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OLD BLOOD, BAD BLOOD, AND *YOUNGBLOOD*: DUE PROCESS, LOST EVIDENCE, AND THE LIMITS OF BAD FAITH

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ABSTRACT

Under the law of lost evidence, absent a showing of bad faith, no due process violation occurs when the police lose potentially exculpatory evidence. This is so even though the evidence may be critical to the defense and even though post-conviction DNA testing has exonerated more than 200 individuals. Ironically, the case that developed that rule of law, Arizona v. Youngblood*, is founded on the conviction of an innocent man.*

This Article critically examines Youngblood *and provides a conceptual framework for examining the constitutional right of access to evidence. Supreme Court precedent reflects two different, sometimes competing, visions of procedural due process: adjudicative fairness to the accused or an instrumental focus on deterring official misconduct. In* Youngblood*, instrumentalism trumped adjudicative fairness. Moreover, four compelling developments in the twenty-one years since* Youngblood *was decided—scientific advances, legislative reform, state judicial disapproval, and doctrinal incoherence—have eroded its rationale and legitimacy.*

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For all those reasons, Youngblood *no longer merits stare decisis effect and should be overruled. In its place, the Court should apply an approach that takes into account the nature of the government's conduct and the degree of prejudice suffered by the accused. This approach restores balance to the constitutional right of access to evidence; it encompasses a broader vision of due process that promotes adjudicative fairness. In some cases, the loss of potentially exculpatory evidence ought to result in a due process violation, even in the absence of bad faith.*

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INTRODUCTION

One of the most remarkable cases in the annals of constitutional criminal procedure is *Arizona v. Youngblood*.[1] Absent a showing of bad faith, the Due Process Clause is not violated when the police lose or destroy potentially exculpatory physical evidence.[2] *Youngblood* is a seminal case on the law of lost evidence and has critical implications in cases involving unexamined DNA samples. The loss of such evidence, even though it may preclude a claim of actual innocence, cannot result in a due process violation unless the accused shows that the police acted in bad faith. This is so despite the fact that forensic DNA typing has exonerated more than 200 individuals, all of whom had been convicted of serious crimes (including sexual assault and homicide), and some of whom had been sentenced to death.[3]

Youngblood has long been controversial.[4] Now, two decades after it was decided, it must be critically re-examined. Ironically, the rule of law established by the case was founded upon the conviction of an innocent man.[5] Youngblood was convicted of abducting and sexually assaulting a child in 1985. Fifteen years later, in 2000, he was exonerated through

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1. 488 U.S. 51 (1988).

2. *Id*. at 58.

3. Innocence Project, Innocence Project Case Profiles, http://www.innocence project.org/know (last visited Dec. 3, 2008); *see also* Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55 (2008) (empirical analysis of how the criminal justice system handled the cases of the first 200 individuals exonerated through DNA testing).

4. For critical commentary, see *Developments in the Law—Confronting the New Challenges of Scientific Evidence*, 108 HARV. L. REV. 1481, 1566 (1995) (calling the ambiguous definition of bad faith "significant"); Daniel R. Dinger, Note, *Should Lost Evidence Mean a Lost Chance to Prosecute?: State Rejections of the United States Supreme Court Decision in* Arizona v. Youngblood, 27 AM. J. CRIM. L. 329, 364–67 (2000) (noting problems with a bad faith litmus test); *The Supreme Court, 1988 Term—Leading Cases*, 103 HARV. L. REV. 137, 157 (1989) (arguing that "[t]he majority, by adopting a subjective 'bad faith' test and by placing the burden of proof on the defendant, needlessly weakened . . . constitutional assurances"); Matthew H. Lembke, Note, *The Role of Police Culpability in* Leon *and* Youngblood, 76 VA. L. REV. 1213, 1215 (1990) (criticizing "inherently flawed" opinion in *Youngblood* because focusing on police bad faith—and not the materiality of the destroyed evidence—"gives inadequate protection to the rights of the defendant to fundamental fairness"); *Recent Developments*—Arizona v. Youngblood, 24 HARV. C.R.-C.L. L. REV. 529, 529 (1989) (faulting bad faith standard as "both theoretically unsound and a serious erosion of protections for criminal defendants").

5. Or, as Peter Neufeld, the co-founder and director of the Innocence Projects put it:

> In law school, we have been taught that, absent bad faith, the destruction of critical evidence will not be deemed prejudicial. As a result, there has been no requirement that law enforcement agencies use due diligence to preserve evidence. This doctrine rested for more than a decade on the shoulders of an innocent man.

Peter Neufeld, *Legal and Ethical Implications of Post-Conviction DNA Exonerations*, 35 NEW ENG. L. REV. 639, 646 (2001).

DNA testing that was unavailable at the time of his trial.[6] Biological material that could not be tested effectively under the relatively primitive forensic science of the 1980s nevertheless held the promise of future exculpation. Moreover, the DNA evidence that exonerated Youngblood led to the 2002 conviction of the actual perpetrator, an individual with two prior convictions for child sex abuse.[7]

Youngblood can be examined through several different prisms. Certainly, it can be viewed as part of a broader, historical shift from the Warren Court's interpretation of criminal procedure to that of the Rehnquist Court.[8] Alternatively, to the extent one accepts the notion that criminal procedure has two normative models—due process and crime control—*Youngblood* can be regarded as furthering the purposes of crime control.[9] *Youngblood* can also be seen as having been influenced by contemporaneous developments in other areas of the law, including limits

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6. Barbara Whitaker, *DNA Frees Inmate Years After Justice Rejected Plea*, N.Y. TIMES, Aug. 11, 2000, at A12. Youngblood's exoneration led to criticism of the Court's ruling, as well as calls for greater post-conviction DNA testing and criminal justice reform. *See id.* (quoting Dr. Edward Blake, a forensic scientist with expertise in DNA, "For those organizations that are poorly run or mismanaged or don't give a damn, the Youngblood case was a license to let down their guard and be lazy. The effect generally was to lower the standards of evidence collection."); Larry Hammond & John Stookey, *Scrutiny a Must in Criminal Cases Commission Would Ensure Justice*, ARIZ. REPUBLIC, Jan. 30, 2002, at 9B (advocating the creation of state commission to examine cases involving the wrongly convicted); Tim O'Brien, *Reasonable Doubt and DNA*, WASH. POST, Sept. 7, 2000, at A25 (advocating greater access to post-conviction DNA testing); *A Mishandling of Justice*, ST. PETERSBURG TIMES, Aug. 12, 2000, at 16A ("Youngblood's story is as old as the common law itself: Bad facts make bad law. In 1988 six justices dispensed with principle in order to keep a man they thought had committed a depraved act behind bars. Instead, their ends-justifies-the-means justice landed an innocent man in prison for years and gave the police the green light to mishandle key evidence without consequence.").

7. David L. Teibel, *Man Gets 24 Years in '83 Child Sex Case*, TUCSON CITIZEN, Aug. 20, 2002, at 5C.

8. For commentary that compares the two Courts, see 1 JOSHUA DRESSLER & ALAN C. MICHAELS, UNDERSTANDING CRIMINAL PROCEDURE § 1.04, at 18–19 (4th ed. 2006) ("With the appointment of Justice Kennedy, the balance of power definitively tipped in favor of the crime control model of criminal justice, and the Court increasingly cut back on the holdings of the Warren Court era."); Stephen F. Smith, *The Rehnquist Court and Criminal Procedure*, 73 U. COLO. L. REV. 1337, 1358 (2002) ("Instead of overruling Warren Court precedents it deemed to be erroneous, the Rehnquist Court has distinguished, created exceptions to, and reinterpreted such precedents."); Carol S. Steiker, *Counter-Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers*, 94 MICH. L. REV. 2466, 2468 (1996) (noting that "the [Rehnquist] Court has clearly become less sympathetic to claims of individual rights and more accommodating to assertions of the need for public order").

9. *See* HERBERT PACKER, THE LIMITS OF THE CRIMINAL SANCTION 149–73 (1968) (asserting that criminal procedure has two normative models, the "Due Process Model" and the "Crime Control Model"). For a critique of Packer's influential conception of criminal procedure, see Peter Arenella, *Rethinking the Functions of Criminal Procedure: The Warren and Burger Courts' Competing Ideologies*, 72 GEO. L.J. 185, 211 (1983) ("Taken at face value, Packer's two 'models' appear to describe in an overly simplified and dichotomized form how our system determines guilt by adversarial trial adjudication or by plea bargaining.").

on the Fourth Amendment's exclusionary rule[10] and the reach of the Due Process Clause in constitutional tort claims.[11]

This Article, however, examines *Youngblood*'s conception of procedural due process. *Youngblood* represents the triumph of one vision of due process over another in criminal cases involving the constitutional right of access to evidence.[12] Prior to *Youngblood*, the Supreme Court had taken into account two different, sometimes conflicting interests served by due process: adjudicative fairness to the accused and an instrumental emphasis on deterring official misconduct.[13] Adjudicative fairness focuses on the individual and the individual's liberty interest; this vision of due process manifests itself in an examination of the materiality of evidence or prejudice to the accused. The instrumental vision of due process is more limited in its approach; the focus is on the state, not the individual. Due process imposes a restraint on the state, the point of which is to punish the state for official misconduct or bad faith. In emphasizing instrumentalism to the exclusion of adjudicative fairness, *Youngblood* broke with precedent and adopted an unduly narrow view of due process.

In critiquing that narrow view of due process, this Article studies the twenty years of legal and factual developments that have occurred since *Youngblood* was decided. The very facts of *Youngblood* reveal the flaws inherent in its conception of due process by illustrating how a faulty doctrine can lead to conviction of the innocent. Four powerful currents

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10. *See* United States v. Leon, 468 U.S. 897, 922 (1984) (recognizing good faith exception to exclusionary rule when officer objectively and reasonably relies on a defective warrant); Lembke, *supra* note 4, at 1230–31 (describing similarities between *Youngblood* and Fourth Amendment precedent).

11. *See* Daniels v. Williams, 474 U.S. 327 (1986); Davidson v. Cannon, 474 U.S. 344 (1986); Brandon L. Garrett, *Innocence, Harmless Error, and Federal Wrongful Conviction Law*, 2005 WIS. L. REV. 35, 95 n.300 (2005) (noting "the role that tort law conceptions of fault play in civil versus criminal procedure constitutional rights"); *Recent Developments*, *supra* note 4, at 537 ("The motive-based test in *Youngblood* is part of a recent trend in Supreme Court jurisprudence toward making bad faith the dispositive feature in a number of constitutional claims.").

12. The author owes this insight to Professor Michael B. Browde.

13. Commentators have devised other models that more broadly discuss the values served by due process in a civil context. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 10–7, at 666–67, § 10–18, at 753 (2d ed. 1998) (describing two competing visions of procedural due process in which one serves an "intrinsic value" of assuring participation to further individual dignity and the other is "instrumental" in using participation to promote accuracy); Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 243 (2004) (noting three models of procedural justice in a civil context, including the "accuracy model," the "balancing model," and the "participation model"); Robert G. Bone, *Rethinking the "Day in Court" Ideal and Nonparty Preclusion*, 67 N.Y.U. L. REV. 193, 201–02 (1992) (in context of claim preclusion, discussing outcome-oriented participation or instrumental theories and process-oriented participation or intrinsic participation theories). Professor Tribe notes that "[i]n specialized settings, such as those of criminal proceedings, the Supreme Court has repeatedly affirmed a right of access to courts." TRIBE, *supra*, § 10-18, at 753.

have eroded *Youngblood*'s bad faith standard: scientific advances, legislative reform, state judicial disapproval, and doctrinal incoherence. When Youngblood was charged in 1983, forensic DNA typing did not exist. This science was in its infancy when the Supreme Court decided the case in 1988.[14] Since that time, courts have routinely accepted DNA evidence, and DNA testing has become more sensitive, sophisticated, cheaper, and quicker.

This advance in forensic science, in turn, has sparked legislative reform. In recognition of the power of DNA testing to exonerate the accused, forty-three states, the District of Columbia, and the federal government have passed innocence protection acts.[15] These laws vary widely in scope and coverage, but many require the preservation of DNA evidence.[16] Ten state supreme courts have also rejected the bad faith

14. *See* George Bundy Smith & Janet A. Gordon, *The Admission of DNA Evidence in State and Federal Court*, 65 FORDHAM L. REV. 2465, 2478–86 (1997) (describing admissibility of DNA evidence in state and federal courts).

15. *See* Innocence Project, Reforms by State, http://www.innocenceproject.org/news/LawView2.php (last visited Feb. 22, 2008); Cynthia E. Jones, *Evidence Destroyed, Innocence Lost: The Preservation of Biological Evidence under Innocence Protection Statutes*, 42 AM. CRIM. L. REV. 1239, 1249 & n.49 (2005); *see also* Federal Innocence Protection Act, 18 U.S.C. § 3600A (Supp. 2004); ARIZ. REV. STAT. ANN. § 13-4240(H) (2004); ARK. CODE ANN. § 12-12-104(A) to (B)(1) (2005); CAL. PENAL CODE § 1417.9(a) (WEST 2005); CONN. GEN. STAT. § 54-102jj(b) (2004); DEL. CODE ANN. tit. 11, § 4504 (2005); D.C. CODE § 22-4134(a) (2004); FLA. STAT. § 925.11(4)(a) (2006); GA. CODE ANN. § 5-5-41(C)(10) (2004); HAW. REV. STAT. § 844D-126 (2004); IDAHO CODE ANN. § 19-4902 (2004); 725 ILL. COMP. STAT. 5/116–4(a) (2004); IND. CODE § 35-38-7-14(1) (2004); IOWA CODE § 81.10 (2005); KAN. STAT. ANN. § 21-2512(b)(2) (2003); KY. REV. STAT. ANN. § 524.140 (West 2006); LA. CODE CRIM. PROC. ANN. art. 926.1(H)(1)–(5) (2004); ME. REV. STAT. ANN. tit. 15, § 2138(14) (2004); MD. CODE ANN. CRIM. PROC. § 8-201(i)(1)–(2) (West 2007); MICH. COMP. LAWS § 770.16 (11) (2004); MINN. STAT. § 590.01–.06 (2004); MO. REV. STAT. § 650.056 (2004); MONT. CODE ANN. § 46-21-111 (2003); NEB. REV. STAT. § 29-4120(3)–(4) (2006); NEV. REV. STAT. § 176.0918(3) (2004); N.H. REV. STAT. ANN. § 651-D:2(II) (2006); N.J STAT. ANN. §§ 2A:84A-32a (2005); N.M. STAT. § 31-1A-2(L) (2004); N.Y. CRIM. PROC. LAW § 440.30(1-a)(a) (McKinney 2005); N.C. GEN. STAT. § 15A-268 (2004); N.D. CENT. CODE § 29-32.1-15 (2004); OHIO REV. CODE ANN. §§ 2953.71–.81 (West 2005); OKLA. STAT. tit. 22, § 1372(A) (2004); OR. REV. STAT. § 138.005 (West 2007); 42 PA. CONS. STAT. § 9543.1(b)(2) (2004); R.I. GEN. LAWS § 10-9.1-11(a) (2004); TENN. CODE ANN. § 40-30-309 (2004); TEX. CRIM. PROC. CODE ANN. art. 38.39(a) (VERNON 2005); UTAH CODE ANN. § 78B-9-301(5) (2005); VA. CODE ANN. § 19.2-270.4:1(A) (2004); V.T. STAT. ANN. tit. 13, § 5566; WASH. REV. CODE § 10.73.170(6) (2007); W. VA. CODE § 15-2B-14 (2005); WIS. STAT. § 974.07(5) (2004).

