lowering the probability the government will detect their crime.¹² By so doing, defendants who obstruct justice can reduce the expected cost of their crime. If the government imposes otherwise efficient penalties, defendants' obstruction will make these penalties inefficiently low. When defendants obstruct justice, they reduce the probability that the government will detect their crimes and thereby lower the expected penalty for these crimes to below the efficient level the government originally set.

Failing to consider obstruction of justice in economic terms can undermine law enforcement, so it is particularly important that the government carefully considers the various tools at its disposal to encourage efficient behavior. The government can define the elements of the crime efficiently; it can implement enforcement measures by setting fines and by changing the probability that a crime will be detected; and it can encourage firms to police themselves and implement internal enforcement mechanisms. While recent changes to laws governing obstruction of justice have incorporated all of these mechanisms with varying degrees of success, not all of these tools will be equally effective in setting efficient incentives.

This Note explores how successfully the government has used these tools to encourage efficient behavior. Defining the elements

9. Under the concept of efficient breach, violating the law is efficient if the benefit the actor derives from the breaching conduct is greater than the cost it imposes on others. See A. MITCHELL POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS 79–80 (2003).

10. Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169, 176, 207–08 (1968). The earliest formulations of this principle date to the eighteenth century. See Cesare Beccaria, *Of Crimes and Punishments, Preface* to ALESSANDRO MANZONI, THE COLUMN OF INFAMY 11, 43, 86 (Kenelm Foster & Jane Grigson trans., Oxford Univ. Press 1964) (1764); JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 158–59 (J.H. Burns & H.L.A. Hart eds., Athlone Press 1970) (1789).

11. See Sanchirico, *Detection Avoidance*, *supra* note 8, at 1348 (“[A]most without exception neoclassical enforcement theory depicts the detection of violations as a one-sided affair. The state as detector decides how much to invest in apprehension and the more it invests the more likely it is to successfully detect violations. The detected has no active role in the story.”).

12. *Id.* at 1332.

of the crime efficiently is the most effective way to deter undesirable behavior. Unfortunately, and contrary to this insight, recent changes in the law have defined the crime of obstruction poorly. The most successful aspect of these recent changes is with respect to internal enforcement mechanisms, which play an important role in deterring obstruction within firms. The success of these changes, however, has been hampered by the government's choice to leave its most effective tool unused.

Part I of this Note reviews the recent changes to the law governing obstruction of justice. Part II identifies some lessons of the economic analysis of criminal law and considers these lessons in light of the new obstruction laws. First, this Note argues that statutes do not define the crime as efficiently as they could; they are either too narrow or too broad to effectively separate innocent from nefarious behavior. Second, it argues that the primary effect of recent changes has been to increase uncertainty about what the law prohibits. This has both desirable and undesirable consequences for setting efficient penalties and implementing an efficient enforcement regime. Finally, this Note argues that while *Arthur Andersen* undermines firms' incentives to report internal wrongdoing, a new provision enacted in the Sarbanes-Oxley Act strengthens that incentive.

I.

SUMMARY OF CHANGES IN THE LAW.

Law and policy concerning obstruction of justice have changed considerably in recent years, through the Supreme Court's decision in *Arthur Andersen*,¹³ Congress's passage of the Sarbanes-Oxley Act of 2002,¹⁴ and the development of recent Department of Justice policies. This section will address each of these three developments in turn.

At the time of Arthur Andersen's indictment, the primary federal statute criminalizing document destruction was 18 U.S.C. § 1512.¹⁵ This statute includes a long list of crimes related to witness tampering; it was first enacted as part of the Victim and Wit-

13. *Arthur Andersen LLP v. United States*, 544 U.S. 696, 706–07 (2005).

14. Pub. L. No. 107-204, 116 Stat. 745 (codified in scattered sections of 11, 15, 18, 28 and 29 U.S.C.).

15. Two "omnibus" provisions, sections 1503 and 1505, also punish obstruction of justice. 18 U.S.C. §§ 1503, 1505 (2000 & Supp. IV 2004). Though these provisions are not specific to document destruction, section 1505 does forbid document destruction in the context of civil investigative demands under the Antitrust Civil Process Act. 18 U.S.C. § 1505.

ness Protection Act of 1982. Each subsection punishes a different crime. For example, a defendant could be charged with violating both section 1512(a), which punishes various types of violence against witnesses, and section 1512(d), which punishes harassment of witnesses. Section 1512(b) punishes individuals who persuade others to destroy evidence or withhold testimony from an official proceeding.¹⁶ Arthur Andersen was charged with violating section 1512(b) because some employees allegedly “knowingly . . . corruptly persuade[d]”¹⁷ others to destroy documents.

Sections 1512(c)¹⁸ and 1519¹⁹ were enacted by the Sarbanes-Oxley Act. Section 1512(c) is similar to section 1512(b) in that it criminalizes the same set of acts—for example, both punish the destruction, mutilation, and concealment of documents. The crucial distinction is in the identity of the actor who is punished; unlike section 1512(b), which punishes the person who persuaded others to act, section 1512(c) punishes the person who actually destroyed the document. Likewise, section 1519 punishes the destroyer, not

16. The relevant provision reads:

(b) Whoever knowingly uses intimidation or physical force, threatens, or corruptly persuades another person, or attempts to do so, or engages in misleading conduct toward another person, with intent to—

. . . (2) cause or induce any person to—

(A) withhold testimony, or withhold a record, document, or other object, from an official proceeding;

(B) alter, destroy, mutilate, or conceal an object with intent to impair the object’s integrity or availability for use in an official proceeding . . .

shall be fined under this title or imprisoned not more than ten years, or both.

18 U.S.C. § 1512(b)(2) (2000 & Supp. IV 2004) (section headings omitted).

17. *Id.*

18. The relevant provision reads:

(c) Whoever corruptly—

(A) alters, destroys, mutilates, or conceals a record, document, or other object, or attempts to do so, with the intent to impair the object’s integrity or availability for use in an official proceeding; or

(B) otherwise obstructs, influences, or impedes any official proceeding, or attempts to do so,

shall be fined under this title or imprisoned not more than 20 years, or both.

18 U.S.C. § 1512(c) (2000 & Supp. IV 2004).

19. The relevant provision reads:

Whoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States or any case filed under title 11, or in relation to or contemplation of any such matter or case, shall be fined under this title, imprisoned not more than 20 years, or both.

18 U.S.C. § 1519 (2000 & Supp. IV 2004).

just the persuader. These two new provisions also differ from section 1512(b) (and each other) in their mens rea requirements and in the required “nexus” between the act of obstruction and the affected proceeding. Section 1519 is notable for significantly expanding the law’s reach, making far more behavior subject to punishment.

A. *Arthur Andersen.*

In *Arthur Andersen LLP v. United States*,²⁰ the Supreme Court construed section 1512(b) to include a stricter mens rea requirement²¹ and a more stringent nexus requirement than either lower court had applied.²² The government and Arthur Andersen had disputed the interpretation of statutory language punishing defendants who “knowingly . . . corruptly persuade” others to destroy documents “with intent to impair the object’s . . . availability for use in an official proceeding.”²³ No authoritative interpretation of section 1512(b)(2) existed at that time, and the legal import of many factual ambiguities in the government’s case depended on which interpretation was adopted.

The case begins with Enron, a former natural gas pipeline operator that over the 1990s reinvented itself as an energy trading and investment conglomerate.²⁴ Enron underwent rapid expansion.²⁵ Throughout this period, Arthur Andersen provided (“aggressive”²⁶) accounting services, led by David Duncan, head of Andersen’s Enron “engagement team.”²⁷ As Enron’s finances deteriorated, CEO Jeffrey Skilling resigned on August 14, 2001.²⁸ Shortly thereafter, Sherron Watkins, an in-house accountant at Enron, warned Skilling’s replacement, Kenneth Lay, that Enron “could implode in a wave of accounting scandals.”²⁹ She likewise warned David Duncan and his supervisor at Andersen, Michael Odom.³⁰

On August 28, nearly six weeks before the period covered by Arthur Andersen’s indictment, the *Wall Street Journal* published a

20. 544 U.S. 696 (2005).

21. *Id.* at 706–07.

22. *Id.* at 707–08.

23. 18 U.S.C. § 1512(b)(2) (2000 & Supp. IV 2004).

24. *United States v. Arthur Andersen LLP*, 374 F.3d 281, 284 (5th Cir. 2004).

25. *Arthur Andersen*, 544 U.S. at 698.

26. *See id.* (describing Enron’s accounting practices); *Arthur Andersen*, 374 F.3d at 285 (detailing the accounting devices used).

27. *Arthur Andersen*, 544 U.S. at 698–99.

28. *Id.* at 699.

29. *Id.*

30. *Id.*

public hint of Enron's brewing collapse.³¹ In response to the article suggesting improprieties at Enron, the Securities and Exchange Commission ("SEC") opened an informal investigation.³² Of course, notice to the public also put Arthur Andersen on notice that an SEC inquiry was likely, if not certain, to occur. By early September, Andersen had assembled a "crisis-response" team, which included in-house attorney Nancy Temple.³³ On October 9, Temple understood that "some SEC investigation" was "highly probable."³⁴

The indictment covered a time period that began on October 10, 2001.³⁵ That day, at a training session, Odom urged Andersen employees (including ten from the Enron engagement team) to comply with Andersen's document retention policy,³⁶ adding "if [a document is] destroyed in the course of normal policy and litigation is filed the next day, that's great [W]e've followed our own policy and whatever there was that might have been of interest to somebody is gone and irretrievable."³⁷ On October 12, Temple designated the Enron matter a "Government/Regulatory Investigation" in an internal filing system and contacted Odom to suggest that he remind the engagement team to follow Andersen's document retention policy.³⁸

Following Enron's earnings release on October 16, in which it announced a \$1.01 billion charge to earnings and a \$1.2 billion drop in shareholder equity, the SEC advised Enron that it had opened an informal investigation (in August) and requested various documents.³⁹ Enron forwarded the letter to Andersen on October 19.⁴⁰ Andersen employees continued to urge their subordinates to destroy documents, even after the SEC advised Enron that it had opened an informal investigation and requested documents.⁴¹ Subsequent reminders to follow the document reten-

31. *Id.*; Rebecca Smith & John Emshwiller, *Enron Prepares to Become Easier to Read*, WALL ST. J., Aug. 28, 2001, at C1 (describing Enron's "plummeting stock price" and "financial opaqueness" and citing worries that "the unexpected exit of Mr. Skilling has some wondering if there isn't another shoe about to drop" (internal quotation marks omitted)).

32. *Arthur Andersen*, 544 U.S. at 699.

33. *Id.*

34. *Id.*

35. *Id.* at 702.

36. *Id.* at 699-700.

37. *Id.* at 700.

38. *Id.*

39. *Id.*

40. *Id.* at 700-01.

41. *See id.* at 700-01.

tion policy occurred on October 20 (by Temple) and October 23 (by Duncan).⁴²

The SEC again contacted Enron on October 30 to request additional documents; that day, the SEC opened its formal investigation.⁴³ On November 8, the SEC served Andersen and Enron with subpoenas.⁴⁴ The next day Duncan's assistant emailed a notification: "Per Dave—No more shredding We have been officially served for our documents."⁴⁵

All told, Andersen shredded nearly two tons of Enron-related documents.⁴⁶ A government exhibit charted Andersen's shredding in 2001 and showed that Andersen's "fairly steady" rate of 500 pounds increased to nearly 2500 pounds on October 25, continuing at that rate until Andersen received the SEC's subpoena.⁴⁷

The grand jury charged that between October 10 and November 9, 2001, Arthur Andersen violated section 1512(b).⁴⁸ The government argued that once Nancy Temple knew "some SEC investigation" was "highly probable," subsequent instructions to destroy relevant documents violated section 1512(b).⁴⁹

At trial, the parties disputed how the jury would be instructed regarding two key issues: first, the degree of intent required to prove knowing corrupt persuasion, and, second, the required "nexus" between the obstruction and the official proceeding such conduct is designed to disrupt. The government suggested that to find that Andersen had acted "corruptly," the jury need only find that Andersen had acted with an "improper purpose" in enforcing its document retention policy, meaning that Andersen had acted "with the intent to obstruct an official proceeding."⁵⁰ Moreover, the government argued it need not prove that Andersen knew its conduct violated the law.⁵¹ On the other hand, Andersen argued that it could not be convicted unless it had used an "improper

42. *Id.* at 701.

43. *Id.*

44. *Id.* at 702.

45. *Id.*

46. *United States v. Arthur Andersen LLP*, 374 F.3d 281, 286 (5th Cir. 2004).

47. *Id.*

48. Indictment at 7–8, *United States v. Arthur Andersen LLP*, Cr. A. H-02-121 (S.D. Tex. Mar. 7, 2002) [hereinafter *Andersen Indictment*].

49. Temple strongly suspected an investigation would be forthcoming on October 9. *Arthur Andersen*, 544 U.S. at 699. The indictment covered acts beginning on October 10. *Andersen Indictment* at 7.

50. Government's Proposed Jury Instructions, *United States v. Arthur Andersen LLP*, Cr. A. H-02-121 (S.D. Tex. Apr. 26, 2002), 2002 WL 32153898.

51. *Id.*

method,” or “persuade[d] the other person to do something that they would not have had a lawful right to do had they been acting on their own.”⁵² Andersen urged that the jury be instructed that to constitute obstruction, the act must be “carried out with the specific purpose of making that object unavailable for use.”⁵³

This dispute between the parties reflected a split among the circuits. Some circuit courts had construed “corruptly” to mean that a defendant had acted with an improper purpose, while others had held it required a defendant to use an improper method.⁵⁴ The district court agreed with the government, and the jurors were instructed that “The word ‘corruptly’ means having an improper purpose. An improper purpose, for this case, is an intent to subvert, undermine, or impede the fact-finding ability of an official proceeding.”⁵⁵

With respect to the nexus requirement, the parties disagreed over how the Supreme Court’s earlier decision in *United States v. Aguilar*,⁵⁶ which construed the language of section 1503, would apply to section 1512(b). Robert Aguilar, a federal judge, had been convicted for obstruction of justice in violation of section 1503 for making false statements to an FBI agent.⁵⁷ Reversing Aguilar’s conviction, the Supreme Court held that his acts had an insufficient “nexus” to an official proceeding.⁵⁸ According to the Court, acts of obstruction must have “a relationship in time, causation, or logic with the judicial proceedings”; or, they must have the “natural and probable effect” of interfering with the official proceeding to be criminal under section 1503.⁵⁹

The *Aguilar* nexus requirement had never been applied to section 1512(b), and the government argued strenuously against its extension. The government proposed that the jury be instructed:

[I]t is not necessary for the government to prove that an official proceeding was pending, or even about to be initiated, at

52. Andersen’s Proposed Jury Instructions, *United States v. Arthur Andersen LLP*, Cr. A. H-02-121 (S.D. Tex. Apr. 26, 2002), 2002 WL 32153900.

53. *Id.*

54. *Compare, e.g.*, *United States v. Shotts*, 145 F.3d 1289, 1301 (11th Cir. 1998) (finding an improper purpose sufficient), *with United States v. Farrell*, 126 F.3d 484, 489–90 (3d Cir. 1997) (requiring an improper method) (cited in *Arthur Andersen*, 544 U.S. at 702 n.7).

55. Court’s Instructions to the Jury, *United States v. Arthur Andersen LLP*, Cr. A. H-02-121 (S.D. Tex. 2002), *reprinted in* O’SULLIVAN, *supra* note 7, at 447–48.

56. 515 U.S. 593 (1995).

57. *Id.* at 597.

58. *Id.* at 599–601.

59. *Id.* at 599.

the time the charged conduct occurred. The government need only prove that Andersen acted with . . . some particular official proceeding [in mind], whether or not that proceeding had begun or was even imminent.⁶⁰

In contrast, Andersen argued that the *Aguilar* nexus requirement applied to section 1512(b) just as it applied to section 1503. Specifically, Andersen argued that the government needed to establish that the alleged act of obstruction was in contemplation of “a particular official proceeding that is ongoing or has been scheduled to be commenced in the future.”⁶¹ The government relied heavily on section 1512(f)(1), which states that “an official proceeding need not be pending or about to be instituted at the time of the offense.”⁶²

The district court sided with the government, and the jurors were instructed that:

It is not necessary for the government to prove that an official proceeding was pending, or even about to be initiated, at the time the obstructive conduct occurred The government need only prove that Andersen acted corruptly and with the intent to withhold an object or impair an object’s availability for use in an official proceeding.⁶³

Andersen was convicted, and the Fifth Circuit affirmed.⁶⁴

Upon review, the Supreme Court did not resolve the circuit split on the proper definition of “corruptly” and offered no precise definition of culpable intent. Nonetheless, the Court did set some minimum standards by holding that the trial court’s jury instructions required “striking[ly]” little culpability, and “simply failed to convey the requisite consciousness of wrongdoing.”⁶⁵ The Court emphasized that any effort to persuade another to withhold information from the government “is not inherently malign.”⁶⁶

In the second part of its holding, the Court affirmed *Aguilar*’s nexus requirement as to section 1512(b), holding that obstruction

60. Government’s Proposed Jury Instructions, *United States v. Arthur Andersen LLP*, Cr. A. H-02-121 (S.D. Tex. Apr. 26, 2002), 2002 WL 32153898.

61. Andersen’s Proposed Jury Instructions, *United States v. Arthur Andersen LLP*, C.R. No. H-02-121 (S.D. Tex. Apr. 26, 2002), 2002 WL 32153900.

62. 18 U.S.C. § 1512(f)(1) (2000 & Supp. IV 2004). The section was renumbered to section 1512(f)(1) in the Sarbanes-Oxley Act. Pub. L. No. 107-204, § 1102, 116 Stat. 745, 807 (2002).

63. Court’s Instructions to the Jury, *United States v. Arthur Andersen LLP*, Cr. A. H-02-121 (S.D. Tex. 2002), reprinted in O’SULLIVAN, *supra* note 7, at 447.

64. *United States v. Arthur Andersen LLP*, 374 F.3d 281, 302 (5th Cir. 2004).

65. *Arthur Andersen LLP v. United States*, 544 U.S. 696, 706 (2005).

66. *Id.* at 703–04.

must have a “nexus” to an official proceeding.⁶⁷ The Court’s opinion in *Arthur Andersen* neither explicitly adopted *Aguilar*’s definition nor created a new one. Instead, the Court held that a defendant has not violated the statute if he has persuaded another to act “when he does not have in contemplation any particular official proceeding in which those documents might be material.”⁶⁸ However, section 1512(f)(1) specifies that the proceeding “need not be pending or about to be instituted at the time of the offense.”⁶⁹ Read together, *Arthur Andersen* and the statutory language mean that to be punishable under section 1512(b), document destruction must be done with a particular official proceeding in mind, even if the proceeding has not begun.

B. *The Sarbanes-Oxley Act.*

The Andersen case motivated many lawmakers to seek change. For example, Senator Patrick Leahy was “particularly incensed” by the shredding at Arthur Andersen and, in response, proposed two new felonies for document destruction.⁷⁰ Though Senator Leahy’s proposal was not enacted, Congress did pass the Sarbanes-Oxley Act, which included two new provisions to punish document destruction.⁷¹ These new laws weaken prosecutors’ burden with respect to precisely the elements that the prosecutors in *Arthur Andersen* had the most difficulty proving.⁷² Section 1512(c) uses language mirroring section 1512(b) to punish the act of destruction itself, broadening the coverage of section 1512 to include the destroyer in addition to the persuader. Like section 1512(c), section 1519 punishes the act of destruction itself.⁷³

67. *Id.* at 707–08.

68. *Id.* at 708.

69. 18 U.S.C. § 1512(f)(1) (2000 & Supp. IV 2004).

70. See Frank O. Bowman, III, Pour Encourager Les Autres? *The Curious History and Distressing Implications of the Criminal Provisions of the Sarbanes-Oxley Act and the Sentencing Guidelines Amendments that Followed*, 1 OHIO ST. J. CRIM. L. 373, 393–94 (2004).

71. See Pub. L. No. 107-204, §§ 802, 1102, 116 Stat. 745, 800–01, 807 (codified at 18 U.S.C. §§ 1519 and 1512(c)).

72. Gary G. Grindler & Jason A. Jones, *Please Step Away from the Shredder and the “Delete” Key: §§ 802 and 1102 of the Sarbanes-Oxley Act*, 41 AM. CRIM. L. REV. 67, 76–77 (2004).

73. Section 1519 is more narrowly applicable than section 1512 in one respect: the former covers obstruction aimed at a proceeding “within the jurisdiction of any department or agency of the United States,” which includes proceedings before administrative agencies, but does not include judicial proceedings. See O’SULLIVAN, *supra* note 7, at 447. The statute also covers obstruction directed to-

As a result, *Arthur Andersen's* impact on corporate behavior has been mitigated, since prosecutors may be more likely to elect to prosecute document destruction under either of the statutes enacted in the Sarbanes-Oxley Act, passed shortly after Andersen's guilty verdict.⁷⁴ In fact, in opposing Andersen's petition for certiorari, the government predicted that most future prosecutions for document destruction will be for violations of newly-enacted section 1519, not for violations of section 1512(b), leaving the Court's decision interpreting the latter section "little future impact on prosecutions for document destruction."⁷⁵ Even if section 1512(b) prosecutions become less common, analyzing the efficiency consequences of all three provisions will be instructive for future efforts at reform.

These new provisions significantly broaden the reach of obstruction of justice in two important respects: first, the level of scienter prosecutors must prove and, second, the "nexus" prosecutors must show between the obstructive act and the proceeding it is intended to obstruct.⁷⁶ As for the requisite mens rea, while section 1512(b) requires that a defendant act "knowingly . . . corruptly," section 1512(c) requires "corrupt" behavior and section 1519 requires "knowing" behavior. Although significant doctrinal uncertainty remains,⁷⁷ the Court in *Arthur Andersen* did clarify that knowledge is "normally associated with awareness, understand-

ward cases filed under Title 11, the bankruptcy statute. See 18 U.S.C. § 1519 (2000 & Supp. IV 2004).

74. The Sarbanes-Oxley Act was enacted on July 30, 2002, six weeks after Andersen's guilty verdict was returned. See Pub. L. No. 107-204, §§ 802, 1102, 116 Stat. 745, 800-01, 807 (codified at 18 U.S.C. §§ 1519 and 1512(c)).

75. Brief for the United States in Opposition at 13, *Arthur Andersen LLP v. United States*, 544 U.S. 696 (2005) (No. 04-368), 2004 WL 2825876.

76. 18 U.S.C. § 1519, enacted in the Sarbanes-Oxley Act, requires that a defendant act "knowingly" and "with the intent to impede, obstruct, or influence" a government investigation, or "in relation to or contemplation of any such matter or case" (emphasis added). Compare 18 U.S.C. § 1512(b) (2000 & Supp. IV 2004), which predates the Sarbanes-Oxley Act, and which requires that defendants act "knowingly [and] corruptly" and "with intent to impair the object's integrity or availability for use in an official proceeding."

77. See, e.g., Kalah Auchincloss & Matthew Walsh, *Obstruction of Justice*, 42 AM. CRIM. L. REV. 721, 728 (2005) (describing how circuits have split over the meaning of "corruptly"); John F. Decker, *The Varying Parameters of Obstruction of Justice in American Criminal Law*, 65 LA. L. REV. 49 (2004); Dana E. Hill, *Anticipatory Obstruction of Justice: Pre-Emptive Document Destruction Under the Sarbanes-Oxley Anti-Shredding Statute*, 18 U.S.C. § 1519, 89 CORNELL L. REV. 1519, 1542-46 (2004) (describing how courts have differed on the question of whether a defendant must have specific knowledge of the pending proceedings, or whether general knowledge is sufficient).

ing, or consciousness,” that corruption is “normally associated with wrongful, immoral, depraved, or evil” actions.⁷⁸ Individuals who act “knowingly . . . corruptly” thus must show both knowledge and corruption, and at a minimum must act with consciousness of wrongdoing. The nexus requirement in newly-enacted section 1512(c) is no different from the nexus requirement that already existed in section 1512(b), requiring an express link between the obstructive acts and an official proceeding. Section 1519 requires a substantially lesser link between the acts and the proceeding; so long as the act is “in relation to or contemplation of any such matter or case,” such act is prohibited.