16. *See* Jones, *supra* note 15, at 1255, 1255 nn.81–82 (describing states that impose a "blanket" duty to preserve evidence). For jurisdictions that impose such a duty, see 18 U.S.C. § 3600A(a); ARK. CODE ANN. § 12-12-104(a) to (b)(1) (2005); CAL. PENAL CODE § 1417.9(a); CONN. GEN. STAT. § 54-102jj(b); D.C. CODE § 22-4134(a); FLA. STAT. § 925.11(4)(a); 725 ILL. COMP. STAT. 5/116–4(a); IOWA CODE § 81.10; KY. REV. STAT. ANN. § 524.140; ME. REV. STAT. ANN. tit. 15, § 2138(14); MD. CODE ANN. CRIM. PROC. § 8-201(i)(1)–(2); MICH. COMP. LAWS § 770.16 (11); MO. REV. STAT. § 650.056; MONT. CODE ANN. § 46-21-111; N.H. REV. STAT. ANN. § 651-D:2(II); N.C. GEN. STAT. § 15A-268; OKLA. STAT. tit. 22, § 1372(A); R.I. GEN. LAWS § 10-9.1-11(a); TEX. CRIM. PROC. CODE ANN. art. 38.39(a).

standard in interpreting due process as a matter of state constitutional law.[17] In all, a majority of states have either passed innocence protection acts requiring the preservation of DNA evidence or rejected *Youngblood*'s bad faith standard as a matter of state constitutional law.

Incoherence characterizes post-*Youngblood* case law decided in state and lower federal courts. There are significant disparities in the ways in which courts have interpreted fundamental aspects of *Youngblood*, including the meaning of "bad faith," whether the lost evidence must be potentially exculpatory or possess apparent exculpatory value to establish a due process violation, and what remedy is available in the event of a violation.[18] Regardless of the approach used, the bad faith standard imposes an almost insurmountable burden upon the accused. Over the past two decades, only a handful of courts have found due process violations.[19]

Taken as a whole, those developments have so undermined *Youngblood*'s rationale and legitimacy that it no longer merits stare decisis effect. In place of the bad faith standard, a better, more balanced approach would take into account the overriding concern of due process: adjudicative fairness. Thus, a court would assess both police culpability and the materiality of the lost evidence or prejudice suffered by the accused.

This Article proceeds in four parts. Part I provides an overview of *Youngblood*: the facts of the case, the deliberations and decision of the

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17. *See Ex Parte* Gingo, 605 So.2d 1237, 1241 (Ala. 1992); Gurley v. State, 639 So.2d 557, 565–68 (Ala. Crim. App. 1993); Thorne v. Dep't Pub. Safety, 774 P.2d 1326, 1330–32 (Alaska 1989); State v. Morales, 657 A.2d 585, 592–94 (Conn. 1995); Lolly v. State, 611 A.2d 956, 959–60 (Del. 1992); Hammond v. State, 569 A.2d 81, 85–89 (Del. 1989); State v. Okumura, 894 P.2d 80, 98–99 (Haw. 1995); Commonwealth v. Henderson, 582 N.E.2d 496, 496–97 (Mass. 1991); State v. Smagula, 578 A.2d 1215, 1217 (N.H. 1990); State v. Ferguson, 2 S.W.3d 912, 914–18 (Tenn. 1999); State v. Delisle, 648 A.2d 632, 642–43 (Vt. 1994); State v. Osakalumi, 461 S.E.2d 504, 507–14 (W. Va. 1995).

18. *Compare* State v. O'Dell, 46 P.3d 1074, 1078 (Ariz. Ct. App. 2002) ("[A] determination of bad faith 'must necessarily turn on the police's knowledge of the exculpatory value of the evidence at the time it was lost or destroyed.'") (internal citations omitted), *with* Guzman v. State, 868 So.2d 498, 509 (Fla. 2003) ("[B]ad faith exists only when police intentionally destroy evidence they believe would exonerate a defendant."); *compare* United States v. Day, 697 A.2d 31, 36 (D.C. 1997) (dismissal the appropriate sanction under *Youngblood*), *with* Stuart v. State, 907 P.2d 783, 793 (Idaho 1995) ("In a criminal case, application of a favorable inference under the spoliation doctrine is the appropriate remedy for a *Youngblood* due process violation.").

19. *See* JAMIE S. GORELICK ET AL., DESTRUCTION OF EVIDENCE § 6.8 (Supp. 2005) ("[O]nly a handful of decisions have found that the bad faith standard is met."); Elizabeth A. Bawden, *Here Today, Gone Tomorrow—Three Common Mistakes Courts Make When Police Lose or Destroy Evidence with Apparent Exculpatory Value*, 48 CLEV. ST. L. REV. 335, 350 (2000) ("[T]here are a very limited number of cases where courts have found the presence of bad faith."); Jones, *supra* note 15, at 1246 ("In the years since *Youngblood*, the requirement of demonstrating 'bad faith' has proven to be an almost insurmountable burden in establishing a due process violation based on the destruction of evidence.").

Supreme Court, a discussion of the case's significance, and a postscript on what happened to Youngblood after the decision. This part provides a conceptual framework for examining Supreme Court precedent involving the constitutional right of access to evidence. *Youngblood* reflects the tension between two competing visions of procedural due process, with one vision of due process prevailing to the exclusion of another. Part II critiques *Youngblood*. This part discusses developments in DNA testing since *Youngblood* was decided, decisions of state supreme courts that have rejected the bad faith standard as a matter of state constitutional law, the passage of innocence protection acts at the state and federal level, and the incoherence in the law that has resulted as courts have applied *Youngblood*. Part III considers arguments in favor of *Youngblood*. Part IV resolves the arguments for and against *Youngblood* by concluding that, on balance, it should be overturned. In some cases, even in the absence of bad faith by the police, the destruction of physical evidence ought to result in a due process violation.

I. A DISCUSSION OF *ARIZONA V. YOUNGBLOOD*

In light of *Youngblood*'s importance in this area of constitutional criminal procedure, it is worth taking the time to unpack the case. Part I.A outlines the facts of the case. Part I.B describes what happened at the Supreme Court, including the oral argument, the Court's post-argument conference, and the resulting majority opinion, separate concurrence, and dissent. Here, the papers of Justice Harry A. Blackmun at the Manuscript Division of the Library of Congress provide valuable insights into the views of the Justices.[20] Part I.C explores *Youngblood*'s significance and conceptualizes the due process interests at issue in cases involving the constitutional right of access to evidence. Part I.D provides a postscript on what happened to Youngblood after the Supreme Court decided his case.

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20. The Papers of Harry A. Blackmun consist of almost 1600 boxes of material at the Library of Congress. His papers have been open to the public since March 2004. *See* The Papers of Harry A. Blackmun, Library of Congress [hereinafter *Blackmun Papers*] (relevant sections on file with author); *see* Press Release, The Library of Congress, Papers of Supreme Court Justice Harry A. Blackmun Opened for Research at Library of Congress (Mar. 4, 2004), *available at* http://www.loc.gov/today/pr/2004/04-041.html. The author thanks Kevin Kearney, Justice Blackmun's law clerk on *Youngblood*, for his assistance in reviewing the Justice's files and for sharing his insights and recollections. The papers of Justice Thurgood Marshall are also at the Library of Congress, but they were less helpful than Justice Blackmun's papers.

A. Background

On October 29, 1983, David L., a 10-year-old boy, attended church with his mother.[21] After leaving the church around 9:30 p.m., he went to a carnival behind the church.[22] There, he was abducted by a middle-aged black man of medium height and weight.[23] David, who was described as a "very observant youngster," later testified that his assailant was named "Damian" or "Carl" and had greasy grey hair, facial hair, no facial scars, and one unusual distinguishing characteristic—a right eye that was almost completely white.[24] The assailant wore brown leather or plastic loafers and drove a white, medium-sized, two-door sedan with a noisy muffler and an inoperable passenger door.[25] The car started with an ordinary ignition key, and country music played on the radio.[26] For the next hour-and-a-half, the assailant molested the child in a secluded area near a ravine and in an "unidentified, sparsely furnished house."[27] Eventually, the assailant returned the boy to the carnival and threatened to kill him if he told anyone.[28]

David made his way home, and his mother brought him to a hospital.[29] A doctor treated the boy for rectal injuries and used a sexual assault kit to collect evidence of the attack.[30] Among other things, the doctor used a swab to collect samples from the boy's rectum and mouth, made a microscopic slide of the samples, and obtained samples of the boy's saliva, blood, and hair.[31] The Tucson police placed the kit in a refrigerator at the police station.[32] They also collected David's underwear and t-shirt but neglected to refrigerate or freeze them.[33] Ten days after the assault, on November 8, 1983, a police criminologist examined the sexual assault kit and determined that sexual contact had occurred.[34]

There were significant discrepancies between David's description of his assailant and Larry Youngblood. Youngblood was a 30-year-old

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21. Arizona v. Youngblood, 488 U.S. 51, 52 (1988).
22. *Id*.
23. State v. Youngblood, 734 P.2d 592, 592 (Ariz. Ct. App. 1986), *rev'd*, 488 U.S. 51.
24. *Youngblood*, 734 P.2d at 592.
25. *Id.* at 592–93.
26. *Id.* at 593.
27. *Youngblood*, 488 U.S. at 52.
28. *Id*.
29. *Id.*
30. *Id*. at 53.
31. *Id.* at 54.
32. *Id.*
33. *Id.*
34. *Id.* at 53.

African-American male, but he had dry hair, not greasy hair.[35] His hair was black, not grey.[36] He also had a scar on his forehead.[37] Although he had a bad eye, it was his left eye, not his right one.[38] Youngblood wore laced shoes, not loafers, and walked with a noticeable limp caused by a foot injury received in an automobile accident when he was a child.[39] He always wore glasses in public.[40] His sister and her two sons testified that he never listened to country music.[41] Youngblood had been diagnosed as suffering from paranoid schizophrenia, but his psychiatrist testified that there was "very, very little evidence of sociopathy," and no information to suggest sexual deviancy.[42]

There were also discrepancies between David's description of the assailant's car and Youngblood's car. Youngblood owned a white 1964 Chrysler Imperial, but it had four doors not two.[43] Youngblood and others testified that the car did not run at the time of the assault; it lacked even a battery.[44] When operable, the car ran quietly[45] and started with a screwdriver, not a key.[46] The radio did not work.[47] Moreover, a police examination of the car failed to reveal any of David's fingerprints, hair, or clothing fibers; only Youngblood's fingerprints were found.[48]

David's identification of Youngblood was also problematic. Nine days after the assault, a police detective took a taped statement from David, told him an arrest had been made, and asked him to pick the assailant out of a photographic array.[49] Three of the photographs had the left eye whited out; three had the right eye whited out. On the night of the assault, as well as on the day David first viewed the photographs, he was not wearing his

35. State v. Youngblood, 734 P.2d 592, 593 (Ariz. Ct. App. 1986), *rev'd*, 488 U.S. 51.
36. *Id.*
37. *Id.*
38. *Id.*
39. *Id.*
40. *Id.*
41. State v. Youngblood, 790 P.2d 759, 765 n.2 (Ariz. Ct. App. 1989), *rev'd*, 844 P.2d 1152 (Ariz. 1993).
42. *Id.* Youngblood had a prior criminal record that included convictions for aggravated assault and armed robbery. *See* Patty Machelor, *DNA Clears Man in Sex Case after 15 Years*, TUCSON CITIZEN, Aug. 10, 2000, at 1A.
43. *Youngblood*, 734 P.2d at 593.
44. *Id.*
45. *Id.*
46. *Id.*
47. *Id.*
48. *Id.* at 594. Unfortunately, the police disposed of Youngblood's vehicle without giving notice to him or his defense counsel and without determining whether or not the radio worked, a key turned the ignition switch, the muffler was noisy, or the car was even operable. *Id.* at 593.
49. *Id.* at 594.

glasses.[50] David held the photographs very close to his face, selected Youngblood's photograph, and said he was "pretty sure."[51] Later, he identified another man in the array as his possible assailant.[52]

The police obtained an arrest warrant for Youngblood on December 7, 1983.[53] He was arrested two days later.[54] Shortly thereafter, Youngblood's counsel filed a competency motion. In August 1984, Youngblood was found competent to stand trial.[55] In October 1984, the trial court denied the State's motion to compel Youngblood to provide blood and saliva because the State failed to show that it had obtained sufficient samples from the victim to warrant comparison.[56] The police criminologist performed an ABO test on the rectal swab, but was unable to determine the presence of a blood group substance.[57]

Youngblood's first trial in December 1984 ended in a mistrial; the jury deadlocked six to six.[58] The criminologist examined the victim's clothing in January 1985. Unfortunately, by then semen samples on the clothing had deteriorated to the point where they were of little use under the forensic analyses then available.[59] The police could no longer ascertain the blood type of the assailant or whether he secreted a blood-type marker into bodily fluids such as semen.[60]

At Youngblood's retrial, the trial court gave the jury a missing evidence instruction, which allowed the jury to draw an adverse inference against the State if it found the State had lost or destroyed evidence.[61] The trial lasted four days. After ninety-five minutes of deliberation, the jury convicted Youngblood of child molestation, sexual assault, and kidnapping. The court imposed concurrent sentences of ten-and-one-half years of imprisonment.[62] Youngblood appealed to the Arizona Court of

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50. *Id.* David's vision problem, however, was apparently fairly mild. His optometrist testified that even without glasses, David could "still see faces clearly, obtain an Arizona's driver's license, and play ball." Brief for Petitioner at 11 n.7, Arizona v. Youngblood, 488 U.S. 51 (1988) (No. 86-1904).

51. *Youngblood*, 734 P.2d at 594.

52. *Id.* At trial, Youngblood presented an alibi defense. His former girlfriend testified that when she returned home at 10:00 p.m., Youngblood was asleep on a living room sofa. Her home was a 30 to 45 minute drive from the place where the child was abducted. *Id.*

53. Brief for Petitioner at 5, *Youngblood*, 488 U.S. 51 (No. 86-1904).

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.* at 5–6.

58. State v. Youngblood, 790 P.2d 759, 764 (Ariz. Ct. App. 1989), *rev'd*, 844 P.2d 1152 (Ariz. 1993).

59. Arizona v. Youngblood, 488 U.S. 51, 68 (1988) (Blackmun, J., dissenting).

60. *Id.*

61. *Id.* at 54.