C. Policies to Encourage Internal Enforcement.

These legal rules do not work in isolation; policy choices govern the enforcement of the law and thus any economic analysis of the law must consider the interplay of such policies. Current Department of Justice policy is to reward firms’ cooperation with a reduced likelihood of prosecution.⁷⁹ The policy was first outlined in a memorandum issued by former Deputy Attorney General Eric Holder in 1999,⁸⁰ was updated in 2001 by the Thompson Memorandum, issued by former Deputy Attorney General Larry Thompson,⁸¹ and is now governed by the McNulty Memorandum, issued by former Deputy Attorney General Paul McNulty.⁸² The United States Sentencing Guidelines offer firms a reduced fine to reward cooperation if a conviction is obtained.⁸³ The McNulty Memorandum describes the factors the government considers when deciding whether to prosecute firms. For example, if the firm cooperates in the government investigation and discloses any wrongdoing to the government, the government will be more likely to decline to pros-

78. 544 U.S. 696, 705 (2005).

79. Memorandum from Paul J. McNulty, Deputy Attorney General, on Principles of Federal Prosecution of Business Organizations to Heads of Department Components, United States Attorneys at 4 (Dec. 12, 2006), *available at* http://www.usdoj.gov/dag/speeches/2006/mcnulty_memo.pdf [hereinafter McNulty Memorandum].

80. Memorandum from Eric Holder, Deputy Attorney General, on Bringing Criminal Charges Against Corporations to Heads of Department Components, United States Attorneys (June 16, 1999), *available at* <http://www.usdoj.gov/criminal/fraud/docs/reports/1999/chargingcorps.html>.

81. Memorandum from Larry D. Thompson, Deputy Attorney General, on Principles of Federal Prosecution of Business Organizations to Heads of Department Components, United States Attorneys (Jan. 20, 2003), *available at* http://www.usdoj.gov/dag/cftf/corporate_guidelines.htm.

82. McNulty Memorandum, *supra* note 79.

83. U.S. SENTENCING GUIDELINES MANUAL § 8C4.1 (2004).

ecute. These incentives for firms to self-report internal wrongdoing are particularly important to the government's enforcement regime. The Department of Justice depends on the McNulty Memorandum's incentive to conduct internal investigations, because the government does not have the resources to investigate all potential infractions by corporations.

II. EFFICIENCY CONSEQUENCES OF CHANGES IN THE LAW.

Enforcing any criminal law requires proof of wrongdoing; such proof often is in the hands of the defendant. Individuals holding such evidence have three choices: they can destroy it, they can do nothing and hope the government will never find it, or they can turn it over to the government and hope for leniency in return. Individuals seeking to avoid punishment have a natural incentive to hide or destroy evidence of their wrongdoing, and they will do so unless they are given adequate incentives to do otherwise. To ensure that the government can find the proof it needs to prosecute offenders, laws criminalizing obstruction of justice must create strong incentives against destroying evidence, while policies guiding the government's decision to prosecute firms must create strong incentives for companies to report internal wrongdoing. If these laws and policies are effective, they will deter the obstruction as well as the underlying crime, since defendants contemplating criminal activity will know that avoiding detection will be difficult.

Economic analysis of criminal law reveals how efficient law enforcement may be achieved in the context of obstruction of justice. In general, an efficient law enforcement program must thread the needle of three objectives: it must deter inefficient violations of the law, avoid deterring efficient ones,⁸⁴ and operate at the lowest cost possible.⁸⁵

This section will explore three means of deterring obstruction of justice. First, to deter only inefficient violations, the elements of the crime must be carefully defined so that only certain behavior is punished. Second, enforcement policies must be set to ensure that the only individuals who choose to violate the law are those who derive greater benefit from a violation than the costs imposed on

84. Under the concept of efficient breach, violating the law is efficient if the benefit the actor derives from the breaching conduct is greater than the cost it imposes on others. See POLINSKY, *supra* note 9, at 79–80.

85. See *id.* at 81.

others. Third, since most document destruction occurs in the corporate context, the law will deter most efficiently if it is structured to encourage firms to police themselves and use internal enforcement mechanisms. This has the additional advantage of lowering enforcement costs.

A. *Defining the Crime: The Link between Nexus and Intent.*

Obstructive acts are a deadweight loss to society; they are costly and have no corresponding benefits that outweigh their costs.⁸⁶ Even if we assume that the benefit to a particular defendant from escaping detection cancels out the government's loss in its ability to prosecute that defendant (such that the government's loss is the defendant's gain), other un-canceled losses remain. First, a law-abiding society faces costs when some actors evince disrespect for the rule of law, which undermines the government's ability to prosecute crimes. Second, the actual act of identifying which documents to destroy—and then destroying them—is costly because that time could be spent productively.⁸⁷

It generally is efficient to prohibit acts that create deadweight losses, but not all document destruction amounts to obstruction of justice. There are legitimate reasons to destroy documents. Firms have document retention policies because they cannot keep everything—the storage costs would be prohibitive.⁸⁸ Moreover, individuals who routinely destroy documents in the normal course of business are not generally considered to be culpable if they unknowingly destroy documents later determined to be relevant to a government investigation.

86. See Arun S. Malik, *Avoidance, Screening and Optimum Enforcement*, 21 RAND J. ECON. 341 (1990); Sanchirico, *supra* note 8, at 1337. Although crimes usually entail some social cost, many crimes have some corresponding benefits. For example, some corporate crimes are probabilistically enforced (such that, by design, not every crime is prosecuted) because punishing all instances would discourage some productive activity and force firms to incur inefficiently high compliance costs.

87. The facts of *Arthur Andersen* illustrate just how wasteful shredding can be. Immediately before the SEC served its subpoena, Arthur Andersen shredded nearly two tons of paper. In the course of such shredding, Andersen employees presumably had to determine which documents would be shredded, truck the documents to a shredding facility, and actually shred them. At this time, the quantity of waste paper disposed of increased five-fold, from a steady average of 500 pounds to nearly 2500 pounds per day. *United States v. Arthur Andersen LLP*, 374 F.3d 281, 286 (5th Cir. 2004).

88. Christopher R. Chase, *To Shred or Not to Shred: Document Retention Policies and Federal Obstruction of Justice Statutes*, 8 FORDHAM J. CORP. & FIN. L. 721, 759 (2003) (calling retention costs “exorbitant”).

Laws governing obstruction thus have a complicated set of considerations to balance. Obstruction laws serve to deter both obstruction itself and the underlying crime, so they must be designed with sufficient stringency to ensure adequate deterrence. However, they cannot be defined too broadly or they will punish efficient and innocent acts.

1. If Document Destruction Has a Nexus to an Official Proceeding, Any Knowing Shredding Should Be Punished.

Given that firms cannot keep everything, the law must find a way to separate culpable obstruction from innocent document destruction. Assuming that the purpose of penalizing obstruction of justice is to ensure that evidence will be available should the government decide to look for it, the key to defining culpable obstruction is the nexus of documents to the official proceeding their destruction would disrupt. At any given time, the documents that are most valuable to preserve are those relevant to a specific, active investigation, that is, those with the strongest nexus to a specific governmental proceeding. Once the target of a governmental investigation identifies which documents may be relevant, the cost of storing these documents is negligible compared to the cost to the government if these documents are destroyed. Once the relevant documents have been identified, there is little reason to permit employees to destroy them with impunity.

Of course, to be culpable, the destroyer also must have some minimum level of scienter. Admittedly, the cost of lost evidence is high, and such cost does not vary regardless of the destroyer's level of knowledge—the evidence is gone either way. However, there are reasons not to impose a low liability standard. An employee who unknowingly destroys damaging evidence—perhaps because her regular responsibilities include shredding documents pursuant to the firm's document retention policy—arguably should not be subject to criminal sanctions. Under a liability regime that does not require prosecutors to prove scienter, some actors who engaged in routine shredding might be subject to criminal liability. The social costs of a low liability standard for obstruction would be high; the Supreme Court's opinion in *Arthur Andersen* evinced a reluctance to weaken the scienter element of section 1512(b), in part because the jury instructions at issue would have covered "innocent conduct."⁸⁹

Moreover, under a lower standard, firms could be liable even if their employees did not knowingly destroy evidence. If sanctions

89. *Arthur Andersen LLP v. United States*, 544 U.S. 696, 706 (2005).

were high enough, firms might be compelled to keep every piece of paper ever produced, or to impose multiple safeguards to ensure that any document to be shredded is not relevant to pending litigation.⁹⁰ The more costly it is to store documents, the more inefficient this approach. While empirical analysis is beyond the scope of this Note, Congress presumably considered the relative costs and imposed a scienter requirement in part because storage costs are not trivial. Firms likewise must consider storage costs high, because otherwise they would not spend resources to create and enforce document retention policies—they would just store everything instead. Although the cost of lost evidence is high, it is neither high enough to justify keeping every piece of paper ever produced, nor high enough to justify the social cost of imposing criminal penalties for behavior not usually considered to be morally culpable.

A less stringent mens rea standard would be more efficient if storage costs were low relative to the costs of successful obstruction, as is the case for electronic copies of documents. Storing electronic copies is far cheaper than storing paper copies; the cost of storing these documents indefinitely may even be less than taking the time to identify which documents can safely be deleted. If a firm could be punished for reckless or negligent deletion, it would be far more cost-effective for the firm to incur the storage costs associated with storing the electronic documents rather than risk liability for obstruction. Since electronic storage costs are low, it could be efficient to impose these costs on firms in order to preserve evidence; it may be preferable to err on the side of over-deterrence for electronic media. While theoretically efficient to vary the liability standard according to storage costs, notions of justice may make this unpalatable. Negligently deleting a damaging email is no more blameworthy than negligently shredding a printed copy of the same document. Until there is greater support for treating electronic records differently, the same standard that applies to paper documents should apply to electronic documents.⁹¹

90. For a firm, imposing multiple safeguards is costly, but justified if penalties are high enough. Assuming that penalties remain high, a fairly high mens rea standard will reduce the need to impose these multiple safeguards because only intentional acts will be violations. The enforcement regime will be less costly to the firm, which will be able to avoid additional investment in acquiring this “self-characterizing” information. See generally Jeffrey S. Parker, *The Economics of Mens Rea*, 79 VA. L. REV. 741, 745–46 (1993).

91. Increasingly, large corporations maintain digital archives of their documents. Even so, not all firms keep comprehensive digital archives, and much of the information that might become crucial evidence in litigation—handwritten notes on early drafts, for example—cannot readily be stored in electronic format.

In sum, assuming that a defendant has destroyed documents with a nexus to an official proceeding, it is efficient to punish any *knowing* destruction. If a defendant knew that documents would be relevant to a specific, active investigation, but knowingly destroyed them anyway, there is ample reason to apply criminal sanctions. Any standard more stringent than knowledge will leave unpunished some inefficient behavior; any standard less stringent than knowledge would force firms to incur inefficient storage costs and may render some innocuous acts subject to punishment.

2. If the Destroyer Acts with Sufficient Intent, Even Destruction with a Weaker Nexus to an Official Proceeding Should Be Punished.

Under some circumstances, document destruction with a weaker nexus to an official proceeding could warrant punishment. At any given time, the documents in a firm's possession with a weaker nexus to an official proceeding might be more valuable to law enforcement than those with a stronger nexus. For example, a firm under investigation for a relatively minor crime might also happen to have evidence of a more serious crime as yet undetected by the government—documents with no nexus to a specific official proceeding. With full knowledge and perfect hindsight, the government of course would also want to preserve evidence of the more serious crime. However, until that crime is detected, there is no way for the government to define which documents the firm should keep, other than to enact a general prohibition on destroying anything that could ever be used as evidence of a crime. The problem with that approach is that it is impossible to tell whether a document could be used as evidence just by looking at its contents. Anything can be evidence—a “smoking gun” could seem innocuous out of context.

An alternative approach to prohibiting all destruction would be to punish destruction when the destroyer specifically intends to destroy damaging information, but acts with no particular proceeding in mind because the government has not yet discovered any wrongdoing. There seems to be no risk that a statute narrowly targeted to these destroyers would punish innocent conduct. Without such a provision, a prescient criminal could destroy evidence of

In *Arthur Andersen*, two key pieces of evidence were hand-written meeting notes and suggested edits to a press release about Enron. See *United States v. Arthur Andersen LLP*, 374 F.3d 281, 285–86 (5th Cir. 2004). While increased digitization is changing the costs associated with document retention, the cost associated with storing paper copies remains a relevant consideration.

his crime quickly and still be confident that his shredding could not be punished.

The nexus requirement has been defended on the ground that it ensures defendants have fair notice they are engaging in criminal conduct.⁹² It also serves to ensure that the defendant actually acted with culpable intent.⁹³ But if the nexus requirement were to be replaced by a requirement that the acts be undertaken corruptly, both those purposes would still be served. It is hard to argue that a defendant who corruptly destroys incriminating evidence lacks fair notice, and if prosecutors prove that the defendant acted corruptly, there is no need for a proxy to ensure that the defendant acted with culpable intent. Therefore, for individuals, the difficulties associated with a weaker nexus requirement would be mitigated if they were linked to a stronger mens rea standard.

Like individuals, corporations can be held responsible for crimes of obstruction. While it may be efficient to punish individuals acting in their personal capacities for obstruction undertaken with no nexus but with a corrupt intent, a statute taking this approach could create undesirable consequences in the corporate context, when those destroying documents are employees within a corporation. A corporation is subject to vicarious liability whenever an individual employee obstructs justice. Naturally, the corporation will want to avoid liability and prevent obstruction. But if culpable obstruction need not have any nexus to a government proceeding, the corporation will have no way to identify which documents it should preserve.

If the corporation has not yet discovered wrongdoing by a rogue employee, it might not even know what crime the shredding would cover up. If liability is based primarily on the individual shredder's intent, the firm has no real way to control or even detect wrongdoing by its employees. If instead liability were based on nexus to an official proceeding, the firm would have objective criteria it could use to determine which documents to preserve. Once the firm knows that the government is investigating a specific transaction, the firm is on notice to preserve all related documents; preserving all documents related to a particular transaction is far easier than preventing corrupt shredding by an (as yet undetected) rogue employee. In effect, punishing all corrupt shredding by employees would force corporations to either keep all documents or face pos-

92. *E.g.*, *United States v. Aguilar*, 515 U.S. 593, 600 (1995).

93. Hill, *supra* note 77, at 1534 (describing the purposes of the nexus requirement).

sible liability for obstruction of justice. Given the prohibitive cost of complete document retention, the more efficient approach to obstruction of justice in the corporate context is to punish only obstruction undertaken with a nexus to an official proceeding.

3. Recent Changes Do Not Incorporate the Sliding Scale that Economic Theory Recommends.

As just discussed, economic theory suggests the importance of maintaining an inverse relationship between the strength of the intent and nexus requirements. If prosecutors must show a nexus to an official proceeding, they should only be required to show that the shredder acted knowingly, but if prosecutors need not show a nexus, they should be required to show that the shredder acted with at least corrupt intent. As applied to corporations, the second formulation is not as efficient as the first, but both schemes are better than statutes that set a uniformly high (or low) standard. A uniformly high standard—requiring prosecutors to prove both a nexus to an official proceeding, and a high level of intent, such as corruption—would permit too much obstruction to go unpunished. A uniformly low standard—which requires no nexus to an official proceeding and merely knowing acts—would force corporations to incur inefficiently high compliance costs. In spite of these prescriptions, recent changes to the law governing obstruction of justice have taken exactly the opposite approach. In *Arthur Andersen*, the Court interpreted section 1512(b) to include a nexus requirement and to require prosecutors to prove a stricter intent element.⁹⁴ In response, Congress enacted section 1519, which both eliminates the nexus requirement and broadens the intent element to include knowing conduct.⁹⁵

a. Recent Changes to Section 1512 Have Strengthened Both Elements, Leaving Much Inefficient Behavior Unpunished.

As interpreted by the Court in *Arthur Andersen* and as amended by the Sarbanes-Oxley Act, both relevant subsections of section 1512 now include a nexus requirement and relatively stringent intent elements. Both changes increase the burden prosecutors must meet in order to prove that a crime has been committed.

The *Aguilar* nexus requirement applies to both subsections of section 1512. It requires that acts of obstruction have “a relationship in time, causation, or logic with the judicial proceedings”; or, they must have the “natural and probable effect” of interfering with

94. 544 U.S. 696, 707 (2005).

95. 18 U.S.C. § 1519 (2000 & Supp. IV 2004).

the official proceeding.⁹⁶ *Aguilar* interpreted section 1503, an omnibus obstruction provision, and *Arthur Andersen* extended its holding to section 1512(b). *Aguilar* has not explicitly been extended to section 1512(c), but because the section uses language identical to section 1512(b), it is safe to assume that the holding in *Aguilar* will extend to subsection (c) as well.

Whether a defendant who shredded documents acted with the requisite intent often is one of the most hotly contested issues at trial.⁹⁷ Prior to *Arthur Andersen*, there was little authority construing the meaning of “knowingly . . . corruptly.” Instead, the parties relied on existing precedent addressing the meaning of “corruptly,” the formulation used in sections 1503 and 1505.⁹⁸ There was far more interpretive authority related to these sections because they were far more commonly prosecuted than section 1512, and they had been in existence much longer.⁹⁹ However, the Court in *Arthur Andersen* declined to look to existing definitions of “corruptly” because “these provisions lack the modifier ‘knowingly,’ making any analogy inexact.”¹⁰⁰ Although *Arthur Andersen* is unclear about precisely what would be sufficient to prove culpable obstruction under section 1512(b), it does set a floor, holding that at a minimum, prosecutors must prove consciousness of wrongdoing, reasoning that criminal statutes should be construed narrowly, particularly when the behavior at issue “is by itself innocuous” and when the innocuous behavior serves legitimate ends.¹⁰¹

By itself, requiring prosecutors to show consciousness of wrongdoing is not inefficient. It helps ensure that innocent conduct cannot be punished, but not at the cost of leaving culpable conduct unpunishable, since any defendant who acts knowingly will

96. *Aguilar*, 515 U.S. at 599.

97. *See, e.g., Arthur Andersen*, 544 U.S. 696, 706–08; *United States v. Stewart*, 433 F.3d 273, 293 n.4, 302, 318 (2d Cir. 2006) (falsifying documents); *United States v. Quattrone*, 441 F.3d 153, 172–74 (2d Cir. 2006).

98. *See United States v. Arthur Andersen LLP*, No. H-02-121, 2002 U.S. Dist. LEXIS 26870, at *16–17 (S.D. Tex. May 24, 2002).

99. *Compare* Victim and Witness Protection Act of 1982, Pub. L. No. 97-291, 96 Stat. 1248 (codified in 18 U.S.C. § 1512 (2000)) *with* Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified in scattered sections of 11, 15, 18, 28, and 29 U.S.C. (2000 & Supp. IV 2004)).

100. *Arthur Andersen*, 544 U.S. at 705 n.9.

101. The Court reasoned that it should give “deference to the prerogatives of Congress” and preserve the “fair warning” embodied in the statute of potential criminal liability for certain acts. *Id.* at 703. Also, it noted that document retention policies serve legitimate ends. *Id.* at 703–04.

be conscious of his wrongdoing.¹⁰² But consciousness of wrongdoing is not all that prosecutors must show. The statutory language punishes shredders who acted “knowingly . . . corruptly,” and the *Arthur Andersen* Court explained that “corrupt” conduct is “normally associated with wrongful, immoral, depraved, or evil” actions.¹⁰³ Although the Court did not explore just what prosecutors would have to show to prove corrupt conduct, it is clear that prosecutors must prove something beyond consciousness of wrongdoing to meet the requirements of section 1512(b). Requiring prosecutors to also show that a shredder acted corruptly leaves them powerless to prosecute some culpable conduct. A defendant who knowingly destroys evidence that has a nexus to an official proceeding surely is culpable for her acts. However, unless she also shows some additional depravity, she would not be subject to punishment under section 1512(b) as interpreted in *Arthur Andersen*.

Like section 1512(b), section 1512(c), enacted in the Sarbanes-Oxley Act, includes a relatively stringent intent element. Section 1512(c) requires prosecutors to prove corrupt intent, which is a less stringent burden than that of section 1512(b), but still is a higher burden than proving mere knowledge. The precise bounds of corrupt intent are unclear. Federal courts have split on the meaning of “corruptly” as applied to other obstruction provisions; some have required that the prosecution show the defendant acted with only an “improper purpose,” while others have required that the prosecution prove the defendants used an “improper method.”¹⁰⁴

102. *Id.* at 705 (explaining that “‘knowledge’ and ‘knowingly’ are normally associated with awareness, understanding, or consciousness”).

103. *Id.*

104. Courts have not yet had the chance to resolve the meaning of “corruptly” as applied to § 1512(c). See Daniel A. Shtob, *Corruption of a Term: The Problematic Nature of 18 U.S.C. § 1512(c)*, 57 VAND. L. REV. 1429, 1432–33 (2004). Although some district courts have addressed the meaning of “corruptly” in section 1512(c) since 2004, there is nothing close to a consensus. See, e.g., *United States v. Makham*, No. CR. 03-30069-AA, 2005 WL 3533263, at *96 (D. Or. Dec. 23, 2005) (applying the *Andersen* definition of “corruptly” to all sections of § 1512); *United States v. Hey*, No. 03-80863, 2005 WL 1039388, at *5 (E.D. Mich. Apr. 29, 2005) (convicting defendant under § 1512(c)(2) without discussing the definition of “corruptly”); *United States v. Ortiz*, 367 F. Supp. 2d 536, 541 (S.D.N.Y. 2005) (finding that the government need not prove that the defendant’s conduct was “likely to affect” the official proceeding or that defendant knew that her conduct was “likely to affect” the official proceeding); *United States v. Butler*, 351 F. Supp. 2d 121, 132–33, 133 n.12 (S.D.N.Y. 2004).

This circuit split remains unresolved.¹⁰⁵ The Court may well extend the logic used in *Arthur Andersen* to adopt a narrow reading of “corruptly” and side with the circuits which have defined it to require an improper method. Extending the Court’s logic, any definition should clearly exclude the possibility that “innocent” or routine shredding will be punishable. However, Congress’s definition of “corruptly” in section 1515 may hold substantial weight. According to section 1515, “as used in section 1505, the term ‘corruptly’ means acting with an improper purpose, personally or by influencing another, including making a false or misleading statement, or withholding, concealing, altering, or destroying a document or other information.”¹⁰⁶

The circuit split has important implications for obstruction in the context of corporate crime, as illustrated by the dispute between the parties in *Arthur Andersen*. The lack of authority construing “knowingly . . . corruptly” in section 1512(b) led the parties to look instead to existing authority on the meaning of “corruptly” to use in the jury instructions. “Corruptly,” of course, is the language used in section 1512(c), which suggests that the parties’ arguments in *Arthur Andersen* could have important implications for future applications of section 1512(c). While the government argued it needed only to prove that the Andersen employees used an “improper purpose,” Andersen maintained that the government should have to prove its employees had used an “improper method.”¹⁰⁷ The government had alleged no behavior that could have been considered an “improper method”—defined as “improper means of persuasion or knowing inducement to unlawful acts.” No Andersen employee had used improper means of persuasion, like coercion or bribery; nor had anyone knowingly encouraged illegal activity. Instead, the evidence more clearly supported allegations that employees had acted with an improper purpose; the most incriminating evidence created the plausible inference that they wanted to avoid having the evidence available for the Enron inquiry. In general, evidence of obstruction within corporations is likely to conform to the pattern seen in *Arthur Andersen*—agents will be much more likely to have had an improper purpose than to have used improper methods.

105. *The Supreme Court, 2004 Term—Leading Cases*, 119 HARV. L. REV. 169, 408 (2005).

106. 18 U.S.C. § 1515 (2000).

107. *United States v. Arthur Andersen LLP*, No. H-02-121, 2002 U.S. Dist. LEXIS 26870, at *16–17 (S.D. Tex. May 24, 2002).

If the Court sides with the circuits that have defined “corruptly” to require an improper method, section 1512(c) will criminalize far less obstructive behavior within corporations. The shredding that would be left uncovered—shredding where the defendant acts with an improper purpose, but does not use an improper method—will be just as damaging to law enforcement as shredding undertaken with an improper purpose, because the evidence will be unavailable either way. While it is inefficient to punish negligent shredding, there is little reason to permit shredders with an “improper purpose” to act with impunity. Assuming that their acts have the requisite nexus to an official proceeding, they are acting intentionally to destroy specific evidence. This is not innocent conduct, and punishing it will further efficient deterrence of obstruction of justice.