62. State v. Youngblood, 734 P.2d 592, 592 (Ariz. Ct. App. 1986), *rev'd*, 488 U.S. 51; Mark

Appeals on the theory that the State's failure to preserve the evidence had violated the Due Process Clause of the U.S. Constitution.[63]

The Court of Appeals reversed the conviction. "[W]hen identity is an issue at trial and the police permit the destruction of evidence that could eliminate a defendant as the perpetrator, such loss is material to the defense and is a denial of due process."[64] Timely testing of properly preserved semen samples on the victim's clothing could have exonerated Youngblood.[65] The Court of Appeals did not find bad faith on the part of the State, but relied upon *Brady v. Maryland*[66] to "acknowledge the right of an accused to a fair trial: the dismissal is necessary in order to avoid an unfair trial, not as punishment for any inaction by the [S]tate."[67]

The Arizona Supreme Court denied the State's petition for review.[68] The State then petitioned for certiorari in the United States Supreme Court. Certiorari was granted "to consider the extent to which the Due Process Clause of the Fourteenth Amendment requires the State to preserve evidentiary material that might be useful to a criminal defendant."[69]

B. The Supreme Court's Decision

The case was argued on October 11, 1988.[70] At oral argument, the State spent most of its time responding to factual questions from the Justices: what was tested and when, what was not tested and why, what tests were available, and what the tests revealed.[71] The State did not contend that the presence or absence of bad faith was outcome dispositive; that claim was

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Kimble, *Kimble Column*, TUCSON CITIZEN, Aug. 24, 2000, at 5A. At the re-trial defense counsel did not call Youngblood's sister, psychiatric social worker, or psychiatrist. The Arizona Court of Appeals believed that "[counsel's] actions present[ed] a colorable claim for ineffective assistance of counsel." *Youngblood*, 790 P.2d at 765. Carol Wittels, Youngblood's defense lawyer, made the tactical decision not to introduce evidence of his mental illness for fear of prejudicing the jury against him. Telephone Interview with Carol Wittels (Jan. 15, 2008).

63. *Youngblood*, 734 P.2d at 592.

64. *Youngblood*, 790 P.2d at 596 (quoting State v. Escalante, 734 P.2d 597, 603 (Ariz. Ct. App. 1986)).

65. *Id.* at 596–97.

66. 373 U.S. 83 (1963).

67. *Youngblood*, 734 P.2d at 596.

68. Arizona v. Youngblood, 488 U.S. 51, 55 (1988).

69. *Id.* at 52.

70. *Blackmun Papers*, *supra* note 20, Box 513, Folder 1. For an audiotape and transcript of the argument, see Transcript of Petitioner's Oral Argument, *Youngblood*, 488 U.S. 51 (No. 86-1904), *available at* http://www.oyez.org/cases/1980-1989/1988/1988_86_1904/ (last visited Nov. 24, 2008).

71. Transcript of Petitioner's Oral Argument, *supra* note 70.

made, almost in passing, in the State's brief.[72] The questioning of Youngblood's counsel, however, was telling. Justice O'Connor and Chief Justice Rehnquist focused on the absence of bad faith.[73] The Chief Justice worried about the extent of any duty recognized under the Due Process Clause, asking "How broad is this duty? Is the Constitution going to tell prosecutors how they ought to investigate cases?"[74]

Three days later, on October 14, 1988, the Justices conferred.[75] The vote was six to three to reverse the Arizona Court of Appeals.[76] Chief Justice Rehnquist was joined by Justices White, O'Connor, Scalia, and Kennedy in the majority.[77] Justice Stevens concurred in the judgment. Justices Blackmun, Brennan, and Marshall dissented.[78]

According to Justice Blackmun's handwritten notes of the conference, the majority focused on the overall fairness of the proceedings and the State's lack of bad faith.[79] Chief Justice Rehnquist commented, "Our cases do not go so far as Arizona courts said. . . . Due Process [does] not require this [result]."[80] Justice White thought that before the State could be charged with a due process violation there should be a suspect. There was none in the six-week period from the time of the assault to Youngblood's arrest, when the clothing was unrefrigerated and the semen samples had deteriorated.[81] The State was negligent at most.[82] For Justice O'Connor, the trial was not unfair; there was no evidence of bad faith. The defendant was trying to have it both ways, for the loss of evidence had allowed him to argue that the State had failed to carry the burden of proof. Justices Scalia and Kennedy also noted the lack of bad faith.[83]

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72. Brief for Petitioner at 28, *Youngblood*, 488 U.S. 51 (No. 86-1904).

73. Transcript of Respondent's Oral Argument, *Youngblood*, 488 U.S. 51 (No. 86-1904), *available at* http://www.oyez.org/cases/1980-1989/1988/1988_86_1904/ (last visited Nov. 24, 2008).

74. *Id.*

75. *Blackmun Papers*, *supra* note 20, Box 513, Folder 1, Notes of Conference (Oct. 14, 1988).

76. *Id.* at 1–2.

77. *Id*. According to his notes, Justice Blackmun would have denied certiorari, for the case was, in his view, a "fact-specific applic[ation] o[f] t[he] materiality requi[re]ment of *Trombetta*." *Blackmun Papers*, *supra* note 20, Box 513, Folder 1 (July 18, 1988).

78. *Blackmun Papers*, *supra* note 20, Box 513, Folder 1, Notes of Conferences 1–2 (Oct. 14, 1988).

79. *Id*.

80. *Id*. at 1.

81. According to Youngblood's counsel, without refrigeration, the ABO blood markers would have deteriorated over a two-to-three week period. Transcript of Respondent's Oral Argument, *supra* note 73; *Blackmun Papers*, *supra* note 20, Box 513, Folder 1, Notes of Conference 1 (Oct. 14, 1988).

82. *Blackmun Papers*, *supra* note 20, Box 513, Folder 1, Notes of Conference 1 (Oct. 14, 1988).

83. *Id.* at 2.

For Justice Stevens, it was a "close" case.[84] He found it significant that the trial court had instructed the jury that it could draw an adverse inference against the State based on the lost evidence. In his view, looking at the trial "as a whole," there was no unfairness; the State's negligence should not lead to dismissal.[85]

In conference, the dissenters argued that due process required more of the State. According to Justice Brennan, the State did not have to perform all available tests. But, the evidence here obviously had the potential to be exculpatory. When the State collected evidence, it had a duty to preserve it.[86] Justice Marshall agreed, citing *Brady v. Maryland*.[87] One of Justice Blackmun's handwritten notes put it succinctly: "Fair trial is our measure."[88] Justice Brennan asked Justice Blackmun to author the dissent,[89] and Justice Blackmun agreed to do so.[90]

The six-to-three split among the Justices did not change after the conference. Chief Justice Rehnquist circulated the first draft of his opinion on October 27, 1988.[91] Justice Stevens decided to concur separately in the judgment.[92] Justice Blackmun circulated his dissent on November 22, 1988.[93] On November 29, 1988, the Court issued its opinion, reversing the Arizona Court of Appeals.[94]

Consistent with views expressed in conference, the Rehnquist majority held that "unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law."[95] The Court distinguished *Brady* on the ground that the evidence there was known to be favorable to the accused. In contrast, in *Youngblood*, the evidence was only potentially exculpatory. "We think the Due Process Clause requires a different result when we deal

84. *Id.*
85. *Id.*
86. *Id.* at 1.
87. *Id.*
88. *Blackmun Papers*, *supra* note 20, Box 513, Folder 1 (Sept. 25, 1988).
89. Letter from Justice Brennan to Justice Blackmun, *Blackmun Papers*, *supra* note 20, Box 512, Folder 10 (Oct. 14, 1988).
90. Letter from Justice Blackmun to Justice Brennan, *Blackmun Papers*, *supra* note 20, Box 512, Folder 10 (Oct. 14, 1988).
91. Chief Justice Rehnquist, First Draft of Opinion in *Arizona v. Youngblood*, *Blackmun Papers*, *supra* note 20, Box 512, Folder 10 (Oct. 27, 1988).
92. Justice Stevens, First Draft of Concurrence in the Judgment, *Blackmun Papers*, *supra* note 20, Box 512, Folder 10 (Nov. 16, 1988).
93. Justice Blackmun, First Draft of Dissent, *Blackmun Papers*, *supra* note 20, Box 512, Folder 10 (Nov. 22, 1988).
94. Arizona v. Youngblood, 488 U.S. 51, 51 (1988).
95. *Id*. at 58.

with the failure of the State to preserve evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant."[96]

The Court was clearly troubled by the burden that a broad constitutional rule to preserve physical evidence would impose on law enforcement. Such a duty would result in excessive costs; the "'fundamental fairness' requirement of the Due Process Clause [should not be read] . . . as imposing on the police an undifferentiated and absolute duty to retain and to preserve all material that might be of conceivable evidentiary significance in a particular prosecution."[97] Requiring the defendant to show bad faith confined the State's obligation to preserve evidence to "reasonable bounds" and to the "class of cases where the interests of justice most clearly required it, i.e., those cases in which the police themselves by their conduct indicate that the evidence could form a basis for exonerating the defendant."[98] Bad faith, then, became the "bright-line" test.

Justice Stevens concurred in the Court's judgment, but did not join its opinion because, in his view, it announced a proposition of law broader than necessary to decide the case.[99] Justice Stevens left open the possibility that "there may well be cases in which the defendant is unable to prove that the State acted in bad faith but in which the loss or destruction of evidence is nonetheless so critical to the defense as to make a criminal trial fundamentally unfair."[100] For Justice Stevens, *Youngblood* was not such a case for three reasons.

First, at the time the evidence was lost, the police had at least as great an interest in preserving the evidence as the accused. "Even without a prophylactic sanction such as dismissal of the indictment, the State has a strong incentive to preserve the evidence."[101]

Second, it was unlikely that Youngblood was prejudiced by the loss of evidence. In examining witnesses and in summation, defense counsel at trial emphasized to the jury that the State had failed to preserve evidence that might have exonerated Youngblood.[102] In addition, the trial judge instructed the jury that it could draw an adverse inference from the fact

96. *Id*. at 57.
97. *Id*. at 58 (internal citation omitted).
98. *Id*.
99. *Id*. at 60 (Stevens, J., concurring in the judgment).
100. *Id.*
101. *Id.* at 59.
102. *Id.*

that evidence had been lost.[103] "As a result, the uncertainty as to what the evidence might have proved was turned to the defendant's advantage."[104]

Third, that no juror chose to draw the adverse inference and voted to acquit suggested that the lost evidence was immaterial.[105] "[T]he jurors in effect indicated that, in their view, the other evidence at trial was so overwhelming that it was highly improbable that the lost evidence was exculpatory."[106] Had the case posed a closer question of guilt or innocence, Justice Stevens presumed that the jurors would have been more likely to infer that the lost evidence was exculpatory.[107]

In contrast to the majority, the dissent focused on materiality and fairness to the accused, not the police officer's state of mind. First, Justice Blackmun rejected the bad faith standard. Under *Brady* and its progeny, a due process violation could be found even in the absence of bad faith.[108] Justice Blackmun also doubted that the bad faith standard created a bright-line rule. Instead, the standard "may well create more questions than it answers."[109] What was bad faith? Was it "actual malice, or would recklessness, or the deliberate failure to establish standards for maintaining and preserving evidence, be sufficient?"[110] What was good faith? Did it require a "certain minimum of diligence"?[111]

Moreover, the dissent recognized that semen samples were particularly probative in a sexual assault case, as they could have established the perpetrator's blood type and whether he was a secretor or non-secretor.[112] Those tests alone could have exonerated Youngblood, who was determined to be a secretor.[113] Good faith or not, that the evidence had been destroyed was constitutionally "intolerable," for it interfered with the ability of the accused to present a defense.[114] In lieu of the bad faith standard, the dissent proposed the following test:

> [W]here no comparable evidence is likely to be available to the defendant, police must preserve physical evidence of a type that they reasonably should know has the potential, if tested, to reveal

103. *Id.*
104. *Id.* at 60.
105. *Id.*
106. *Id.*
107. *Id.*
108. *Id.* at 66 (Blackmun, J., dissenting).
109. *Id.*
110. *Id.*
111. *Id.*
112. *Id.* at 68.
113. *Id.*
114. *Id.* at 69.

> immutable characteristics of the criminal, and hence to exculpate a defendant charged with the crime.[115]

The inquiry was essentially four-fold. First, the evidence had to be "clearly relevant."[116] When identity was at issue, this included physical evidence that came from the perpetrator such as blood, other bodily fluids, fingerprints, and hair and tissue samples.[117] Nevertheless, not all evidence would have to be preserved; for example, in some cases it might be unclear whether the material came from the perpetrator. "But in a case where there is no doubt that the sample came from the assailant, the presumption must be that it be preserved."[118]

Next, the evidence had to "embody some immutable characteristic of the assailant which can be determined by available testing methods."[119] This included fingerprints or biological material; blood markers could "completely exonerate or strongly implicate a defendant."[120] The dissent presciently noted:

> As technology develops, the potential for this type of evidence to provide conclusive results on any number of questions will increase. Current genetic testing measures, frequently used in civil paternity suits, are extraordinarily precise. The importance of these types of evidence is indisputable, and requiring police to recognize their importance is not unreasonable.[121]

In addition, the evidence had to be of a type "likely to be independently exculpatory."[122] The accused should not have to prove that a particular piece of evidence was exculpatory; this was an impossible task. How could the accused prove something that no longer existed because of the State's misconduct?[123] "Focusing on the *type* of evidence solves this

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115. *Id.* The Blackmun Papers reveal that from the start Justice Blackmun had sought to create a test that limited the duty to preserve evidence. Under an initial formulation, the evidence had to meet five conditions: "1. Be clearly relev[an]t 2. Tied certainly to t[he] perpetrator 3. b[e] ind[e]p[en]de[n]tly exculpatory 4. n[ot] b[e] cumul[ative] or collateral 5. police diffi[cultie]s in preserving." *Blackmun Papers*, *supra* note 20, Box 513, Folder 1 (Sept. 25, 1988).

116. *Youngblood*, 488 U.S. at 70 (Blackmun, J., dissenting).

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.* (internal citation omitted). The dissent declined to address the issue of whether due process requires that police testing be on the "cutting edge" of technology. *Id.* at 71 n.7. "But uncertainty as to these questions only highlights the importance of preserving evidence, so that the defense has the opportunity at least to use whatever scientifically recognized tests are available." *Id.*

122. *Id.* at 70.

123. *Id.* at 71.

problem."[124] A court could consider the type of evidence and the available science, as well as the circumstances of the case, to determine the likelihood that the evidence might have proved to be exculpatory.[125] The evidence could not be cumulative or collateral, and had to bear directly on the question of innocence or guilt.[126]

Finally, Justice Blackmun cautioned that due process had to take into account the cost of preserving evidence.[127] Law enforcement needed to have the option of being able to test the evidence and then to discard it. After a suspect's arrest, the police could notify defense counsel of plans to dispose of the evidence. "When the defense has been informed of the existence of the evidence, after a reasonable time the burden of preservation may shift to the defense."[128]

In applying its proposed test to the facts of the case, the dissent would have affirmed the Arizona Court of Appeals. The evidence was obviously material, for the semen samples on the clothing were probably larger, less contaminated, and more likely to yield conclusive results than the samples collected through the assault kit.[129] Moreover, the semen could have revealed an immutable characteristic of the perpetrator; thus, there was "a genuine possibility" that the results of the testing would exonerate Youngblood.[130] The State's case was "far from conclusive,"[131] as the only evidence implicating Youngblood was the victim's identification of him.[132] There was no other eyewitness, and Youngblood's car had been destroyed before being fully examined.[133] Eyewitness identification was especially problematic in cases involving cross-racial identification and children encouraged by adults.[134]

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124. *Id.*
125. *Id.*
126. *Id.*
127. *Id.*
128. *Id.*
129. *Id.*
130. *Id.* at 72.
131. *Id.* at 73.
132. *Id.* at 72.
133. *Id.*
134. *Id.* at 72 n.8. For commentary on cross-racial identification, see Radha Natarajan, *Racialized Memory and Reliability: Due Process Applied to Cross-Racial Eyewitness Identifications*, 78 N.Y.U. L. REV. 1821 (2003) (arguing that cross-racial eyewitness identifications are more often wrong than same-race identifications and proposing the development of special standards to be applied to cross-racial identifications). According to Natarajan, the dissent in *Youngblood* represents one of the few instances in which the Court has acknowledged the difficulties of cross-racial identifications. *Id.* at 1823 n.14.