Both subsections of section 1512, as now interpreted, include intent and nexus elements that, by their combination, criminalize only a small sphere of conduct. For example, an employee who knew that a document likely would be relevant to some proceeding in the future, but who did not act corruptly or in contemplation of any particular official proceeding, would not be violating section 1512. She would, however, be acting inefficiently. Storing that particular document—which the employee knows could influence an official proceeding, even if she does not know which one—clearly is the more efficient course of conduct, and the law should promote that choice.

b. Section 1519 Relaxes Both Elements, Criminalizing Some Otherwise Efficient Document Destruction.

Section 1519 relaxes both nexus and intent, criminalizing inefficient document destruction that is beyond the reach of section 1512. Indeed, it expands liability so far that it could apply to efficient, innocuous document destruction as well. First, section 1519 significantly relaxes the nexus requirement. While the relevant subsections of section 1512 contemplate a link to a particular official proceeding,¹⁰⁸ section 1519 covers both acts with a direct link to a proceeding and those “in relation to or contemplation of” such proceedings. This portion of section 1519 has been described as covering anticipatory destruction—“document destruction by individuals who are savvy enough to preempt an investigation by acting before they have knowledge about the specific proceeding that may

108. Subsections (b) and (c) of section 1512 punish acts intended “to impair the object’s integrity or availability for use in an official proceeding.” 18 U.S.C. §§ 1512(b)–(c) (2000 & Supp. IV 2004).

demand the documents.”¹⁰⁹ Moreover, section 1519 dispenses with the requirement that the proceeding be “official”; the proceeding can be “any matter” which falls within the government’s jurisdiction. Second, in addition to its weakened nexus requirement, of the three statutes governing document destruction, section 1519 includes the weakest mens rea requirement. It dispenses with the statutory formulation of mens rea in section 1512(b) that was so problematic in *Arthur Andersen*—that of knowing corrupt persuasion—in favor of a simple “knowingly.”

Because section 1519 significantly relaxes both elements, it substantially expands the reach of laws criminalizing obstruction of justice. For example, section 1519 would reach an employee who, pursuant to a document retention policy, shredded early drafts of a final document to ensure that those drafts would not be taken out of context in future litigation.¹¹⁰ That employee would be “knowingly . . . destroy[ing] . . . [a] document . . . in relation to or contemplation of” a government proceeding.¹¹¹ That employee could also be acting in the normal course of business, and not doing anything generally considered to be nefarious. Because section 1519 is so broad, many acts undertaken to enforce document retention policies could fall within its scope.¹¹² If firms change their policies to comply with section 1519, document storage costs could explode.

The inefficiencies associated with section 1519 may have a particularly broad impact. Section 1519 covers “knowing” conduct with no nexus to an official proceeding, a category that includes everything under section 1512(b) and (c), and more. Any individual seeking to comply with the law will look to the broadest liability standard to which she can be held. If she will be subject to punishment for acting knowingly, she will avoid all knowing conduct. In so doing, she will avoid all conduct which falls under either definition of “corrupt,” since “knowing” conduct includes all “corrupt” conduct, under either definition, and more. Corporations seeking to avoid liability for their employees’ actions will bear a particularly difficult burden. If an employee acts “in contemplation of” a government investigation that has not yet begun, a corporation could face liability for obstructing an investigation of which it was not even aware. The only way to avoid liability would be to store everything—a huge cost to ask a firm to bear.

109. Hill, *supra* note 77, at 1523.

110. *The Supreme Court, 2004 Term—Leading Cases*, *supra* note 105, at 412.

111. 18 U.S.C. § 1519 (2000 & Supp. IV 2004).

112. *See The Supreme Court, 2004 Term—Leading Cases*, *supra* note 105, at 412.

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In summary, a weak nexus requirement could be efficient if coupled with a stringent liability standard (such as “corruptly”). Likewise, a statute punishing mere knowing behavior could be efficient if it also required the shredding to have a nexus to an official proceeding. But when both elements are weakened, as they are in section 1519, the statute’s reach is too broad. To mitigate this inefficiency, Congress should amend statutes governing obstruction of justice to reflect an inverse relationship between the strength of the intent and nexus requirements.

B. Enforcing the Law and Penalizing Violations.

Just as the elements of obstruction of justice should be defined to avoid punishing efficient and innocent acts, penalties should be set to ensure efficient deterrence. The primary goal of efficient law enforcement is to deter inefficient violations of the law.¹¹³ Individuals deciding whether to violate the law naturally consider the penalty they can expect to face. An expected fine equals the fine a defendant will pay if caught, multiplied by the probability she will be caught. Economic theory suggests that individuals will violate the law only if the private benefits arising from the violation exceed the fine they expect to pay.¹¹⁴

1. Optimal Expected Sanctions.

a. Set Expected Sanctions at a Level that will Deter Inefficient Violations.

From society’s perspective, violating the law is efficient if the private benefits arising from a violation exceed the associated social costs.¹¹⁵ Therefore, in order to deter only inefficient violations of the law, the expected fine must equal the social cost imposed on others by a violation. Individuals will then violate the law only if the private benefits they derive exceed the social costs of a violation.

There is more than one way to set the same expected sanction. If, for example, the social cost of a violation is five dollars, law enforcement can plan to catch fifty percent of violations and levy a ten dollar fine, or it can plan to catch five percent of violations and levy a hundred dollar fine. In either case, the expected sanction is five dollars.

Although there are multiple, equally effective ways to set expected sanctions to deter inefficient violations, not all of these com-

113. See POLINSKY, *supra* note 9, at 81.

114. See ROBERT COOTER & THOMAS ULEN, *LAW & ECONOMICS* 435–39 (2000).

115. See POLINSKY, *supra* note 9, at 81.

binations work equally well to achieve the other two goals of efficient law enforcement. First, law enforcement is considered to be efficient only if it deters inefficient violations *and* operates at the lowest cost possible.¹¹⁶ It is more costly to run an enforcement regime in which a higher percentage of violations are caught. Second, the enforcement regime must avoid deterring efficient behavior.¹¹⁷ If the actors are risk averse, an enforcement regime that combines high penalties with a low probability of detection may create over-deterrence by encouraging actors to take costly additional steps to ensure that they are not accused of violating the law.

b. Optimal Expected Sanctions are Difficult to Determine.

To deter inefficient document destruction, expected sanctions should be set to equal the social cost of obstruction of justice. Determining the precise expected sanction that will deter inefficient obstruction—whether for a given probability of detection a fine should be ten thousand dollars or ten million dollars, or whether individuals should be imprisoned for ten or twenty years¹¹⁸—requires empirical analysis. The total social cost of obstruction of justice includes many values that are exceedingly difficult to calculate, such as the likelihood that a particular document, which has been destroyed, would affect the outcome of pending litigation had it not been destroyed, or the degree to which lax enforcement of obstruction of justice will encourage more underlying crime.

While the maximum penalties are relatively clear, because they are fixed by statute, the sentence actually imposed is not often the statutory maximum. The U.S. Sentencing Guidelines direct the choice of a sentence within the statutory range, and the sentence imposed varies according to factors specific to each defendant.¹¹⁹ While this precludes precise conclusions about the sentences imposed, it is at least clear that the Sarbanes-Oxley provisions increase statutory maximums. Violations of section 1512(b) are punishable by up to ten years imprisonment, while violations of either provision newly enacted in the Sarbanes-Oxley Act are punishable by up to twenty years imprisonment.¹²⁰

116. *See id.*

117. *See id.*

118. Sections 1512(c) and 1519, newly enacted in the Sarbanes-Oxley Act, impose a maximum term of imprisonment of 20 years; section 1512(b) imposes a 10-year maximum. 18 U.S.C. §§ 1512(b)–(c), 1519 (2000 & Supp. IV 2004).

119. U.S. SENTENCING GUIDELINES MANUAL § 8C3.1 (2004).

120. 18 U.S.C. §§ 1512(b)–(c), 1519.

Expected sanctions also are affected by the probability that obstruction of justice will be detected.¹²¹ The probability of detection likewise is difficult to calculate with any degree of certainty because it requires knowing how many acts of obstruction occur but are never discovered. Even if we cannot attain a precise probability, we may draw broad conclusions about a desirable level. Raising the probability of detection can reduce obstruction at the margin. If the government enforces obstruction laws rigorously, the expected cost of obstruction will be higher, so fewer individuals will do it. This will free authorities to target their enforcement better, so those who still obstruct are more likely to be caught.¹²² Specifically, the government can more effectively target its enforcement to the cases where the stakes are high enough to still make obstruction worthwhile.¹²³ Moreover, those who still obstruct are those with much to gain from the obstruction, so the obstructers who are caught will be high-value targets.¹²⁴ Both effects increase the quantity of evidence the court will receive.¹²⁵ By increasing the probability that obstruction will be discovered and punished, increasing enforcement of obstruction laws will also reduce the incentive to commit the underlying crime.

At some point, increasing enforcement carries diminishing marginal returns, because, as a higher percentage of obstructers are caught, only those obstructers better able to evade detection are left.¹²⁶ Also, once destruction has already been deterred, additional enforcement will have no additional deterrent effect, so it might not be cost-effective.¹²⁷

Precise conclusions about expected sanctions are difficult to draw without detailed empirical work, but approximate conclusions about a desirable degree of enforcement may be drawn in theory from observed behavior. For example, if firms take far too many precautions against liability, to the point where the precautions are obviously inefficient, the level of enforcement may be too high. Then, an increase in penalties would make the new regime less

121. See POLINSKY, *supra* note 9, at 81–82.

122. See Chris William Sanchirico, *Evidence Tampering*, 53 DUKE L.J. 1215, 1297–98 (2004).

123. See *id.*

124. See *id.* at 1297 (“As we drag the net farther and farther out to sea, in other words, we catch bigger and bigger fish.”).

125. See *id.* at 1296–98.

126. See *id.* at 1297 (“Like fishing on an overfished lake, additional enforcement effort is less likely to have much corrective benefit when remaining situations in need of correction are scarce and difficult to find.”).

127. See *id.*

likely to induce efficient behavior. Under current circumstances, approximations cannot be made because recent changes have had countervailing effects: the Sarbanes-Oxley Act doubled penalties while *Arthur Andersen* reduced the scope of behavior subject to punishment.

It is possible to approach the question from a different angle. Insofar as fines reflect the social costs of obstruction, they represent the price of violating the law. As long as a defendant pays more than the social costs of obstruction of justice, she is free to destroy anything she likes.¹²⁸ The punishments imposed for obstruction of justice may be better viewed as sanctions, that is, as penalties for engaging in forbidden behavior. If these fines are best characterized as sanctions, setting fines in response to social costs becomes less important. Instead, fines need only be high enough to deter the illegal behavior; their precise level is less important.¹²⁹ This is accomplished by setting fines so that the potential destroyer's private costs are minimized by conforming to the legal standard rather than by violating it.¹³⁰

For a sanctions-driven regime to work, however, the legal standard must be clear, and it must effectively separate efficient from inefficient document destruction.¹³¹ High sanctions work by making violations very costly; to work efficiently, sanctions must apply only to inefficient violations. However, neither *Arthur Andersen* nor the Sarbanes-Oxley changes work to clarify the distinction between legal and illegal behavior. If anything, they have increased uncertainty, making it more difficult than ever to discern the line between what is permitted and what is forbidden.

2. Efficient Combinations of Fines and Probabilities of Detection.

Different combinations of fines and probabilities of detection carry different enforcement costs. They also impose different levels of risk on anyone who might be caught. Therefore, while it is impossible to know what level of expected sanctions would be optimal,

128. Robert Cooter, *Prices and Sanctions*, 84 COLUM. L. REV. 1523, 1523 (1984) (contrasting sanctions, defined as penalties for forbidden conduct, with prices, defined as money an actor must pay in order to do something that is permitted).

129. *See id.* at 1526–30.

130. *See id.*

131. *Id.* at 1532 (“[L]awmakers who create an obligation backed by a sanction must be certain that the partition between permitted and forbidden zones is in the right place. On the other hand, mistakes in computing the level of the sanction or the frequency of its application are not crucial, because most people will conform in spite of these mistakes.”).

it is possible to say that certain combinations of fines and probabilities of detection are suboptimal.

a. A Low Probability of Detection Will Minimize Enforcement Costs.

Although any given expected fine may be achieved with either a relatively high probability of detection and a relatively low fine, or vice versa, the two enforcement regimes are not equally costly. Achieving a high probability of detection is expensive: to catch most violations, the government must hire more investigators and monitor more actors.¹³² In contrast, fines are relatively inexpensive transfers from defendants to the government.¹³³ Assuming that the defendant can pay the fine, collecting ten million dollars costs the government no more than collecting ten thousand dollars.¹³⁴ Therefore, to enforce the law as cheaply as possible, efficient fines should be set very high, equal to the total wealth of a would-be offender.¹³⁵ The probability of detection could then be set very low and the expected penalty would still equal the total harm associated with the crime.¹³⁶ Because by assumption the expected sanction is set optimally, this regime will deter inefficient violations. Because it relies on high fines rather than a high probability of detection, it will also minimize enforcement costs.

However, such a regime also imposes high risks.¹³⁷ When actors are risk averse, enforcing crime with very high fines and a low probability of detection may create too much deterrence, inducing some actors to avoid efficient behavior.

b. If the Actors are Risk Averse, High Penalties Could Lead to Inefficient Over-Compliance.

Under an enforcement regime that imposes high fines but carries a low probability of detection, very few efficient violations will be punished, but those which are will be very costly to the perpetrators. In other words, the regime will be very risky. Moreover, legal

132. See POLINSKY, *supra* note 9, at 79–81.

133. See *id.* at 100–01 (“[F]ines are a less expensive sanction for society than are imprisonment sentences.”).

134. See *id.* at 82.

135. See *id.* See generally Becker, *supra* note 10, at 208 (explaining advantages of fines over other types of punishment).

136. See Becker, *supra* note 10, at 208.

137. A low probability of a high fine is riskier than a high probability of a low fine. Even if both fines have the same expected value, the higher fine will still be the riskier of the two because the variation in potential outcomes will be greater. See POLINSKY, *supra* note 9, at 86.

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rules are not always perfectly clear, so actors could misjudge whether the law forbids certain behavior; also, even if clear legal rules exist, the courts may misapply the law. Under these conditions, if the actors are risk averse, they will over-comply with the law to avoid the risk of a ruinous fine, or to avoid the reputational harm associated with an indictment. Some efficient violations will then be deterred as well; an actor facing even a small risk of a very high fine would be loath to incur the risk, even if the expected fine (*i.e.*, the actual fine multiplied by the probability it will be imposed) were lower than the benefits she would derive from committing the crime. Efficient deterrence can be achieved only by balancing the cost of enforcement with the risk aversion of the actors.¹³⁸ Otherwise, the regime will deter too much activity, some of which may be efficient.

Risk need be considered only if over-deterrence should be avoided, which is the case only if we assume that there is such a thing as an “efficient violation.”¹³⁹ If no violations are efficient, the problem of over-deterrence does not matter because there would be no efficient violations to deter.¹⁴⁰ Behavior constituting obstruction of justice—if properly defined—entails a deadweight loss. That is, it is costly to society, and the costs clearly outweigh its corresponding benefits. As such, there is no such thing as an efficient violation. In other words, if obstruction laws were defined perfectly, then no violations would be efficient, and it would be best to set fines very high and reduce the probability of detection by a corresponding amount. All inefficient behavior would be deterred, and enforcement costs would be minimized.

However, not all document destruction amounts to obstruction of justice, and when it does not, destruction can be a productive activity. A firm is entirely justified in destroying rather than storing documents that are no longer of any use to either the company or the government. Because it may be cost-effective to destroy some documents in the ordinary course of business, not all document destruction creates a deadweight loss.

138. *See id.* at 83–90. Pragmatic considerations may also govern the balance. Changing the probability of detection is perhaps easier than changing the size of sanctions since the former is governed in part by prosecutorial discretion, while penalties are usually defined by statute or the sentencing guidelines.

139. *See id.* at 88–89. Efficient violations of the law occur when the total benefits associated with committing a crime exceed the total costs associated with the crime.

140. *See id.*

Under current law, crimes of obstruction are not perfectly defined, so there is a chance that efficient document destruction will be subject to punishment. In fact, obstruction laws are both over- and under-inclusive.¹⁴¹ Moreover, there are multiple obstruction provisions that might apply to any given act, so the line between what is criminal and what is not is not always clear. The possibility of an efficient violation is thus real. Therefore, the enforcement regime should avoid over-detering document destruction and reflect a cognizance of risk aversion in its fines and enforcement policy. It is not optimal to minimize enforcement costs by setting the fine as high as possible and reducing the probability of detection accordingly. Instead, it is best to incur costs associated with raising the probability of detection so that fines may be reduced.

c. Uncertainty in the Legal Rules Increases Deterrence with Minimal Cost.

When individuals are risk averse, additional risk that a sanction will be imposed will increase deterrence, however that risk is brought to bear.¹⁴² The law and economics literature on optimal enforcement is primarily concerned with risk created by the relationship between the probability of detection and the size of the sanction,¹⁴³ but enforcement is not the only source of risk. Risk also may be introduced through uncertainty in the legal rules themselves.¹⁴⁴ This section evaluates the effects of this second source of uncertainty.

One key effect of *Arthur Andersen* has been to create uncertainty in the legal rules. The Court set the outer parameters of the nexus and intent elements but specifically declined to adopt more

141. See *supra* Part II.A; cf. Hill, *supra* note 77 (exploring the extent to which the Sarbanes-Oxley Act criminalizes anticipatory, or pre-emptive, document destruction); *The Supreme Court, 2004 Term—Leading Cases*, *supra* note 105, at 412 (citing Brief for Amicus Curiae Am. Inst. of Certified Pub. Accountants in Support of Petitioner, Arthur Andersen LLP, 544 U.S. 696 (2005) (No. 04-368), 2005 WL 435910 (describing how shredding drafts pursuant to a document retention policy could be prohibited under section 1519)).

142. See John E. Calfee & Richard Craswell, *Some Effects of Uncertainty on Compliance with Legal Standards*, 70 VA. L. REV. 965, 968 (1984) (discussing uncertainty throughout the legal process, particularly with respect to not knowing the legal standard which may apply).

143. See generally POLINSKY, *supra* note 9, at 79–90 (providing an overview of the economic analysis of law enforcement when fines are used as a sanction).

144. See generally Gillian K. Hadfield, *Weighing the Value of Vagueness: An Economic Perspective on Precision in the Law*, 82 CAL. L. REV. 541 (1994); Richard Craswell & John E. Calfee, *Deterrence and Uncertain Legal Standards*, 2 J.L. ECON. & ORG. 279, 279–80 (1986).

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precise definitions, making the scope of these elements unclear. The Sarbanes-Oxley obstruction provisions introduce additional uncertainty. Prior to the Sarbanes-Oxley Act, there were two omnibus provisions addressed to obstruction, sections 1503 and 1505, and one provision specifically addressed to document destruction, section 1512(b). By adding two provisions which criminalize document destruction, sections 1512(c) and 1519, the Sarbanes-Oxley Act created uncertainty with respect to which of the overlapping (and unclear) statutes prosecutors will charge defendants with violating. Both sections 1512(c) and 1519 expand the behavior considered to be criminal, and both are broadly worded.¹⁴⁵ Given the Court's concern in *Arthur Andersen* with expansive criminalization of innocent conduct, a judge might be reluctant to implement such a broad provision fully; creative construction is therefore possible, but uncertain. However, the statute includes no "obvious hook upon which a court could tether any constraint,"¹⁴⁶ and anchoring analysis on the assumption that a court will use a creative reading of the statute is dubious. Much of the new statutory language has not been subjected to judicial interpretation, so doubt remains regarding how it will be implemented.

Some aspects of *Arthur Andersen* may have increased certainty. The Court's affirmation of the nexus requirement creates a clearer separation between the enforcement of regular document destruction policies and culpable obstruction. As such, it increases certainty with respect to behavior that clearly falls outside the scope of the nexus requirement. However, on balance, recent changes in obstruction laws have reduced the certainty with which potential defendants know what the law is and how it will be applied. Moreover, while Congress and the President, by means of the Sarbanes-Oxley Act, have signaled their intent to "get tough" on white collar crime, the Court in *Arthur Andersen* emphasized the importance of construing criminal statutes narrowly to avoid punishing "innocuous" conduct which "is not inherently malign."¹⁴⁷ These conflicting approaches are a source of additional uncertainty.

Increasing uncertainty in the legal standard may induce two countervailing responses. It may increase the chance that certain behavior will not be punished, creating an incentive to under-comply. To use Professor Sanchirico's metaphor,¹⁴⁸ if it is easier to escape from a net with larger holes, one is less likely to try avoiding

145. *The Supreme Court, 2004 Term—Leading Cases*, *supra* note 105, at 412–13.

146. *Id.* at 412.

147. *Arthur Andersen LLP v. United States*, 544 U.S. 696, 703–04 (2005).

148. *See Sanchirico*, *supra* note 122, at 1297.

the net. On the other hand, it may create the opportunity to over-comply, inducing potential offenders to “play it safe” to reduce the probability that their behavior will be deemed prohibited under the statute;¹⁴⁹ some might take even greater precautions to escape the scope of the net altogether.

Under conditions likely to prevail in the context of obstructing justice, it has been shown that the latter effect is likely to dominate the former, and actors will over-comply with the law.¹⁵⁰ When faced with uncertainty, the incentive to over-comply is greatest when it is cost effective; that is, when the lower probability of being held liable is significant enough to offset the additional costs of compliance.¹⁵¹ This would likewise be true when the additional cost of compliance is low. In the case of obstruction of justice, the marginal cost of over-compliance is certainly low and conceivably negative—it may be less costly to store documents than to shred them if employees must spend time identifying which documents should be destroyed. In the corporate context, over-compliance among employees is even more likely. The employee who avoids liability for obstruction by storing documents is not the one paying the costs of storage, or in most cases, the one who would be liable for any underlying crimes.

Empirical studies¹⁵² and practical experience¹⁵³ likewise suggest that individuals are more likely to “play it safe” and over-com-

149. See Craswell & Calfee, *supra* note 144, at 280.

150. See Calfee & Craswell, *supra* note 142, at 980–81 (explaining when the incentive to over-comply is likely to dominate the incentive to under-comply); Craswell & Calfee, *supra* note 144, at 280.

151. See Calfee & Craswell, *supra* note 142, at 980–81 (arguing that overdeterrence will result when the uncertainty is distributed evenly around the optimal level of compliance); Craswell & Calfee, *supra* note 144, at 280.

152. Reducing the precision with which people know the probability of detection (holding the overall probability of detection constant) has been found to increase deterrence. *E.g.*, Tom Baker, Alon Harel & Tamer Kugler, *The Virtues of Uncertainty in Law: An Experimental Approach*, 89 IOWA L. REV. 443, 464 (2004) (“Uncertainty with regard to either the size of a sanction or the probability of detection increases deterrence.”).

153. The same concerns about over-compliance motivate the Court’s view that vague regulation of speech might have a “chilling effect” and deter politically valuable speech in addition to the targeted speech. See Calfee & Craswell, *supra* note 142, at 1001. Another example is the selection of tax audits. The Internal Revenue Service closely guards the criteria it uses to select tax returns for audits, reducing the precision with which any taxpayer will know the probability she will be audited. Research indicates that this increases taxpayer compliance. The same principles may be applied to criminal law enforcement. Rudolph Giuliani, as United States Attorney for the Southern District of New York, established “federal day,” one day each week chosen at random when all drug arrests would be prose-

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ply in the face of uncertainty. This suggests that uncertainty in the law is desirable insofar as it is a low-cost way to increase deterrence. However, uncertainty introduced in either *Arthur Andersen* or the Sarbanes-Oxley provisions may be undesirable for other reasons. Usually, uncertainty in criminal law is undesirable because it is considered unjust; sanctions should be known in advance and statutes must provide fair warning of the behavior subject to punishment.¹⁵⁴ Moreover, if existing statutes have already created either efficient deterrence or too much deterrence, increasing deterrence further is undesirable.¹⁵⁵

Whether the changes in *Arthur Andersen* and the Sarbanes-Oxley Act create desirable or undesirable uncertainty depends on current levels of compliance. While a precise answer requires empirical study, anecdotal observations may indicate the approximate degree of precautions being taken. If firms were taking inefficiently high precautions, by saving, for example, every document ever produced, one could conclude that the statutes are over-detering; if so, either fines should be reduced, or the degree of certainty in the law should be increased. Over time, firms' reactions to the Sarbanes-Oxley Act and *Arthur Andersen* should be observed, and Congress should adjust the law accordingly.