Here, there was no equivalent evidence available to Youngblood.[135] The assault kit's swab contained a semen sample, but not enough to allow for proper testing. No other evidence could have exonerated Youngblood. Nor would preservation of the evidence have imposed a burden on the police. Refrigeration was available, and the clothing would not have required much storage space.[136]

C. Youngblood*'s Significance*

Youngblood's significance is two-fold. First, as a doctrinal matter, *Youngblood* represents an important limitation of the constitutional right of access to evidence. The Supreme Court rejected a view of due process that was more protective of the rights of the accused; instrumentalism trumped adjudicative fairness. The Court crafted a rule that broke with prevailing precedent in state and lower federal courts[137] and that relied upon strands of prior holdings to make the presence or absence of bad faith the linchpin of the analysis, instead of examining materiality or prejudice to the accused. Second, *Youngblood* retains its vitality on the federal level, as the Supreme Court has reaffirmed the bad faith standard.[138]

1. Competing Visions of Due Process

Youngblood explores the meaning of procedural due process in the context of the constitutional right of access to evidence. More than a century ago, the Supreme Court declared that due process required fundamental fairness of the state.[139] Since that time, the Court has engaged in the process of defining the content of fundamental fairness. In general,

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135. *Youngblood*, 488 U.S. at 73.

136. *Id*.

137. *See* Dinger, *supra* note 4, at 342 ("The major effect of *Youngblood* was that it set a precedent for federal cases involving lost or destroyed evidence, and thereby overruled the holdings of some federal circuits which had, to that point, made determinations based upon a balancing of 'the magnitude of the State's failure to perform its duty to preserve evidence against the degree of prejudice thereby sustained by the defendant.'"); Lembke, *supra* note 4, at 1240–41 ("In the years preceding *Youngblood* virtually no state or federal court held that subjective bad faith on the part of the police was required to find a fundamental fairness violation of the federal or state constitutions; instead, these courts looked to police culpability as only one factor to be considered in assessing whether a due process violation had occurred.").

138. *See* Illinois v. Fisher, 540 U.S. 544 (2004) (per curiam).

139. *See* Hurtado v. California, 110 U.S. 516, 535 (1884) (due process protects "those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions").

precedent prior to *Youngblood* emphasized two different, sometimes competing visions of due process: adjudicative fairness to the accused or an instrumental focus on deterring official misconduct.

Adjudicative fairness seeks to ensure that the accused receives meaningful protection in court, in other words, reliable fact finding and a fair trial.[140] The core concern is the individual and the individual's liberty interest. Due process shields the individual from the arbitrary exercise of state power, thereby promoting fairness and helping prevent wrongful conviction. This concern for the individual manifests itself in an assessment of the materiality of evidence and prejudice to the accused, which become paramount in determining whether a due process violation has occurred.

The other view of due process is instrumental and more limited in its approach. The aim of due process is to impose restraints on the state. This includes punishing the state for police and prosecutorial misconduct. Punishment is intended to deter future misconduct and to create a prophylactic effect.[141] In measuring the misconduct, one examines the subjective intent of the officer and whether the officer acted in good faith or bad faith. Under this approach, the focus is on the state, not the individual. Moreover, the focus on the state and on deterring official misconduct invites an examination of the costs of providing additional process.[142]

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140. *See* TRIBE, *supra* note 13, § 10-7, at 665 (noting that due process "may require officials to submit to judicial or quasi-judicial review of choices which disadvantage the individual"); Seth F. Kreimer & David Rudovsky, *Double Helix, Double Bind: Factual Innocence and Postconviction DNA Testing*, 151 U. PA. L. REV. 547, 588 (2002) ("The protection of innocence has been the touchstone of due process in the criminal justice system.").

141. The same competing values may be seen in a Fourth Amendment context. *See* Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 367 (1974) (asking "whether the amendment should be viewed as a collection of protections of atomistic spheres of interest of individual citizens or as a regulation of governmental conduct"); DRESSLER & MICHAELS, *supra* note 8, at 54–57 (describing different purposes of the Fourth Amendment). Moreover, they may be viewed as roughly corresponding with Professor Packer's characterization of criminal procedure as having two normative models: due process or crime control. PACKER, *supra* note 9, at 149–73. An instrumental approach to due process can be seen as furthering the purposes of the crime control model.

142. Mathews v. Eldridge, 424 U.S. 319 (1976), reflects instrumental values insofar as it weighs the nature of the private interest at stake, the value of additional safeguards, and the burden of the safeguards on the government. *Id.* at 335. The Supreme Court has used this cost-benefit approach in criminal cases, though sparingly. *See, e.g.*, United States v. Ruiz, 536 U.S. 622, 631–33 (2002) (applying *Mathews* to find no due process violation in requiring defendant to waive right to receive exculpatory impeachment information as part of plea agreement); Ake v. Oklahoma, 470 U.S. 68, 77–83 (1985) (applying *Mathews* to find that due process requires the state to provide access to psychiatric assistance when defendant seeks to raise insanity defense). *But see* Medina v. California, 505 U.S. 437,

It is instructive to examine precedent involving the constitutional right of access to evidence from the standpoint of both adjudicative fairness and instrumentalism. In doing so, a continuum emerges. At one end are cases that implicate both interests: the accused suffered prejudice and the state acted in bad faith. The Supreme Court has had little difficulty deciding these cases. An early example was *Mooney v. Holohan*.[143] There, the defendant alleged that the prosecutor had knowingly used perjured testimony and deliberately suppressed evidence impeaching the testimony.[144] The state argued for a cramped view of due process in which "the acts or omissions of a prosecuting attorney can [never], in and by themselves" result in a due process violation.[145] Not surprisingly, perhaps, a unanimous Court disagreed. "Such a contrivance by a state to procure the conviction and imprisonment of a defendant [through the knowing use of perjury] is as inconsistent with the rudimentary demands of justice as is the obtaining of a like result through intimidation."[146] Seven years later, the Court reached a similar result in *Pyle v. Kansas*,[147] unanimously holding that the state's knowing use of perjured testimony and deliberate suppression of evidence favorable to the accused violated due process.[148]

At the other end of the continuum are cases in which neither due process interest is implicated: where the accused suffered little or no prejudice from the loss of evidence and there was no evidence of bad faith. These, too, have been comparatively easy cases for the Court to decide. In *Killian v. United States*,[149] the defendant alleged a denial of due process caused by the destruction of notes that documented payments made to an informant.[150] The Court remanded for a factual hearing, noting that no due process violation would occur as long as the notes were of limited use to the defense and the agents had acted in good faith:

> If the agents' notes of [the informant's] oral reports of expenses were made only for the purpose of transferring the data thereon to the receipts to be signed by [the informant], and if, after having served that purpose, they were destroyed by the agents in good faith

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443 (1992) (refusing to apply *Mathews* to assess "the validity of state procedural rules which . . . are part of the criminal process").

143. 294 U.S. 103 (1935) (per curiam).
144. *Id*. at 110.
145. *Id*. at 111–12.
146. *Id*. at 112.
147. 317 U.S. 213 (1942).
148. *Id*. at 216.
149. 368 U.S. 231 (1961).
150. *Id*. at 239–41.

> and in accord with their normal practice, it would be clear that their destruction did not constitute an impermissible destruction of evidence nor deprive petitioner of any right.[151]

Another example of this line of reasoning is *United States v. Valenzuela-Bernal*.[152] In *Valenzuela-Bernal*, the defendant was charged with an immigration offense.[153] Before trial, the United States deported two undocumented individuals that Valenzuela-Bernal had transported after the prosecutor determined that they possessed no evidence material to the prosecution or the defense.[154] A third individual was detained to testify for the prosecution at trial. Valenzuela-Bernal alleged a due process violation because he was unable to interview the deportees and to determine if they could assist his defense.[155] The Supreme Court rejected the claim. The government had "good reason to deport [the individuals]."[156] Moreover, Valenzuela-Bernal had failed to establish that the deportees possessed testimony "material and favorable to his defense, in ways not merely cumulative to the testimony of available witnesses."[157]

Similarly, in *California v. Trombetta*, the Supreme Court considered whether due process required the State to preserve evidence after it had been tested.[158] In *Trombetta*, the defendant was stopped on suspicion of drunken driving and given an Intoxilyzer test, which indicated a blood-alcohol concentration well over 0.10 percent, the legal limit at the time.[159] The police did not preserve the breath sample after it had been analyzed.[160] Trombetta claimed that he would have been able to impeach the test results and that the loss of the sample violated due process.[161]

Justice Marshall, writing for a unanimous Court, disagreed. The Court had "never squarely addressed" the government's duty to preserve evidence in criminal cases.[162] "Whenever potentially exculpatory evidence

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151. *Id.* at 242. *Killian* was a 5–4 decision, but the dissenters objected to other parts of the majority decision. *See also* United States v. Augenblick, 393 U.S. 348, 356 (1969) (loss of agent's notes and tape recording of interviews of defendant and witness did not result in due process violation because proceeding was not rendered fundamentally unfair).

152. 458 U.S. 858 (1982).

153. *Id.* at 860.

154. *Id*. at 861.

155. *Id.*

156. *Id.* at 866.

157. *Id.* at 873.

158. 467 U.S. 479, 481 (1984).

159. *Id.* at 482.

160. *Id.*

161. *Id.* at 482–83.

162. *Id.* at 486.

is permanently lost, courts face the treacherous task of divining the import of materials whose contents are unknown and, very often, disputed."[163] Fashioning a remedy was also difficult because the court had to choose between dismissing the case or suppressing the State's most probative evidence.[164]

The Court offered two reasons for denying the due process claim. Citing *Killian*, Justice Marshall noted that the police had acted "'in good faith and in accord with their normal practice.'"[165] The opinion focused, however, on the breath samples' lack of constitutional materiality.[166] "Whatever duty the Constitution imposes on the States to preserve evidence, that duty must be limited to evidence that might be expected to play a significant role in the suspect's defense."[167] Constitutional materiality meant that the evidence "must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means."[168]

Trombetta failed to meet both conditions of the constitutional materiality standard: the breath samples did not possess apparent exculpatory value and comparable evidence was not otherwise unobtainable. First, based on existing testing procedures, there was very little chance that the Intoxilyzer was wrong and the sample exculpatory.[169] Second, Trombetta had other ways of demonstrating his innocence. He was free to explore whether there was faulty calibration of the machine, extraneous interference with its measurements, or operator error.[170]

Somewhere in the middle of the continuum are cases in which the facts implicate one due process interest but not the other: the state failed to disclose material information, but there was no evidence of bad faith. These cases have been somewhat harder for the Court to resolve. Here, the

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163. *Id.*

164. *Id.*

165. *Id.* at 488 (quoting Killian v. United States, 368 U.S. 231, 242 (1961)).

166. *See* CHARLES H. WHITEBREAD & CHRISTOPHER SLOBOGIN, CRIMINAL PROCEDURE: AN ANALYSIS OF CASES AND CONCEPTS 641 (4th ed. 2000) ("While the *Trombetta* Court considered the absence of bad faith relevant, it appeared to put the most stress on the failure of the defendant to prove the evidence destroyed had a unique exculpatory value.").

167. *Trombetta*, 467 U.S. at 488.

168. *Id.* at 489.

169. *Id.*

170. *Id.* at 490. Justice O'Connor separately concurred. She noted, "Rules concerning preservation of evidence are generally matters of state, not federal constitutional law. The failure to preserve breath samples does not render a prosecution fundamentally unfair, and thus cannot render breath-analysis tests inadmissible as evidence against the accused." *Id*. at 491 (O'Connor, J., concurring) (internal citation omitted).

seminal case is *Brady v. Maryland*.[171] In *Brady*, the defendant was convicted of murder committed during a robbery and sentenced to death.[172] At trial, he admitted participating in the robbery but claimed that his co-defendant, Boblit, committed the homicide.[173] In spite of a request by Brady's defense counsel to examine Boblit's statements, the prosecutor unwittingly failed to disclose Boblit's admission to killing the victim.[174] The Court held that this non–bad faith failure to disclose resulted in a denial of due process. "The suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."[175] The purpose of the rule was not to punish the State for the prosecutor's misdeeds, but rather to avoid an unfair trial of the accused. "Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly."[176]

Youngblood represents a collision between the two due process interests of ensuring fairness to the accused and of deterring official misconduct. *Youngblood*'s facts fall somewhere between the facts of *Trombetta* and *Brady*. As in *Trombetta* and *Brady*, there was no evidence of bad faith on the part of the police. Yet while the evidence in *Brady* was undoubtedly exculpatory and material, the evidence in *Trombetta* was not. The test results there had been inculpatory; they were well above the legal limit, and there was little reason to doubt their accuracy.[177] *Youngblood* was a stronger case for the accused than *Trombetta* because the pertinent evidence was untested and was not known to be inculpatory. But *Youngblood* was a weaker case for the accused than *Brady* because the evidence lost in *Youngblood* was only potentially exculpatory.

Viewed from this perspective, the majority, concurrence, and dissent in *Youngblood* advance competing conceptions of due process. For the majority, a central concern was the burden that a broad duty to preserve evidence would impose upon the state. The state's duty to preserve must

171. 373 U.S. 83 (1963).
172. *Id.* at 84–85.
173. *Id.* at 84.
174. *Id.* at 88.
175. *Id*. at 87.
176. *Id*. The Court extended the prosecutor's duty to disclose exculpatory evidence in *United States v. Agurs*, 427 U.S. 97 (1976). The Court reiterated that the prosecutor's good faith or bad faith in failing to disclose exculpatory evidence was irrelevant. "If the suppression of [exculpatory] evidence results in constitutional error, it is because of the character of the evidence, not the character of the prosecutor." *Id*. at 110.
177. California v. Trombetta, 467 U.S. 479, 482, 489 (1984).

be limited to "reasonable bounds," and, as a result, bad faith became the touchstone.[178] An instrumental conception of due process thus prevailed. The majority's focus was on the state and on deterring police misconduct, not on avoiding prejudice or unfairness to the accused.

In his concurrence, Justice Stevens took into account both due process interests, though ultimately fairness to the accused trumped instrumental considerations.[179] The concurrence can be viewed as instrumental in that Justice Stevens argued that the police already had an interest in preserving evidence, for it might inculpate the accused. "[E]ven without a prophylactic sanction such as dismissal of the indictment, the State has a strong incentive to preserve the evidence."[180] In his view, establishing a broad duty to preserve evidence would impose additional costs on the State with little, if any, added benefit.[181] But Justice Stevens was also concerned with adjudicative fairness; he considered materiality and prejudice to the accused.[182] In the end, he rejected the bad faith standard because "there may well be cases in which the defendant is unable to prove that the State acted in bad faith but in which the loss or destruction of evidence is nonetheless so critical to the defense as to make a criminal trial fundamentally unfair."[183]

The dissenters signaled their view of due process: "[t]he Constitution requires that criminal defendants be provided with a fair trial, not merely a 'good faith' try at a fair trial."[184] The "primary inquiry" is on the constitutional materiality of the lost evidence, not on the officer's subjective state of mind.[185] Yet Justice Blackmun was not heedless of the cost of recognizing a duty to preserve evidence. Under his approach, the evidence had to be "clearly relevant," "embody some immutable characteristic of the assailant," and be "of a type likely to be independently exculpatory."[186] He acknowledged that "[d]ue process must also take into account the burdens that the preservation of evidence places on the police."[187]

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178. Arizona v. Youngblood, 488 U.S. 51, 58 (1988).
179. *Id*. at 61 (Stevens, J., concurring).
180. *Id*. at 59.
181. *Id*.
182. *Id*. at 60.
183. *Id*. at 61.
184. *Id*. (Blackmun, J., dissenting).
185. *Id*. at 65–66.
186. *Id*. at 70.
187. *Id*. at 71.