C. *Incentives for Internal Enforcement.*

Most cases of document destruction occur in the corporate context, and the economic model of individual liability does not perfectly fit corporate crime. Under longstanding principles of agency law, employers are subject to vicarious liability for their agents' illegal activity when their agents act within the scope of their employment,¹⁵⁶ even if the acts are contrary to firm policy or

cuted in federal court; in creating this "sentencing lottery," Giuliani explained, "the idea was to create a Russian roulette effect." See Baker et al., *supra* note 152, at 471-74.

154. See *United States v. Lanier*, 520 U.S. 259, 265-66 (1997) (discussing role of statutes in providing fair warning).

155. It has been argued that all corporate criminal liability creates overdeterrence because there are appropriate civil remedies in place. See Daniel R. Fischel & Alan O. Sykes, *Corporate Crime*, 25 J. LEGAL STUD. 319 *passim* (1996). Any increase in deterrence associated with uncertainty would carry the regime further from efficiency. Alternatively, any increased uncertainty might not have any effect at all: existing uncertainty might already be so high that increased uncertainty will not have much effect.

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

express instructions.¹⁵⁷ Agents' interests can differ from the firm's, and their acts likewise may diverge from what would be best for the firm.¹⁵⁸ Even when a company's policies are set to encourage employees to act efficiently (from its perspective), an individual agent may have his own independent reasons for breaking the law.¹⁵⁹ In the context of obstruction, this effect is likely to be particularly important. For example, an employee may want to cover up his role in an underlying crime to avoid individual liability, but the corporation might prefer to report the individual's wrongdoing and hope for leniency rather than face the risk of prosecution for both the underlying crime and obstruction of justice.¹⁶⁰ Thus, companies have strong incentives to police their employees to ensure they do not obstruct justice.

The law can further encourage firms to implement internal enforcement mechanisms to monitor their agents for wrongdoing. When an individual employee has committed an underlying crime, the employee who committed the crime may not be the one in a position to cover it up. Because the employee in a position to shred documents would not be liable for the underlying crime, incentives to report wrongdoing rather than to shred documents can be particularly effective. Conversely, if the law is structured poorly, it could encourage firms to cover up wrongdoing and discourage self-reporting.¹⁶¹

157. See *United States v. Hilton Hotels Corp.*, 467 F.2d 1000, 1004 (9th Cir. 1972).

158. See, e.g., Jennifer Arlen & Reinier Kraakman, *Controlling Corporate Misconduct: An Analysis of Corporate Liability Regimes*, 72 N.Y.U. L. REV. 687 (1997); Fischel & Sykes, *supra* note 155, at 319.

159. If an agent is individually liable for his actions, he may be less willing to engage in risks that would be beneficial for the firm. Alternatively, if only the firm is liable, but, for example, an agent's compensation is tied to a particular accounting number, the agent has an incentive to inflate that number, regardless of the firm's interest.

160. A corporation may indemnify an individual officer for liability connected with her role as an officer, but only if she had no reasonable cause to believe her conduct was unlawful. See DEL. CODE ANN. tit. 8, § 145 (2006). If the officer would not be eligible for indemnification, she would have much to gain from a cover-up.

161. See generally Malik, *supra* note 86 (arguing that overly large fines may lead to costly avoidance activity).

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1. Encourage Firms to Report Internal Wrongdoing.

- a. In an Optimal Corporate Liability Regime, the Law Should Impose Strict Vicarious Liability on Firms and Preserve Their Incentives to Police Internal Misconduct.

Economic analysis recommends that a firm be strictly liable for its agent's misconduct, and that a firm's liability be mitigated to reflect steps the firm took to police and report internal misconduct.¹⁶² Under strict vicarious liability, firms are fully liable for an employee's crimes, creating strong incentives to prevent employee misconduct. This reduces enforcement costs by encouraging firms to use internal enforcement mechanisms, which often are cheaper and more effective than public enforcement mechanisms, while achieving the same level of deterrence.¹⁶³ Strict liability also encourages companies to try to prevent employee misconduct by making it more expensive or by reducing its expected gains.¹⁶⁴

Current federal policy reflects this goal. In choosing whether to prosecute a firm, the Department of Justice will consider the adequacy of the firm's prevention and policing measures, as well as its disclosure of wrongdoing and cooperation with the government's investigation. Likewise, the U.S. Sentencing Guidelines reduce a firm's fine if the firm has implemented a compliance program, cooperated with the government's investigation, and reported wrongdoing. The recent changes to laws governing obstruction of justice should be evaluated according to their tendency to shift the legal regime toward strict liability, as well as the extent to which they do not weaken the incentives created by the McNulty Memorandum and the Sentencing Guidelines for firms to continue to police themselves and self-report wrongdoing.

162. *See generally* Arlen & Kraakman, *supra* note 158.

163. *Id.* at 692–93. Internal enforcement is likely to be cheaper because firms have an informational advantage relative to the government. Strict liability is superior to duty-based liability in encouraging firms to impose sanctions on their agents. Implementing a duty-based regime would require defining the extent of a firm's duty to sanction its agents, and would entail high administrative costs because it would require the government to know details of the agent's misconduct.

164. *See* Arlen & Kraakman, *supra* note 158, at 701–03. Strict liability induces optimal prevention because the firm internalizes the full cost of any misconduct. A duty-based regime could achieve the same result if the standard were set at the optimal level, but that requires very detailed knowledge about the firm and would presumably require different standards for different firms.

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b. The Law Should Preserve the Incentive for Organizations to Report Internal Wrongdoing.

Self-reporting is beneficial to both companies and the government. From the company's perspective, self-reporting is advantageous because it reduces risk. The company can deal with wrongdoing by paying a certain, and sometimes lower penalty, rather than risk a higher penalty if the government discovers wrongdoing independently.¹⁶⁵ From the government's perspective, laws and policies that preserve the incentive to self-report wrongdoing also lower enforcement costs. First, companies are better able to detect internal wrongdoing than is the government. Second, the government need not spend its scarce resources to identify wrongdoing when a company self-reports; instead, it can focus on investigating firms that are not cooperating.¹⁶⁶ The Department of Justice depends on the incentive to self-report created by the McNulty Memorandum, since it does not have the resources to investigate all potential infractions. Because the benefits associated with self-reporting are clear, it is important that the legal regime not undermine the incentive to self-report wrongdoing.

In addition to creating an incentive to report one's own wrongdoing, the McNulty Memorandum has the potential to facilitate undesirable strategic behavior. By rewarding cooperation, it gives firms an "out" by allowing firms that have discovered internal wrongdoing to conduct ex post policing and thereby avoid prosecution. A firm may address employees' illegal activities in two ways: it can try to prevent wrongdoing, or it can monitor its employees and police them (that is, it can punish wrongdoing ex post). Preventing illegal activity within a firm is costlier than an extensive monitoring program.¹⁶⁷ Insofar as the McNulty Memorandum gives the firm an avenue to reduce the probability that wrongdoing will be prosecuted, it devalues prevention relative to a strategy of monitoring, ex post policing, and self-reporting the results to the government. This effect is likely to operate only at the margin because the strategy is very risky. The Department of Justice will consider the adequacy of the compliance program and whether the wrongdoing

165. See Robert Innes, *Self-Policing and Optimal Law Enforcement When Violator Remediation is Valuable*, 107 J. POL. ECON. 1305, 1305-06 (1999) (showing how preserving the incentive to self-report increases efficiency); Louis Kaplow & Steven Shavell, *Optimal Law Enforcement with Self-Reporting of Behavior*, 102 J. POL. ECON. 583, 584-85 (1994).

166. See Kaplow & Shavell, *supra* note 165, at 584.

167. See Arlen & Kraakman, *supra* note 158, at 701-12 (comparing prevention and monitoring).

appears to be condoned by management.¹⁶⁸ If the firm miscalculates, the penalties will be high: in addition to the legal consequences, the firm likely will suffer significant reputational harm. For firms that develop and then trade on their reputations, such as accounting firms, this would be particularly costly. Although the strategy is a risky one, there is some evidence that Andersen may have been implementing it and under-investing in prevention. Shortly before the Enron scandal, the SEC investigated irregularities in Andersen's audits of Waste Management, Inc. and Sunbeam Corporation.¹⁶⁹ That Arthur Andersen had three instances of irregularities in such a short period suggests that it had inadequate safeguards preventing them. Andersen's fate—it is now defunct—demonstrates the risks of this strategy. Andersen also illustrates the social costs of such a strategy—the shredded documents are gone and prosecutors do not know what information they contained. Because it is possible that other firms have not learned the lesson that Arthur Andersen learned the hard way, the law should discourage this strategy by eliminating this set of incentives.

c. *Arthur Andersen* Undermines Firms' Incentive to Report Internal Wrongdoing.

Arthur Andersen affects the risks associated with prosecution. *Arthur Andersen* creates a higher standard for proving obstruction of justice under the relevant statute, making convictions harder to obtain and companies less inclined to try to avoid them. In particular, *Arthur Andersen* increases opportunities for a company to undertake obstructive acts without incurring the risk of criminal penalties. Because *Arthur Andersen* makes prosecution for obstruction less of a threat, corporations are less likely to self-report internal wrongdoing, because the "carrot" offered by the McNulty Memorandum is less valuable. If prosecution is less of a risk, avoiding it is less of a reward.

The scope of the nexus requirement will also affect the incentives created by the McNulty Memorandum and the United States Sentencing Guidelines. Although the outer reaches of the element have not been specified, it is at least clear that section 1512(b) does not require that the official proceeding "be pending or about to be instituted at the time of the offense,"¹⁷⁰ which likewise is not required for prosecutions under section 1512(c). *Arthur Andersen's* language also makes clear that a defendant has not violated the stat-

168. McNulty Memorandum, *supra* note 79.

169. *Arthur Andersen LLP v. United States*, 544 U.S. 696, 699 n.2 (2005).

170. *See* 18 U.S.C. § 1512(f)(1) (2000 & Supp. IV 2004).

ute if he has persuaded another to act “when he does not have in contemplation any particular official proceeding in which those documents might be material.”¹⁷¹ Together, these mean that to be punishable under section 1512, document destruction must be done with a particular official proceeding in mind, even if the proceeding has not begun. It remains unclear whether an informal investigation constitutes an “official proceeding.”¹⁷²

Arthur Andersen’s description of the nexus requirement has the potential to encourage strategic obstruction because it places much document destruction outside the reach of the statute. The facts of the case itself provide an instructive example of how much shredding can be done before it is carried out with a “particular official proceeding” in mind. Arthur Andersen employees started destroying documents as soon as they were alerted to the possibility of an SEC investigation by the *Wall Street Journal* article on irregularities at Enron.¹⁷³ They continued shredding as Andersen formed a “crisis-response” team, and still shredded while Nancy Temple knew that “some SEC investigation” was “highly probable.”¹⁷⁴ They kept shredding after receiving a copy of the SEC’s letter to Enron that it had begun an informal investigation. They kept shredding as Enron disclosed to the public that an SEC inquiry had in fact begun.¹⁷⁵ And they kept shredding after Enron had received notice from the SEC of a formal investigation and of the SEC’s interest in accounting documents. The shredding stopped only once Andersen was served with a subpoena.

Throughout this period, Andersen arguably acted with a particular official proceeding in mind (the SEC’s proceeding against Enron). Even if the SEC had not yet begun its formal investigation, an investigation “need not be pending,” or even “about to be instituted” to satisfy the nexus requirement.¹⁷⁶ The Court provided very little guidance regarding the point at which Andersen’s behavior first had the requisite nexus, but instead only rejected jury instructions indicating that the jury “did not have to find *any* nexus between the ‘persua[sion]’ to destroy documents and any particular proceeding.”¹⁷⁷ As can be seen from the facts of the case, the nexus

171. *Arthur Andersen*, 544 U.S. at 708.