The majority's focus on bad faith can be critiqued on several grounds. First, in emphasizing bad faith, the Court altogether disregarded materiality or prejudice to the accused. In doing so, it neglected important principles in its own precedent. As the dissent argued, "the prosecutor's state of mind is *not* determinative."[188] Materiality, not bad faith, should be the proper focus.[189] "Regardless of intent or lack thereof, police action that results in a defendant's receiving an unfair trial constitutes a deprivation of due process."[190] Moreover, although the majority cited *United States v. Marion*,[191] *United States v. Lovasco*,[192] and *United States v. Valenzuela-Bernal*,[193] in support of its holding, an examination of those cases shows that they offer limited support.[194] *Marion* and *Lovasco* dealt with preindictment delay;[195] *Valenzuela-Bernal* involved the deportation of potential defense witnesses.[196] In all three cases the Court stressed the importance of materiality or prejudice to the accused in determining whether a due process violation had occurred.[197]

Second, *Youngblood* is anomalous in making bad faith the touchstone of the due process analysis.[198] The Supreme Court has applied the Due

188. *Id*. at 64.

189. *Id.*

190. *Id*. at 62; *see also Recent Developments*, *supra* note 4, at 537 ("The majority's bad faith test dilutes the guarantees of due process by allowing police motive to define the substantive rights in an individual case.").

191. 404 U.S. 307 (1971).

192. 431 U.S. 783 (1977).

193. 458 U.S. 858 (1982).

194. For other critiques of the majority's reliance on those cases, see *Youngblood*, 488 U.S. at 66 n.5 (Blackmun, J., dissenting); Lembke, *supra* note 4, at 1221 n.47.

195. *Marion*, 404 U.S. at 325 (38-month delay); *Lovasco*, 431 U.S. at 784 (18-month delay).

196. *Valenzuela-Bernal*, 458 U.S. at 861.

197. *See id.* at 873 (deportation of witnesses in and of itself does not violate due process absent "some showing that the evidence lost would be both material and favorable to the defense"); *Lovasco*, 431 U.S. at 790 ("[T]he due process inquiry must consider the reasons for the delay as well as prejudice to the accused."); *Marion*, 404 U.S. at 325 ("No actual prejudice to the conduct of the defense is alleged or proved, and there is no showing that the Government intentionally delayed to gain some tactical advantage over appellees or to harass them.").

198. For an exhaustive examination of the Court's interpretation of the Due Process Clause in a criminal context, see Jerold H. Israel, *Free-Standing Due Process and Criminal Procedure: The Supreme Court's Search for Interpretive Guidelines*, 45 ST. LOUIS U. L.J. 303, 389–99 (2001). Professor Israel lists *North Carolina v. Pearce*, 395 U.S. 711 (1969) and *Blackledge v. Perry*, 417 U.S. 21 (1974), as part of "a small group" of cases that require a showing of "bad purpose" on the part of the state actors in order to establish a due process violation. Israel, *supra*, at 397 n.547. Both cases involve defendants who were penalized for exercising appeal rights. *Pearce*, 395 U.S. at 713; *Perry*, 417 U.S. at 22–23. In *Perry*, however, the Court explained that *Pearce*'s rationale "was not grounded upon the proposition that actual retaliatory motivation must inevitably exist." *Id.* at 28. Instead, the fear of such vindictiveness may unconstitutionally chill a defendant's exercise of appeal rights. *Id*. The Court in *Perry* found a due process violation even though there was no evidence that the prosecutor

Process Clause in every phase of the criminal justice process,[199] from the investigation of crime,[200] to the indictment of charges,[201] discovery,[202] the conduct of trial and the burden of proof,[203] sentencing,[204] and appeals.[205] When certain wrongs occur, the Court has found a per se denial of due process. The accused need not show that prejudice has occurred because it is presumed.[206] In some cases, the Court has applied a totality of circumstances approach.[207] The Court has also found a due process violation based on prejudice to the accused, regardless of the officer's subjective intent.[208] In other cases, the Court has examined both the officer's subjective intent and prejudice to the accused.[209] Nevertheless, in

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had acted in bad faith. *Id. See also* Garrett, *supra* note 11, at 95 n.300 (noting that *Youngblood* "stands alone among fair trial rights in requiring fault").

199. *See* Israel, *supra* note 198, at 388–89.

200. *See, e.g.*, Neil v. Biggers, 409 U.S. 188, 198 (1972) (overly suggestive identification procedures may violate due process, for "[i]t is the likelihood of misidentification which violates a defendant's right to due process").

201. *See, e.g.*, Wayte v. United States, 470 U.S. 598, 602–08 (1985) (selective prosecution results in denial of due process when there is disparate treatment plus improper prosecutorial motivation based on "race, religion, or other arbitrary classification"); Bordenkircher v. Hayes, 434 U.S. 357, 363 (1978) (vindictive prosecution results in "a due process violation of the most basic sort"); *Lovasco*, 431 U.S. at 789–90 (1977) (due process may be violated by "oppressive delay" in bringing charges).

202. *See, e.g.*, Brady v. Maryland, 373 U.S. 83, 86 (1963) (non-disclosure of exculpatory evidence a denial of due process, even though the prosecutor did not act in bad faith).

203. *See, e.g.*, *In re* Winship, 397 U.S. 358, 364 (1970) (due process "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged"); Tumey v. Ohio, 273 U.S. 510, 532 (1927) (due process requires impartial judge).

204. *See, e.g.*, Specht v. Patterson, 386 U.S. 605, 610 (1967) (due process violated when defendant convicted under one statute is sentenced under another without notice and a full hearing); Williams v. New York, 337 U.S. 241, 252 (1949) (no due process violation for sentencing judge to consider information from persons the defendant has not confronted or cross-examined).

205. *See, e.g.*, Evitts v. Lucey, 469 U.S. 387, 397 (1985) (due process guarantees effective assistance of counsel in criminal defendant's first appeal as of right); Blackledge v. Perry, 417 U.S. 21, 28–29 (1974) (violation of due process for state to file more serious charges against defendant after he invoked his statutory right to appeal).

206. *See, e.g.*, Mullaney v. Wilbur, 421 U.S. 684, 701–04 (1975) (finding due process violation in state law that, in effect, shifted the burden of proof to the defendant in a criminal case); 273 U.S. at 535 (defendant had the right to an impartial judge "[n]o matter what the evidence was against him"). For a fuller listing of cases, *see* Israel, *supra* note 198, at 395 n.540.

207. *See, e.g.*, United States v. Young, 470 U.S. 1, 12 (1985) ("[R]emarks must be examined within the context of the trial to determine whether the prosecutor's behavior amounted to prejudicial error.").

208. *See, e.g.*, Brady v. Maryland, 373 U.S. 83, 86 (1963).

209. *See, e.g.*, California v. Trombetta, 467 U.S. 479, 488–90 (1984) (in denying due process challenge, noting that the officers had acted in good faith and that the evidence was not constitutionally material); Killian v. United States, 368 U.S. 231, 242 (1961) (no due process violation from destruction of agents' notes if the notes were of limited helpfulness to the defense and were destroyed "in good faith and in accord with their normal practice").

focusing exclusively on bad faith, *Youngblood* is unique in due process jurisprudence.

Indeed, developments in other areas of the law, including constraints on the reach of the Due Process Clause and the Fourth Amendment's exclusionary rule, may have shaped *Youngblood*'s holding.[210] In a series of cases involving claims under 42 U.S.C. § 1983, the Supreme Court gave a limited reading to the Due Process Clause.[211] In *Daniels v. Williams*,[212] an inmate sued for damages after slipping on a pillow left on a prison stairway.[213] He argued that the State's negligence deprived him of a liberty interest without due process of law. The Supreme Court disagreed, focusing on the word "deprive": "[n]ot only does the word 'deprive' in the Due Process Clause connote more than a negligent act, but we should not 'open the federal courts to lawsuits where there has been no affirmative abuse of power.'"[214] Deprivation involves "deliberate decisions of government officials."[215] Of course, *Daniels* was a civil case, not a criminal one. Nor could it have served as controlling authority for *Youngblood*, unless the Court overruled *Brady*, for there the Court found a due process violation "irrespective of the good faith or bad faith of the prosecution."[216]

It is also useful to examine *Davidson v. Cannon*,[217] the companion case to *Daniels*. In *Davidson*, a prisoner sued officials under § 1983 after they negligently failed to protect him from another inmate. A divided Court held that no due process violation had occurred. Justice Rehnquist explained that a "lack of [due] care simply does not approach the sort of abusive government conduct that the Due Process Clause was designed to prevent."[218] The split in *Davidson* foreshadowed the split in *Youngblood*. In *Davidson*, as in *Youngblood*, Justices Brennan, Blackmun, and Marshall dissented, and Justice Stevens concurred separately. For Justice Stevens, a

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210. *See supra* notes 10–11.

211. *See* DeShaney v. Winnebago County Dep't of Soc. Serv., 489 U.S. 189 (1989); Davidson v. Cannon, 474 U.S. 344 (1986); Daniels v. Williams, 474 U.S. 327 (1986).

212. 474 U.S. 327 (1986).

213. *Id.* at 328.

214. *Id*. at 330.

215. *Id*. at 331; *see also* TRIBE, *supra* note 13, § 10–7, at 665 (noting that for the majority, "due process functions only to curb governmental abuse, unfairness, or oppression, not to compensate for injury caused by unintentional official behavior").

216. Brady v. Maryland, 373 U.S. 83, 87 (1963). Of course, this raises the curious issue of whether "deprivation" has different meanings for the Due Process Clause depending on whether the matter is civil or criminal or nature.

217. 474 U.S. 344 (1986).

218. *Id*. at 347–48. Justice Rehnquist was joined by Chief Justice Burger, Justice White, Justice Powell, and Justice O'Connor.

"deprivation" had occurred.[219] As in *Youngblood*, he reasoned that the focus should be on the victim's loss, not the official's state of mind.[220] The harm to a prisoner was the same regardless of whether the official acted negligently, recklessly, or deliberately. Davidson, however, had failed to demonstrate that state procedures for redressing this type of injury were constitutionally inadequate.[221] In dissent, Justice Brennan argued that a due process violation could be based on recklessness or deliberate indifference.[222] Justice Blackmun, joined by Justice Marshall, advocated a more flexible standard in which even negligence might suffice.[223] "In some cases, by any reasonable standard, governmental negligence is an abuse of power."[224]

Similarly, Fourth Amendment precedent may have influenced the *Youngblood* majority. There are striking parallels between *Youngblood* and *United States v. Leon*,[225] even though the two cases address different constitutional rights and concerns.[226] In *Leon*, for purposes of the Fourth Amendment's exclusionary rule, the Court distinguished between good faith and bad faith police conduct.[227] Bad faith—or conduct in which the Fourth Amendment violation was "substantial and deliberate"—resulted in an application of the exclusionary rule.[228] In contrast, good faith did not. An officer's objectively reasonable reliance on a defective warrant would

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219. *Id.* at 341 (Stevens, J., concurring).

220. *Id.*

221. *Id*. at 341–42.

222. *Id*. at 349 (Brennan, J., dissenting).

223. *Id*. at 353.

224. *Id*. The denouement of *Daniels* and *Davidson* was *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189 (1989). In *DeShaney*, the Court articulated a conception of due process as a negative liberty: "The [Due Process] Clause is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security. . . . Like its counterpart in the Fifth Amendment, the Due Process Clause of the Fourteenth Amendment was intended to prevent government 'from abusing [its] power, or employing it as an instrument of oppression.'" *Id.* at 195–96. *See generally* Erwin Chemerinsky, *The State-Created Danger Doctrine*, 23 TOURO L. REV. 1, 2 (2007) (noting that in *DeShaney* "Chief Justice Rehnquist explained that the Constitution typically provides negative liberties and does not impose affirmative duties on the government"). For other commentary on that conception of due process, see Susan Bandes, *The Negative Constitution: A Critique*, 88 MICH. L. REV. 2271 (1990); Michael J. Gerhardt, *The Ripple Effects of* Slaughter-House*: A Critique of a Negative Rights View of the Constitution*, 43 VAND. L. REV. 409 (1990); Douglas W. Kmiec, *Young Mr. Rehnquist's Theory of Moral Rights—Mostly Observed*, 58 STAN. L. REV. 1827 (2006); Laurence H. Tribe, *The Curvature of Constitutional Space: What Lawyers Can Learn from Modern Physics*, 103 HARV. L. REV. 1 (1989).

225. 468 U.S. 897 (1984).

226. *See* Lembke, *supra* note 4, at 1231 ("While the two cases certainly involve different circumstances, the pragmatic reality is that the defendant will not obtain relief in either context unless a court is convinced that the police have acted culpably.") .

227. DRESSLER & MICHAELS, *supra* note 8, at 394.

228. *Leon*, 468 U.S. at 909.

not lead to suppression of the evidence.[229] In *Leon*, good faith prevented the suppression of evidence; in *Youngblood*, the absence of bad faith precluded a due process violation and dismissal of the indictment. In each case, the officer's subjective state of mind was outcome determinative. In each case, the Court was troubled by the costs of finding a violation.[230] And, in each case, the Court viewed the constitutional provision at issue in an instrumental fashion, as intended to deter police misconduct.[231] The cost of imposing a sanction was deemed to outweigh any putative benefits.

Third, *Youngblood* simply ignored established precedent from state and lower federal courts that used a multi-factor balancing test to take into account prejudice to the defendant and the nature of the government's conduct.[232] Two sources of law appear to have been particularly influential in the development of a balancing test. One was the common law doctrine of spoliation of evidence. Since the early seventeenth century, the common law had recognized spoliation in a civil context, *omnia praesumuntur*

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229. *Id.* at 922.

230. *See id.* ("We conclude that the marginal or nonexistent benefits produced by suppressing evidence obtained in objectively reasonable reliance on a subsequently invalidated search warrant cannot justify the substantial costs of exclusion."); Arizona v. Youngblood, 488 U.S. 51, 58 (1988) (Due Process Clause should not be read "as imposing on the police an undifferentiated and absolute duty to retain and preserve all material that might be of conceivable evidentiary significance in a particular prosecution").

231. *See Leon*, 468 U.S. at 906 ("The [exclusionary] rule . . . operates as 'a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved.'"); *Youngblood*, 488 U.S. at 58 ("[R[equiring a defendant to show bad faith on the part of the police both limits the extent of the police's obligation to preserve evidence to reasonable bounds and confines it to that class of cases where the interests of justice most clearly require it . . . .").

232. Dinger, *supra* note 4, at 342; Lembke, *supra* note 4, at 1240–41. For a sampling of circuit precedent that employed a multi-factored test that took into account prejudice to the accused and the nature of the government's conduct, see United States v. Nabors, 707 F.2d 1294, 1296–97 (11th Cir. 1983); United States v. Gonzalez, 697 F.2d 155, 156 (6th Cir. 1983); United States v. Grammatikos, 633 F.2d 1013, 1019–20 (2d Cir. 1980); United States v. Wilks, 629 F.2d 669, 674 (10th Cir. 1980); United States v. Loud Hawk, 628 F.2d 1139, 1152 (9th Cir. 1979) (en banc) (Kennedy, J., concurring in the result and writing majority opinion on issue), *overruled on other grounds by* United States v. W.R. Grace, 526 F.3d 499 (9th Cir. 2008); United States v. Picariello, 568 F.2d 222, 227 (1st Cir. 1978); United States v. Herndon, 536 F.2d 1027, 1029 (5th Cir. 1976). For examples of state court precedent that discuss a balancing approach, see cases cited *infra* note 382; Kelley v. State, 486 So.2d 578, 581 (Fla. 1986); State v. Antwine, 636 P.2d 208, 212 (Kan. Ct. App. 1981); State v. Schmid, 487 N.W.2d 539, 541 (Minn. Ct. App. 1992); People v. Haupt, 524 N.E.2d 129, 130 (N.Y. 1988); State v. Wittenbarger, 880 P.2d 517, 523 (Wash. 1994); State v. Bauer, 368 N.W.2d 59, 64 (Wisc. Ct. App. 1985), *vacated*, 377 N.W.2d 175 (Wisc. 1985). For examples of other state approaches, see State v. Youngblood, 844 P.2d 1152, 1157 (Ariz. 1993) (bad faith or prejudice to the accused); State v. Dulaney, 493 N.W.2d 787, 790 (Iowa 1992) (requirements to show due process violation are "1. a proper defense request for the evidence, 2. a showing that the evidence would be favorable to the defendant, and 3. a showing the evidence was material"); Collins v. Commonwealth, 951 S.W.2d 569, 571 (Ky. 1997) (evidence must be either intentionally destroyed or destroyed inadvertently outside normal practice and possess apparent exculpatory value).

contra spoliatorem (all things are presumed against a wrongdoer).[233] The destruction of evidence had to be intentional or in bad faith.[234] The remedy was often a jury instruction in which the finder of fact could draw an adverse inference from the destruction.[235] Early American treatises on evidence establish that, at some point, the civil law of spoliation crossed into the criminal realm, and the general duty to preserve evidence applied to the defense and prosecution alike.[236] Courts similarly recognized that the duty applied to all parties in a criminal case.[237] Indeed, a prosecutor's questionable failure to produce material evidence could result in the imposition of sanctions, including the suppression of evidence[238] and reversal of a conviction.[239] Conversely, the loss of evidence did not result

233. *See* JAMIE S. GORELICK ET AL., DESTRUCTION OF EVIDENCE § 6.8 (2d ed. 1995); Lawrence Solum & Stephen Marzen, *Truth and Uncertainty: Legal Control of the Destruction of Evidence*, 36 EMORY L.J. 1085, 1087 (1987) ("Since the early seventeenth century, the legal maxim *omnia praesumuntur contra spoliatorem* (all things are presumed against a wrongdoer) has expressed a rule that allows the fact finder to draw an unfavorable inference against a litigant who has destroyed documents relevant to a legal dispute.").

234. GORELICK ET AL., *supra* note 233, § 2.8.

235. *Id*. § 2.1.

236. *See* 1 SIMON GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE 42 (1842) ("The presumption of innocence may be overthrown, and a *presumption of guilt* be raised, by the misconduct of the party in suppressing or *destroying evidence*, which he ought to produce, or to which the other party is entitled."); 1 FRANCIS WHARTON, A TREATISE ON THE LAW OF EVIDENCE IN CRIMINAL ISSUES 602 (8th ed. 1880) ("'The suppression or destruction of pertinent evidence . . . is always a prejudicial circumstance of great weight; for as no act of a rational being is performed without a motive, it naturally leads to the inference that such evidence, if it were adduced, would operate unfavorably to the party in whose power it is.'"); 1 JOHN HENRY WIGMORE, A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 278 (1904) ("It has always been understood—the inference, indeed, is one of the simplest in human experience—that a party's falsehood or other fraud in the preparation and presentation of his cause, his fabrication or suppression of evidence by bribery or spoliation, and all similar conduct, is receivable against him as an indication of his consciousness that his case is a weak or unfounded one, and from that consciousness may be inferred the fact itself of the cause's lack of truth and merit."); 11 ENCYCLOPEDIA OF EVIDENCE 966–67 (Edgar W. Camp ed., 1907) ("The rule as to spoliation applies equally in a criminal case except as to the failure or refusal of the defendant to testify in his own behalf.").

237. *See* Wilson v. United States, 162 U.S. 613, 621 (1896) ("The destruction, suppression or fabrication of evidence undoubtedly gives rise to a presumption of guilt to be dealt with by the jury."); United States v. Remington, 191 F.2d 246, 251 (2d Cir. 1951) ("Evidence of efforts to suppress testimony or evidence in any form like the spoliation of documents is affirmative evidence of the weakness of the prosecution's case."); United States v. Graham, 102 F.2d 436, 443 (2d Cir. 1939) ("The principle [of spoliation] is equally applicable to the prosecution of a criminal charge."); State v. Chamberlain, 1 S.W. 145, 147 (Mo. 1886) ("Every presumption is against the destroyer of evidence.").

238. *See* Hagan v. United States, 5 F.2d 965, 965 (8th Cir. 1925) (failure to produce search warrant coupled with "strangely vague" testimony regarding its terms led court to conclude that "the warrant was insufficient and that the seizure thereunder was illegal").

239. *See* Hiner v. State, 149 N.E. 168, 169 (Ind. 1925) ("It was incumbent upon . . . [the state] to produce evidence that would naturally have been produced in an honest effort to support the charge in the indictment, and its nonproduction permits the inference that if such evidence had been given, its tenor would have been unfavorable to [the state]."); Arthur v. Commonwealth, 307 S.W.2d 182, 184

in sanctions when the evidence was not material and the prosecutor had acted in good faith.[240]

In addition to the doctrine of spoliation, another more recent, influential source of law in the development of a pre-*Youngblood* balancing test was Supreme Court precedent that recognized and developed the constitutional right of access to evidence under the Due Process Clause.[241] As we have seen, that precedent examined materiality or prejudice to the accused and often the state actor's subjective intent as well.

United States v. Loud Hawk[242] is a noteworthy example of a pre-*Youngblood* lower federal court articulating a multi-factor test that takes into account prejudice to the defendant and the nature of the government's conduct.[243] Such a test synthesizes both conceptions of due process: adjudicative fairness and instrumentalism. In *Loud Hawk*, an en banc decision of the Ninth Circuit, then-Judge Kennedy described a test grounded not in the Due Process Clause itself but in the supervisory power of the court "to prevent police misconduct and permit as fair a trial as possible."[244] In cases involving the destruction of evidence, "[t]he proper balance is that between the quality of the Government's conduct and the degree of prejudice to the accused."[245] *Loud Hawk* established a balancing test in which the two key variables were government fault and prejudice to the accused:

> In a rare case, government action may be so culpable that deterrence of future violations and protection of judicial integrity become the

(Ky. Ct. App. 1957) ("The concealment and suppression of the written statement raise the inference that it contained something favorable to the accused."); White v. State, 248 S.W. 690, 692 (Tex. Crim. App. 1923) ("In a case of circumstantial evidence, inferences from evidence not introduced which are in the possession of the state are in favor of and not against the accused.").

240. *See* United States v. David, 246 F.2d 895, 897 (7th Cir. 1957) (no adverse inference from destruction of evidence where defendant conceded presence of alcohol and where destruction of jugs and shopping bags followed customary practice); United States v. Coplon, 185 F.2d 629, 637 (2d Cir. 1950) (Hand, J.) (spoliation inference unwarranted where government destroyed wiretap records but summaries of originals remained, the records were of limited relevance, the destruction followed "usual practice," and there was "scarcely . . . a sinister purpose"); McDonald v. United States, 89 F.2d 128, 137 (8th Cir. 1937) (destruction of marked ransom money in kidnapping case by Treasury officials, not prosecutor, was "improvident and ill-considered" but did not preclude use of secondary evidence to establish recovery of money).

241. *See* United States v. Agurs, 427 U.S. 97 (1976); Brady v. Maryland, 373 U.S. 83 (1963); Pyle v. Kansas, 317 U.S. 213 (1942); Mooney v. Holohan, 294 U.S. 103 (1935) (per curiam).

242. 628 F.2d 1139 (9th Cir. 1979) (en banc).

243. *Id*. at 1151–52.

244. *Id*. at 1153–54 (Kennedy, J., concurring in the result and writing majority opinion on issue).

245. *Id.* at 1152.

> principal concern, and then only a plausible suggestion of prejudice or none at all would be required for suppression of evidence or the imposition of other sanctions, such as dismissal of charges. In the more frequent case, the Government's responsibility for loss of the evidence is caused by actions that are, alternatively, negligent in some degree, or inadvertent, or done intentionally but with an element of good faith, and in these instances a somewhat greater degree of prejudice may be tolerated. In cases of severe prejudice, suppression or other sanctions would be appropriate without regard to the good faith or culpability of the Government. However, in other cases, proper reconciliation of these competing interests requires us to resort to the familiar judicial process of balancing the factors in a given case.[246]

In *Youngblood*, the Supreme Court attempted to draw a bright-line that determined when the loss of potentially exculpatory evidence resulted in a due process violation. Bad faith became the key. But in emphasizing bad faith at the expense of materiality or fairness to the accused, the Court ignored the balancing approach in effect in state and lower federal courts.[247] More than that, the Court disregarded important principles from its own precedent.[248] In *Brady*, the non-disclosure of exculpatory evidence violated due process even though the prosecutor had not acted in bad faith at all.[249] In other cases involving the loss of evidence, the Court had taken into account both materiality and the nature of the government's

246. *Id*.

247. Lembke, *supra* note 4, at 1240–41 ("In the years preceding *Youngblood* virtually no state or federal court held that subjective bad faith on the part of the police was required to find a fundamental fairness violation of the federal or state constitutions; instead, these courts looked to police culpability as only one factor to be considered in assessing whether a due process violation had occurred."); Dinger, *supra* note 4, at 382 ("The majority opinion in *Youngblood v. Arizona* created a rule with no basis in historical or legal precedent.").

248. Illinois v. Fisher, 540 U.S. 544, 549 n.* (2004) (per curiam) (Stevens, J., concurring) ("*Youngblood's* focus on the subjective motivation of the police represents a break with our usual understanding that the presence or absence of constitutional error in suppression of evidence cases depends on the character of the evidence, not the character of the person who withholds it."); 2 JOSHUA DRESSLER & ALAN C. MICHAELS, UNDERSTANDING CRIMINAL PROCEDURE § 7.04, at 151 (4th ed. 2006) ("This result stands in direct contrast to the Court's treatment of exculpatory material in the possession of the police, for which good or bad faith is irrelevant when the prosecution fails to disclose it."); WHITEBREAD & SLOBOGIN, *supra* note 166, at 641 ("While the *Trombetta* Court considered the absence of bad faith relevant, it appeared to put the most stress on the failure of the defendant to prove the evidence destroyed had a unique exculpatory value."); Lembke, *supra* note 4, at 1221 (describing *Youngblood* as "a clear retreat from *Brady v. Maryland* and *United States v. Agurs*, which held police bad faith to be irrelevant to a due process analysis").

249. Brady v. Maryland, 373 U.S. 83, 88 (1963).

conduct.[250] Under *Youngblood*, with respect to potentially exculpatory evidence, the Court would do so no more. An instrumental conception of due process trumped an alternative conception that insisted on adjudicative fairness.

2. Youngblood's Vitality

Not only has *Youngblood* been an influential case, but the Supreme Court has re-affirmed its holding. In *Illinois v. Fisher*,[251] the defendant was arrested for possession of cocaine.[252] Fisher filed a discovery motion and requested that the State's physical evidence be made available to him.[253] He then absconded and was caught more than ten years later. By then, the cocaine had been destroyed pursuant to police procedure. Fisher filed a motion to dismiss based on the State's destruction of evidence.[254] The motion was denied, and he was convicted at trial. The Illinois Court of Appeals reversed, holding that due process required dismissal of the charges because the police, despite acting in good faith and according to established procedures, had destroyed evidence subject to the defendant's discovery request.[255]

The Supreme Court reversed the Illinois Court of Appeals. The existence of a pending discovery request did not eliminate the need to show bad faith on the part of the police. The point of the bad faith requirement was "to 'limi[t] the extent of the police's obligation to preserve evidence to reasonable grounds and confin[e] it to that class of cases where the interests of justice most clearly require it.'"[256] *Youngblood* applied even if the contested evidence provided a defendant's only hope for exoneration and was outcome determinative. The Court explained:

> [T]he applicability of the bad-faith requirement in *Youngblood* depended not on the centrality of the contested evidence to the prosecution's case or the defendant's defense, but on the distinction between "material exculpatory" evidence and "potentially useful" evidence. As we have held, the substance destroyed here was, at

250. *See* California v. Trombetta, 467 U.S. 479 (1984); United States v. Valenzuela-Bernal, 458 U.S. 858 (1982); Killian v. United States, 368 U.S. 231 (1961).
251. 540 U.S. 544 (2004) (per curiam).
252. *Id*. at 545.
253. *Id*.
254. *Id*. at 546.
255. *Id.* at 546–47.
256. *Id*. at 548 (alterations in original) (quoting Arizona v. Youngblood, 488 U.S. 51, 58 (1988)).

best, "potentially useful" evidence, and therefore *Youngblood*'s bad-faith requirement applies.[257]

Justice Stevens concurred in the judgment.[258] He reiterated that "'there may well be cases in which the defendant is unable to prove that the State acted in bad faith but in which the loss or destruction of evidence is nonetheless so critical to the defense as to make a criminal trial fundamentally unfair.'"[259] He also noted that a number of states have rejected the *Youngblood* bad faith standard under state constitutional law.[260] Here, however, the loss of evidence was not so critical to the defense as to render the trial fundamentally unfair.[261] Indeed, Justice Stevens criticized the Court for granting certiorari.[262]

D. A Postscript: The Rest of the Story

No examination of *Youngblood* would be complete without discussing what happened after the Supreme Court's reversal. On remand, an insistent Arizona Court of Appeals found a violation of state due process, which "provide[s] greater protection than its federal counterpart."[263] The semen evidence was "'virtually dispositive of guilt or innocence, and collecting the evidence places only a slight burden upon the state.'"[264] The court concurred with Justice Blackmun "that this type of evidence, which a reasonable police officer should know 'has the potential, if tested, to reveal immutable characteristics of the criminal, and hence to exculpate a defendant charged with the crime,' . . . was not only relevant . . . but in this case there was no comparable evidence available to Youngblood."[265]

A divided Arizona Supreme Court reversed the court of appeals.[266] The state supreme court held that a proper application of the state constitution led to the same result that the Supreme Court had reached under the U.S. Constitution: the failure to preserve potentially exculpatory physical evidence did not violate due process absent bad faith on the part of the