172. *Id.* at 707 n.10.

173. See Smith & Emshwiller, *supra* note 31; see also *Arthur Andersen*, 544 U.S. at 700–01.

174. *Arthur Andersen*, 544 U.S. at 699.

175. See Rebecca Smith & John R. Emshwiller, *SEC Seeks Information on Enron Dealings with Partnerships Recently Run by Fastow*, WALL ST. J., Oct. 23, 2001, at A3.

176. See 18 U.S.C. § 1512(f)(1) (2000 & Supp. IV 2004).

177. *Arthur Andersen*, 544 U.S. at 707 (emphasis in original).

conceivably could have arisen at any one of many points along the continuum.

If employees within a firm have committed an underlying crime, the firm has a choice: it can try to destroy all evidence of the crime before the government's investigation has advanced sufficiently to satisfy the nexus requirement, or it can self-report to the government and hope that the government will decline to prosecute pursuant to the policy announced in the McNulty Memorandum. Reporting one's own wrongdoing carries risks. In spite of the firm's cooperation, the government may decide to prosecute anyway.¹⁷⁸ In isolation, the rule of *Arthur Andersen* likely would permit firms to destroy documents for a longer period once they suspect some official proceeding might occur. This extension would make it more feasible for a firm to destroy all the evidence of the underlying wrongdoing without being subject to penalties, thereby reducing the incentives for the firm simply to report its wrongdoing to the government and hope for a decision not to prosecute. Therefore, in situations where it is feasible to destroy all evidence of wrongdoing before the government investigation has reached a sufficiently advanced stage, *Arthur Andersen* undermines the incentive to self-report created by the McNulty Memorandum.

d. Section 1519 Preserves the Incentive Firms Have to Report Internal Wrongdoing.

Courts have not yet settled how broadly section 1519 will sweep. Under a broad interpretation, employees implementing a company's regular document retention policy easily could be acting "in relation to or contemplation of" a government proceeding.¹⁷⁹ Even if interpreted this way, section 1519 would not be over-broad, because prosecutors still would be required to prove that employees had acted with culpable intent. Section 1519 would only punish those engaging in nefarious document destruction; employees engaging in routine shredding would lack culpable intent. Alternatively, courts could adopt a narrower interpretation and require that employees acting "in contemplation of" an official proceeding have a particular proceeding in mind. Interpreted in this way, section 1519 would criminalize document destruction in fewer circum-

178. See McNulty Memorandum, *supra* note 79. A corporation may be charged in spite of its cooperation if, for example, the wrongdoing is particularly pervasive or committed by employees at particularly high levels (Parts IV and V), if the firm purports to cooperate but actually acts to impede the investigation (Part VII), or if the nature and seriousness of the crime is particularly grievous (Part IV).

179. See *The Supreme Court, 2004 Term—Leading Cases*, *supra* note 105, at 411.

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stances. Nonetheless, either interpretation would include more than is subject to punishment under section 1512(b). Most importantly, relative to section 1512(b), section 1519 makes illegal instances of document destruction undertaken with a slightly weaker nexus to a pending proceeding, but which are no less culpable.

In practice, the distinction between sections 1512 and 1519 can be seen in their differing treatment of the short time between when Andersen found out that the SEC knew about Enron's problems and when Andersen learned of the SEC's informal investigation. As soon as Enron's problems were reported in the press, Andersen knew some SEC proceeding was likely to materialize. Between that day and the day Andersen heard about the SEC's particular response, Andersen's behavior was "in contemplation of"¹⁸⁰ a particular proceeding, even if it was not sufficiently connected to a government investigation to satisfy the nexus requirement articulated in *Arthur Andersen*.

Taken alone, *Arthur Andersen* creates a window of opportunity for firms, enabling them to destroy documents with no risk of criminal penalties if they can act before a government investigation has advanced far enough to satisfy the nexus requirement. If the firm can destroy all evidence of its crime during this time, it will face no risk of liability for its underlying crime, and therefore have no incentive to self-report its wrongdoing. Section 1519 plays a crucial role in preserving this incentive because it broadens the nexus element, shortening the period before a firm would be liable for obstruction; it latches shut the window of opportunity that *Arthur Andersen* otherwise would have opened.

2. Exploit Divergent Incentives Among Employees Within a Firm: Recent Changes Make it Harder to Enlist Help to Cover Up a Crime.

In theory, self-reporting incentives can also operate on the individual level. Preserving the incentive to self-report can discourage people who have already broken the law from trying to cover up their crimes.¹⁸¹ However, the federal policies that encourage self-reporting by firms do not apply to individuals.¹⁸² It is therefore particularly important for the obstruction statutes to deter obstruc-

180. 18 U.S.C. § 1519 (2000 & Supp. IV 2004).

181. See generally Innes, *supra* note 165 (analyzing the incentive to self-report and how it relates to activities criminals can undertake to avoid detection).

182. McNulty Memorandum, *supra* note 79, at n.1 (explaining that guidelines are applicable to all types of business organizations, including partnerships, sole proprietorships, government entities, and unincorporated associations); U.S. SENTENCING GUIDELINES MANUAL §8C1.1 (2004).

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tion by individual employees within a firm. By making obstruction a less feasible way to avoid liability for an underlying crime, these statutes can deter the underlying crimes as well.

In practice, the employees who are likely to engage in underlying crimes (partners or managers) are not typically the same employees who implement document retention policies (administrative or secretarial employees). A manager who has committed a crime cannot shred the evidence himself, because that would arouse suspicion: his ordinary responsibilities do not include shredding documents, so anyone who saw him at the shredder would know something was amiss. In order to cover up his crime, the manager will have to enlist the administrative staff's help. Administrative employees face no personal liability for the underlying crime, so they have no personal stake in the success of the cover-up. If they also face no possibility of personal responsibility for their shredding, their boss' request may provide sufficient incentive for them to participate—either way, they face no personal liability, and if they participate in the cover-up, they keep their boss happy. But if administrative employees could face individual liability for obstruction of justice, they will be much more hesitant to participate in the cover-up—keeping the boss happy seems much less appealing when doing so invites the risk of criminal sanction.

Obstruction statutes should highlight these different roles among employees by imposing direct sanctions on the employees who actually destroy evidence, not just the managers who persuade them to do so. Individual sanctions for obstruction can discourage employees not involved in the underlying crime from helping in the cover-up. Then, the law will also deter the underlying crime, because an agent considering committing a crime will know that it will be difficult to enlist others' help to cover it up, which increases the odds that the underlying crime will be detected and punished. Raising the cost of a cover-up may deter both obstruction and the underlying crime.

Surprisingly, prior to Sarbanes-Oxley, the only statute that explicitly addressed document destruction, section 1512(b), punished only the persuasion of others to destroy documents, but not the act of document destruction itself.¹⁸³ Other provisions¹⁸⁴ filled this gap, ensuring that a shredder could be punished just as a persuader could be. These “omnibus” obstruction provisions are also known as “catch-all” provisions, designed to address any obstructive acts;

183. See 18 U.S.C. § 1512(b) (2000 & Supp. IV 2004).

184. See 18 U.S.C. §§ 1503, 1505 (2000 & Supp. IV 2004).

their reach is “limited only by the imagination of the criminally inclined.”¹⁸⁵

The Sarbanes-Oxley obstruction provisions eliminate this curiosity. Both sections 1512(c) and 1519 punish the individual who actually destroyed the documents. By explicitly expanding personal liability to individuals who are not likely to be involved in the underlying crime but who might well be called upon to help orchestrate the cover-up, these new sections deter both obstruction of justice and the underlying crime. Moreover, rather than helping cover up a crime, the second employee may choose to report it instead, taking advantage of the enhanced whistleblower protection in section 1513(e).¹⁸⁶ The Sarbanes-Oxley Act makes it that much riskier to seek and that much more difficult to engage other employees’ help in a cover-up.

Expanding personal liability to low-level employees who actually destroy documents may have desirable deterrence effects, but it also creates the danger that behavior which is not blameworthy might lead to criminal liability. Given that firms often have standing document retention policies that are (or should be) enforced regularly, most employees who shred documents are just innocently implementing a routine document retention policy. Employees who really were just doing their jobs and had no idea they were destroying evidence of a crime should not be subject to punishment. Otherwise, all administrative employees would be reluctant to enforce the firm’s regular document retention policies, resulting in an obviously undesirable consequence.

As the most expansive of the three statutes criminalizing document destruction, section 1519 significantly broadens both the intent and the nexus elements, but it still requires that the defendant at least act “knowingly” and “in contemplation of” a government proceeding. Even an employee who was negligent in carrying out his routine shredding responsibilities could not be punished. From the firm’s perspective, tailoring punishment to the different roles employees play does not directly affect liability, because the firm faces vicarious liability for crimes committed by any of its employees.¹⁸⁷ But if imposing individual liability on anyone participating

185. *Catrino v. United States*, 176 F.2d 884, 887 (9th Cir. 1949).

186. See Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 1107, 116 Stat. 745, 810 (codified at 18 U.S.C. § 1513(e) (2000 & Supp. IV 2004)).

187. In theory, it is possible that either destruction or persuasion may occur independently of the other. In practice, however, the agent involved in the underlying crime is likely to be a senior employee not normally charged with enforcing a document retention policy. To avoid arousing suspicion, she will have to “per-

in the cover-up also deters the underlying crime, the firm will benefit too.

CONCLUSION

The government's ability to enforce laws depends on the availability of evidence; laws criminalizing obstruction of justice therefore have a central place in any law enforcement regime. Although deterring obstruction of justice is crucial to law enforcement, the government must take care to avoid punishing innocent behavior and to avoid forcing firms to incur excessive compliance costs. Rather than incorporating these principles, however, the Sarbanes-Oxley Act reflected a surge of zeal to deter and prosecute corporate crime. Two years after the passage of Sarbanes-Oxley, the Court's decision in *Arthur Andersen* has dampened somewhat the government's aggressive pursuit of document destruction.

These recent changes rightly have been criticized for being hastily implemented and ad hoc.¹⁸⁸ Although it is crucial to define the elements of obstruction so that they separate innocent from nefarious behavior, recent changes include exactly the wrong combinations of elements. Section 1512 includes rigorous intent and nexus elements, leaving some problematic document destruction uncovered. In contrast, section 1519 reaches too broadly, forcing firms to incur inefficiently high costs to ensure their compliance with the law.

It is difficult to assess whether these laws are being enforced efficiently. Uncertainty in the legal standard has several countervailing consequences. It becomes difficult to know exactly what activity is prohibited, leading potentially to inefficient over-compliance. Insofar as compliance levels are low, however, uncertainty could be a low-cost way to increase compliance since there is no need to incur policing costs to increase deterrence. Given the difficulty of knowing current levels of compliance—after all, the goal of the crime is avoiding detection, making detecting wrongdo-

suade" subordinates to destroy documents; seeing a senior employee shredding documents herself is likely to raise a red flag. Conversely, employees normally charged with enforcing a document retention policy will not be in a position to persuade others to destroy documents. Nor is she likely to be in a position to perpetrate a fraud that she will then have a personal stake in covering up.

188. See, e.g., Grindler & Jones, *supra* note 72, at 68 (2004) (noting that "the hastily prepared Act is by no means a model of clarity"); Michael A. Perino, *Enron's Legislative Aftermath: Some Reflections on the Deterrence Aspects of the Sarbanes-Oxley Act of 2002*, 76 ST. JOHN'S L. REV. 671, 672 (2002) (noting that "haste makes waste" and that the Act "moved with lightening speed through the legislature").

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ing especially difficult—there are significant empirical hurdles to creating efficient incentives through enforcement policy.

Because it is difficult to use government enforcement to create efficient incentives, it is particularly important to encourage firms to implement internal enforcement mechanisms. Fortunately, recent changes create efficient incentives for internal enforcement within firms. Although *Arthur Andersen* undermines the incentive to report internal wrongdoing created by the Department of Justice enforcement policy, Congress bolstered that same incentive by enacting section 1519. Likewise, section 1519 makes it difficult for corporate criminals to enlist their colleagues' help to cover up their crimes. Creating these incentives has been the biggest success of recent reforms. These incentives certainly further efficiency, but in order to fully exploit the economic tools available, Congress must amend the statutory definitions of obstruction of justice.