257. *Id.* at 549 (quoting *Youngblood*, 488 U.S. at 57–58) (citations omitted).
258. *Id*. (Stevens, J., concurring in the judgment).
259. *Id*. (quoting *Youngblood*, 488 U.S. at 61).
260. *Id*. at 549 n.*.
261. *Id*. at 549.
262. *Id*. at 550.
263. State v. Youngblood, 790 P.2d 759, 762 (Ariz. Ct. App. 1989), *rev'd*, 844 P.2d 1152 (Ariz. 1993).
264. *Id.* at 763 (quoting Montano v. Superior Court, 719 P.2d 271, 275 (Ariz. 1986)).
265. *Id.* at 764 (quoting Arizona v. Youngblood, 488 U.S. 51, 69 (1988) (Blackmun, J., dissenting)).
266. State v. Youngblood, 844 P.2d 1152, 1158 (Ariz. 1993).

state.[267] "Where the nature of the evidence—exculpatory, inculpatory, or neutral—is unknown, as in these cases, there can be no showing of prejudice in fact. Thus, only a showing of bad faith implicates due process."[268]

The Arizona Supreme Court noted that under *State v. Willits*,[269] when the State "lost, destroyed, or failed to preserve" potentially exculpatory evidence, the trial court should instruct the jury to draw an adverse inference against the State if the jury found the State's explanation for the loss inadequate.[270] Such an instruction had been given in Youngblood's case. "With respect to evidence which might be exculpatory, and where there is no bad faith conduct, the *Willits* rule more than adequately complies with the fundamental fairness component of Arizona due process."[271] Youngblood's conviction was thus reinstated.[272]

Youngblood, who had served three years in prison before being released by the first Arizona Court of Appeals decision and who had remained free as his case wound its way through the courts, was returned to prison for a second time in 1993.[273] Five years later, in 1998, he was released on parole. In 1999, he was charged with failing to register his new address as required by Arizona's sex offender laws.[274]

All along, Youngblood's trial counsel, Carol Wittels, believed in his innocence. In 1999, as a birthday present, she asked her husband, Scott McNamara, who was also an attorney, to represent Youngblood.[275] At McNamara's request, the police tested the rectal swab using new, sophisticated forensic DNA typing. The results exonerated Youngblood; he was released from prison and his conviction vacated.[276] David L.'s

267. *Id.*
268. *Id.* at 1157.
269. 393 P.2d 274 (Ariz. 1964).
270. *Youngblood*, 844 P.2d at 1156.
271. *Id*. at 1156–57.
272. *Id.* at 1158.
273. *See* Innocence Project, Know the Cases: Larry Youngblood, http://www.innocence project.org/Content/303.php (last visited Jan. 9, 2008) [hereinafter Innocence Project, Know the Cases].
274. *Id.*
275. Telephone Interview with Carol Wittels, *supra* note 62. For an interview of Larry Youngblood and Carol Wittels, see *Religion & Ethics Newsweekly: DNA and Fair Trials* (PBS television broadcast June 9, 2006), *available at* http://pbs.org/wnet/religionandethics/week941/ feature.html (last visited Feb. 1, 2008).
276. Innocence Project, Know the Cases, *supra* note 273. *See also* Machelor, *supra* note 42; Whitaker, *supra* note 6. Justice Blackmun's Papers include an August 2000 newspaper article reporting Youngblood's exoneration, Laurie P. Cohen, *DNA Tests Free Man Imprisoned 10 Years: Supreme Court Had Ruled Destruction of Evidence Didn't Prevent Fair Trial*, WALL ST. J., Aug. 10, 2000, at B12, *in Blackmun Papers*, *supra* note 20, Box 512, Folder 10, but the Justice had died a year

identification had been proven wrong to a scientific certainty. The Pima County Attorney apologized to Youngblood and vowed to test DNA in cases in which there was even "an inkling" that a conviction was mistaken.[277]

The DNA profile from the evidence was entered into a national database for convicted offenders, and in early 2001 the police determined that the profile matched that of Walter Calvin Cruise, who was serving a prison sentence in Texas on unrelated charges.[278] Cruise had two prior child sex abuse convictions in Texas.[279] Both cases preceded his assault of David L.[280] Cruise was African-American and was blind in his left eye, which was also misshapen.[281] After being charged in Pima County, Cruise pled guilty to sexual conduct with a minor and was sentenced to twenty-four years of imprisonment.[282] One of the victim's three sisters spoke at the sentencing hearing: "I spent most of my life and wasted most of my life hating Larry Youngblood."[283] Youngblood's lawyer invited him to Cruise's sentencing, but he was too angry to attend.[284]

There were other tragic twists to this case. After the assault, David L. had a troubled youth characterized by problems with the law and substance abuse.[285] According to his mother, she saw a "tremendous change" in him; he went from being "very sweet" to being aggressive and angry.[286] In 1993, David L. was sent to prison for assaulting a girlfriend and attempting to flee the police.[287] In June 1999, he assaulted a former girlfriend.[288] A few weeks before Youngblood was freed, David L. was sentenced to one-and-a-half years in prison. The judge who sentenced him

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earlier in 1999. Library of Congress, *U.S. Supreme Court Justice Harry A. Blackmun (1908–1999): A Selected Bibliography*, *available at* http://www.loc.gov/rr/mss/blackmun/blackmun-ex-bib.html (last visited Nov. 24, 2008).

277. David J. Cieslak, *County Moves to Find Other Cases DNA May Resolve*, TUCSON CITIZEN, Aug. 9, 2000, at 1A.

278. *See* Innocence Project, Know the Cases, *supra* note 273.

279. Teibel, *supra* note 7.

280. Harris County District Clerk, Certificate of Disposition of Walter Calvin Cruise (Sept. 9, 2007) (on file with author). Cruise was charged with aggravated sexual abuse of a child on July 2, 1982, and convicted on May 30, 1984. *Id*. Thus, he assaulted David L. while his Texas case was pending.

281. *Id.*; Teibel, *supra* note 7; Innocence Project, Know the Cases, *supra* note 273.

282. Teibel, *supra* note 7.

283. *Id.*

284. *Id.*

285. Kimble, *supra* note 62.

286. *Id*.

287. *Id.*

288. *Id.*

later exonerated Youngblood.[289] In June 2004 an intoxicated David L. was struck by a train in Tucson and killed.[290]

Youngblood also continued to have troubles. On April 7, 2003, he was arrested for assaulting an employee at a Tucson eatery.[291] While looking for Youngblood, the police mistakenly stopped Professor Julian Kunnie, Director of the University of Arizona's Africana Studies Program.[292] Kunnie, an African-American, had been attending a peace vigil at the Islamic Center of Tucson. He was ordered to get on his knees at gunpoint, handcuffed, and detained for about ten minutes.[293] Youngblood and Kunnie were around the same height but Youngblood was about 50 pounds heavier. Kunnie also had different hair and wore glasses.[294] As for Youngblood, he never received a penny in compensation for his wrongful conviction and died of a drug overdose in July 2007.[295]

II. A CRITICAL RE-EXAMINATION OF *YOUNGBLOOD*

Two decades after *Youngblood* was decided, it is time for a critical re-examination of its holding. There are reasons to question its validity. First, DNA testing was nascent in 1988. Since then, there have been remarkable advances in forensic science. Evidence that might have produced an ambiguous result in the 1980s can now be subjected to far more precise and sensitive testing that has the potential to inculpate or exculpate to a scientific certainty. Second, almost all states and the federal government have enacted innocence protection acts that provide convicted individuals with access to DNA testing.[296] Many of these laws require the preservation of DNA evidence.[297] Third, a number of state courts have rejected *Youngblood*'s bad faith standard in interpreting due process under their

289. *Id.*

290. David L. Autopsy Report, ML 04-0977, at 8 (Pima County, Arizona, June 17, 2004) (on file with author); E-mail from Kathleen Mayer, Special Assistant to the County Attorney, Pima County Attorney's Office, to Norman C. Bay, Associate Professor of Law, University of New Mexico School of Law (Apr. 2, 2008) (on file with author); Telephone Interview with Carol Wittels, *supra* note 62; *Tucson Man, 31, Dies after Being Hit by a Train*, ARIZ. DAILY STAR, June 17, 2004, at B2.

291. L. Anne Newell, *UA Prof: Campus Cops Racist*, ARIZ. DAILY STAR, Apr. 16, 2003, at B1.

292. *Id.*

293. *Id.*

294. *Id.*

295. Larry Youngblood Autopsy Report, ML 07-1362, at 2 (Pima County, Arizona, July 24, 2007) (on file with author); E-mail from Carol Wittels to Norman C. Bay, Associate Professor of Law, University of New Mexico School of Law (Jan. 8, 2008) (on file with author).

296. *See supra* note 15.

297. *See supra* note 16.

constitutions.[298] Finally, *Youngblood* draws a line that may be more blurry than it is bright. Significant disparities characterize the way in which courts have interpreted *Youngblood*, and this has led to incoherence in the law. The one constant, however, has been that bad faith is almost impossible to prove. In combination, those developments undermine *Youngblood*'s bad faith standard as well as its conception of due process.

A. New Science

In 1983, when the crime at issue in *Youngblood* occurred, forensic DNA typing did not exist. Five years later, when the Supreme Court decided the case, DNA testing was still a recent phenomenon. There is a world of difference between the forensic science available then and what is available now. Developments in DNA typing over the past two decades have been nothing short of extraordinary. Indeed, they have been so extraordinary that they raise the question of whether the Supreme Court would have decided the case differently if today's science had been available then.

In contrast to more recent forms of DNA analysis, the types of testing at issue in *Youngblood* were relatively primitive, imprecise, and insensitive. The police criminologist examined the rectal swab but was unable to detect any blood group substances.[299] By the time the criminologist tested the victim's clothing, fourteen months had elapsed and the clothing had not been refrigerated or frozen.[300] The ABO technique failed to obtain blood group substances from semen stains on the boy's clothing. P-30 protein molecule testing of the stains identified a small amount of semen but was inconclusive as to the assailant's identity.[301]

Even under the best of circumstances, the forensic analysis available in 1983 provided limited information. One test could determine whether the perpetrator was a secretor or a non-secretor of genetic markers in certain bodily fluids, such as semen and saliva.[302] In 1926, scientists discovered that blood-type substances were present in bodily fluids other than blood.[303] In general, between 75 percent and 80 percent of the population

298. *See supra* note 17.
299. Arizona v. Youngblood, 488 U.S. 51, 54 (1988).
300. *Id.* at 53–54.
301. *Id.* at 54.
302. *See* State v. Youngblood, 734 P.2d 592, 596 (Ariz. Ct. App. 1986), *rev'd*, 488 U.S. 51.
303. R.E. GAENSSLEN, SOURCEBOOK IN FORENSIC SEROLOGY, IMMUNOLOGY, AND BIOCHEMISTRY 169, 280 (1983).

are secretors.[304] This test has the potential to exculpate (or partially inculpate) the accused depending upon whether or not the sample matches the suspect's status as a secretor or non-secretor.

Another test involved blood typing or the ABO technique.[305] By 1930, blood type differences were used forensically.[306] All humans have O, A, B, or AB type blood.[307] Some blood groups are common; others are uncommon. In general, approximately 40 percent of the population is type A, 14 percent type B, 3 percent type AB, and 43 percent type O.[308] The ABO technique compares the blood type of the accused with that of the perpetrator.[309]

A non-match exculpates the accused. Conversely, a match may be somewhat inculpatory. The usefulness of any match depends upon the frequency of the blood type.[310] Overall, blood typing is not a particularly discriminating forensic test. The FBI has estimated that DNA testing excluded approximately 33 percent of suspects who matched evidence samples based on conventional serology.[311]

Both blood typing and testing for secretor or non-secretor status have another serious drawback: by today's standards they are not sensitive tests. Under the techniques then available, a relatively large amount of genetic material was required, and the material had to be properly preserved.[312] In several important respects, the facts of *Youngblood* expose the limitations of testing for blood type and secretion. First, the trial court denied the State's motion for a blood and saliva sample from Youngblood on the ground that the semen sample was too small to make a valid comparison.[313] Second, Youngblood was later found to be a secretor with blood type A.[314] But tests of the rectal swab and semen-stained clothing

304. 1 PAUL C. GIANNELLI & EDWARD J. IMWINKELRIED, SCIENTIFIC EVIDENCE § 17-8, at 810 (3d ed. 1999).

305. GAENSSLEN, *supra* note 303, at 261.

306. *Id*. at 262.

307. GIANNELLI & IMWINKELRIED, *supra* note 304, § 17-9, at 839; NATIONAL COMM'N ON THE FUTURE OF DNA EVIDENCE, THE FUTURE OF FORENSIC DNA TESTING: PREDICTIONS OF THE RESEARCH AND DEVELOPMENT WORKING GROUP 13 (2000) [hereinafter 2000 NIJ REPORT], *available at* http://www.ncjrs.org/pdffiles1/nij/183697.pdf.

308. GIANNELLI & IMWINKELRIED, *supra* note 304, § 17-9(A), at 839.

309. *Id*. at 810–11.

310. 2000 NIJ REPORT, *supra* note 307, at 13–14.

311. NATIONAL RESEARCH COUNCIL, DNA TECHNOLOGY IN FORENSIC SCIENCE 88 (1992) [hereinafter DNA TECHNOLOGY].

312. 2000 NIJ REPORT, *supra* note 307, at 15 (listing numerous advantages of DNA testing over conventional serology).

313. Arizona v. Youngblood, 488 U.S. 51, 53–54 (1988).

314. State v. Youngblood, 734 P.2d 592, 596 (Ariz. Ct. App. 1986), *rev'd*, 488 U.S. 51.

were unable to detect any blood group substances. Either the perpetrator was a non-secretor, or he was a secretor and the sample was insufficient to determine blood type.[315] The semen stains had deteriorated because of improper storage; this precluded further forensic analysis.[316]

Unlike the majority in *Youngblood*, Justice Blackmun specifically recognized the possibility of advances in forensic science.[317] This weighed in favor of recognizing a due process right to the preservation of evidence: "As technology develops, the potential for this type of evidence to provide conclusive results on any number of questions will increase. . . . The importance of . . . [genetic testing measures] is indisputable, and requiring police to recognize their importance is not unreasonable."[318]

Forensic DNA typing was not developed until 1985, when Dr. Alec Jeffreys, an English scientist, used the technique to exonerate one suspect in the sexual assault and murder of two young girls and to inculpate another.[319] Three years later, in 1988, the same year *Youngblood* was decided, the FBI began testing DNA.[320] That same year, for the first time,[321] a state appellate court upheld the admission of DNA evidence in a criminal case.[322] The crime at issue in *Youngblood* occurred well before the advent of DNA testing, and the Supreme Court decided the case when DNA testing was in its infancy, still embroiled in litigation over its reliability and admissibility.[323]

In the two decades since it was first used, forensic DNA typing has continued to progress. At this point, scientists have developed three generations of tests.[324] The current, dominant generation of technology is the polymerase chain reaction (PCR).[325] This approach analyzes DNA taken from the nucleus of a cell.[326] PCR allows the DNA in a biological sample to be replicated; only a minute amount of DNA is needed and the

315. *Id.*
316. *Id.*
317. *Youngblood*, 488 U.S. at 70–71 (Blackmun, J., dissenting).
318. *Id.* at 70.
319. 2000 NIJ REPORT, *supra* note 307, at 14–15; JOHN M. BUTLER, FORENSIC DNA TYPING 3 (2005).
320. 2000 NIJ REPORT, *supra* note 307, at 15.
321. TERRENCE F. KIELY, FORENSIC SCIENCE: SCIENCE AND THE CRIMINAL LAW 427 (2d ed. 2006).
322. Andrews v. State, 533 So.2d 841, 841 (Fla. App. 1988).
323. *See generally* GIANNELLI & IMWINKELRIED, *supra* note 304, at 48–49 (noting that most early courts were "quite receptive to DNA evidence," but that there were "occasional setbacks").
324. *Id*. at 3.
325. *Id.* at 10, 16.
326. NATIONAL INST. OF JUSTICE, USING DNA TO SOLVE COLD CASES 6 (2002) [hereinafter USING DNA].

sample from which it comes can be highly degraded.[327] Only a few cells are required for reliable results.[328] Usable DNA can be recovered from a myriad of items, including computer keyboards, hats, bandannas, eyeglasses, facial tissue, cotton swabs, dirty laundry, toothpicks, chewing gum, cigarette butts, envelope seals, the mouths of bottles, the rims of glasses, or urine stains.[329]

PCR is usually followed by short tandem repeat (STR) testing, which compares thirteen specific regions, or loci, found on nuclear DNA.[330] The odds that two unrelated individuals will share the same thirteen-loci DNA profile can be as high as one in a billion or more.[331] Thus, PCR-STR analysis is both highly sensitive and discriminating. It is sensitive in that small amounts of biological material can be tested. It is discriminating in that the results of a thirteen-loci comparison generate unique DNA profiles that can establish guilt or innocence to a practical certainty in certain types of cases.[332]

Yet another powerful forensic DNA tool has emerged: mitochondrial DNA (mtDNA) testing. Unlike STR analysis, this technique examines the DNA contained in the mitochondria of a cell, not its nucleus.[333] This is important because some biological material, including hair shafts, bones, and teeth, lack nuclei, but possess mitochondria.[334] In some cases, especially those involving decomposed tissue, only teeth or bones may remain. Mitochondrial DNA testing allows for the study and comparison of DNA in such material.[335] One drawback to mtDNA is that it is not as discriminating as STR.[336] Mitochondrial DNA is passed maternally; consequently, siblings and maternal relatives have the same mtDNA, and the test cannot distinguish among them.[337] Nonetheless, mtDNA provides

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327. *Id.*; *see also* AMERICAN PROSECUTORS RESEARCH INST., FORENSIC DNA FUNDAMENTALS FOR THE PROSECUTOR: BE NOT AFRAID 7–8 (2003).

328. NATIONAL COMM'N ON THE FUTURE OF DNA EVIDENCE, POSTCONVICTION DNA TESTING: RECOMMENDATIONS FOR HANDLING REQUESTS, at xv (1999).

329. *See* USING DNA, *supra* note 326, at 21 exhibit 4; FED. BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, HANDBOOK OF FORENSIC SERVICES 41–43 (Kim Waggoner ed., 2003), *available at* http://www.fbi.gov/hq/lab/handbook/forensics.pdf; Ana Costello, Mercedes Alvarrez & Fernando Verdu, *DNA from a Computer Keyboard*, FORENSIC SCIENCE COMMS., July 2004, *available at* http://www.fbi.gov/hq/lab/fsc/backissu/july2004/case/2004_03_case01.htm.

330. USING DNA, *supra* note 326, at 6.

331. *Id.*

332. Harvey v. Horan, 285 F.3d 298, 305 n.1 (4th Cir. 2002) (Luttig, J., respecting the denial of rehearing en banc).

333. USING DNA, *supra* note 326, at 6.

334. *Id.*

335. *Id.* at 6–7.

336. 2000 NIJ REPORT, *supra* note 307, at 18.

337. BUTLER, *supra* note 319, at 248–49.

a powerful supplement to STR and may allow for analysis when none is otherwise available. Among other things, mtDNA has identified one of the unknown soldiers in the Tomb of the Unknown Soldier in Arlington National Cemetery, the remains of Czar Nicholas II and his family, and the likely offspring of Thomas Jefferson and Sally Heming.[338]

Since 1985, the field of forensic DNA typing has continued to progress.[339] Emerging Y-chromosome analysis focuses on variations in male genetic material; it may prove to be helpful in sexual assault cases involving multiple male perpetrators.[340] Hand-held or portable devices with "labs-on-a-chip" may be developed that allow for rapid DNA testing at a crime scene.[341] Robotic systems are already being used to help process DNA samples.[342] Similarly, computer software compares and interprets STR data.[343] In short, forensic DNA typing will continue to become increasingly automated, faster, cheaper, and more accurate.[344] This, in turn, ought to affect the due process calculus when the state loses or destroys potentially exculpatory evidence. The context in which such problems arise today is entirely different than when *Youngblood* was decided.

B. Legislative Reform

As forensic DNA typing has progressed, a growing number of individuals have been exonerated through post-conviction DNA testing. According to the Innocence Project, such testing has freed more than 200 individuals, all of whom had been convicted of serious crimes.[345] In response to scientific advances, reported exonerations, and a fundamental recognition of the power of DNA testing, almost all states and the federal government have passed innocence protection acts. New York passed the

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338. *Id*. at 250–53; Neil A. Lewis, *Study Finds Strong Evidence Jefferson Fathered Slave Son*, N.Y. TIMES, Jan. 27, 2000, at A14.

339. *See* BUTLER, *supra* note 319, at 10–13.

340. *Id*. at 201–03; 2000 NIJ REPORT, *supra* note 307, at 19; USING DNA, *supra* note 326, at 7.

341. BUTLER, *supra* note 319, at 414.

342. *See id.* at 422.

343. *Id*. at 424–29.

344. *Id*. at 430; *see also Automating the Forensic Analysis of Nuclear DNA: The FBI's Research and Development Initiative*, FORENSIC SCIENCE COMMS., Oct. 2004, *available at* http://www.fbi.gov/hq/lab/fsc/backissu/oct2004/research/2004_10_research04.htm (noting that commercial testing costs as little as $1095); E-mail from Joan Gulliksen, Customer Liaison, Forensics, Orchid Cellmark, to Norman C. Bay, Associate Professor of Law, University of New Mexico School of Law (Sept. 18, 2008) (on file with author) (STR analysis priced at $1095; mtDNA at $2850).

345. Innocence Project Case Profiles, *supra* note 3.

first law in 1994; Illinois followed in 1997.[346] Forty-three states, the District of Columbia, and the federal government now have laws that allow for post-conviction DNA testing under certain circumstances.[347]

In and of themselves, innocence protection acts undermine *Youngblood*'s rationale. They acknowledge the development of forensic science in a way that the Court in *Youngblood* could not. More important, as the phrase "innocence protection" suggests, their overriding concern is fairness to the accused—the protection of innocence, not the punishment of official misconduct.[348] They evince a lingering concern that even though a jury found guilt beyond a reasonable doubt, the possibility remains that the accused has been wrongfully convicted. Moreover, as a matter of logic, the creation of a specific statutory post-conviction right to DNA testing is inconsistent with *Youngblood*'s de minimis pre-conviction protection of potentially exculpatory evidence.[349] Any right afforded by innocence protection acts is undercut if the evidence no longer exists. Put another way, implicit in the right to post-conviction testing is a correlative duty on the state to preserve evidence. Otherwise, without preservation, the statutory right is an illusory one.

Perhaps for that reason, seventeen states with innocence protection acts, along with the District of Columbia and the federal government, impose a "blanket" duty to preserve evidence.[350] Under several statutes, the duty begins before trial.[351] Under other statutes, the duty follows conviction, and the government must preserve all biological evidence until

346. *See* Diana L. Kanon, Note, *Will the Truth Set Them Free? No, But the Lab Might: Statutory Responses to Advancements in DNA Technology*, 44 ARIZ. L. REV. 467, 470–71, 480–81 (2002).

347. *See supra* note 15. There are significant variations among the state statutes. Some only apply to certain types of serious offenses. Under other statutes, evidence must be preserved for as long as the defendant remains incarcerated, for a set period of time after conviction, or during the pendency of post-conviction proceedings. *See* Jones, *supra* note 15, at 1251; Kathy Swedlow, *Don't Believe Everything You Read: A Review of Modern "Post-Conviction" DNA Testing Statutes*, 38 CAL. W. L. REV. 355, 358–60 (2002).

348. *See* Patrick Leahy, *The Innocence Protection Act of 2001*, 29 HOFSTRA L. REV. 1113, 1115 (2001) (describing the purpose of the law as "to protect the innocent and to ensure that if the death penalty is imposed, it is the result of informed and reasoned deliberation, not politics, luck, bias, or guesswork"); Jones, *supra* note 15, at 1248–49 ("[L]egal reform was urgently needed to better protect the rights of prisoners seeking post-conviction exoneration through the use of DNA testing.").

349. *Cf. Developments in the Law*, *supra* note 4, at 1570 ("It is nonsensical to posit a constitutional concern to ensure that the defense be able to test evidence in the prosecution's possession because it might be exculpatory, but not to evince a concern to ensure that the prosecution preserve such evidence in the first place.").

350. *See supra* note 16. Professor Jones characterizes innocence protection acts as imposing a "blanket" duty, "qualified" duty, or no duty to preserve evidence, and this article adopts her classification system. *See* Jones, *supra* note 15, at 1253–56.

351. *See* ARK. CODE ANN. § 12-12-104(a) (2005); 725 ILL. COMP. STAT. 5/116–4(a) (2004); KY. REV. STAT. ANN. § 524.140(2) (West 2006).

the defendant completes his sentence.[352] Under federal law, and the law of a number of jurisdictions, the unlawful destruction of physical evidence is a crime.[353] Fourteen states create a "qualified" duty to preserve evidence that is generally triggered when a defendant files a post-conviction motion for DNA testing.[354] Two states impose a "blanket" duty in capital cases and a "qualified" duty in non-capital cases.[355] In nine states, the statute is silent on the duty to preserve evidence.[356] Two of those states, however, have rejected *Youngblood*'s bad faith standard in interpreting due process under their own constitutions.[357] Only one state's statute explicitly disclaims a duty to preserve evidence.[358]

That so many states now require the preservation of physical evidence is significant. The duty to preserve evidence applies even after the finder of fact has overcome the presumption of innocence and found guilt beyond a reasonable doubt. It is equally significant that states have adopted this measure even though the law in this area is less than clear. Some courts have said that there is no post-conviction federal due process right to access DNA evidence at all.[359] It is also an open question whether

352. Jones, *supra* note 15, at 1255–56.

353. *Id*. at 1258.

354. *Id.* at 1254, 1254 n.75. *See* ARIZ. REV. STAT. ANN. § 13-4240(H) (2004); GA. CODE ANN. § 5-5-41(C)(10) (2004); HAW. REV. STAT. § 884D-122 (2004); IND. CODE § 35-38-7-14(1) (2004); KAN. STAT. ANN. § 21-2512(b)(2) (2003); NEB. REV. STAT. § 29-4120(3)–(4) (2006); NEV. REV. STAT. § 176.0918(3) (2004); N.M. STAT. § 31-1A-2(L) (2004); OHIO REV. CODE ANN. § 2953.71–.81 (West 2005); 42 PA. CONS. STAT. § 9543.1(b)(2) (2004); TENN. CODE. ANN. § 40-30-309 (2004); UTAH CODE ANN. § 78B-9-301 (2005); WASH. REV. CODE § 10.73.170(6) (West 2007); WIS. STAT. § 974.07(5) (2004).

355. LA. CODE CRIM. PROC. ANN. art. 926.1(H)(1)–(5) (2004); VA. CODE ANN. § 19.2-270.4:1(A) (2004).

356. Jones, *supra* note 15, at 1253, 1253 n.73. *See* DEL. CODE ANN. tit. 11, § 4504 (2005); IDAHO CODE ANN. § 19-4902 (2004); MINN. STAT. § 590.01–.06 (2004); N.J. STAT. ANN. §§ 2A:84A-32a (2005); N.Y. CRIM. PROC. LAW § 440.30(1-a)(a) (McKinney 2005); N.D. CENT. CODE § 29.32.1-15 (2004); OR. REV. STAT. § 138.005 (2007); VT. STAT. ANN. tit. 13, § 5566.1; W. VA. CODE § 15-2B-14 (2005).

357. *See* Lolly v. State, 611 A.2d 956 (Del. 1992); State v. Osakalumi, 461 S.E.2d 504 (W.Va. 1995).

358. COLO. REV. STAT. § 18-1-414(3) (2004) (noting that the statute "does not create a duty to preserve biological evidence nor does it create a liability on the part of a law enforcement agency for failing to preserve biological evidence.").

359. *See* Alley v. Key, No. 06-5552, 2006 WL 1313364 (6th Cir. May 16, 2006), *cert. denied*, 126 S. Ct. 2973 (2006); Harvey v. Horan, 278 F.3d 370, 372 (4th Cir. 2002). *But see* Osborne v. Dist. Attorney's Office, 521 F.3d 1118, 1132 (9th Cir. 2008) (recognizing "due process right to post-conviction access to potentially exculpatory DNA evidence"), *cert. granted*, 129 S. Ct. 488 (Nov. 3, 2008) (No. 08-6); Grayson v. King, 460 F.3d 1328, 1340 (11th Cir. 2006) (not recognizing right on facts of case but "not foreclose[ing] the possibility that a § 1983 plaintiff could, under some extraordinary circumstances, be entitled to post-conviction access to biological evidence for the purpose of performing DNA testing"); Harvey v. Horan, 285 F.3d 298, 312 (4th Cir. 2002) (Luttig, J., respecting the denial of rehearing en banc); Wade v. Brady, 460 F. Supp. 2d 226, 244–51 (D. Mass.

Youngblood even applies to the post-conviction destruction of evidence. Some courts have held that it does not;[360] others have reached a contrary result.[361] Regardless, imposing an affirmative statutory duty upon the state to preserve evidence is at odds with the limited protection afforded by *Youngblood*'s bad faith standard.

As a matter of either law or policy, it makes little sense to require the preservation of potentially exculpatory DNA evidence post-conviction, when the presumption of innocence no longer applies, but not pre-conviction, when the accused is presumed innocent and the evidence might help avoid a wrongful conviction from the start. It is illogical not to afford the same protection pre-conviction as is afforded post-conviction. Indeed, the American Bar Association recently passed Criminal Justice Standards on DNA Evidence that declare, "Consistent with the rights of privacy and due process, DNA evidence should be collected, preserved, tested, and used when it may advance the determination of guilt or

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2006) (Gertner, J.) (finding due process right based on *Brady* and meaningful access to court); Godschalk v. Montgomery County Dist. Attorney's Office, 177 F. Supp. 2d 366, 370 (E.D. Pa. 2001); Dabbs v. Vergari, 570 N.Y.S.2d 765, 767–69 (N.Y. Sup. Ct. 1990). For authority recognizing the conflict among the courts of appeals, see Bryson v. Gonzales, 534 F.3d 1282, 1287 (10th Cir. 2008) (noting conflict but declining to resolve issue).

For commentary on this issue, see Kreimer & Rudovsky, *supra* note 140, at 547 (arguing that under the Due Process Clause there is a post-conviction right of access to DNA evidence); David DeFoore, *Postconviction DNA Testing: A Cry for Justice from the Wrongly Convicted*, 33 TEX. TECH L. REV. 491 (2002) (urging legislatures to pass post-conviction laws for DNA testing); Todd E. Jaworsky, *A Defendant's Right to Exculpatory Evidence: Does the Constitutional Duty to Disclose Evidence Extend to New Evidence Discovered Post-Conviction?*, 15 ST. THOMAS L. REV. 245 (2002) (arguing that the prosecutor should have a constitutional duty to disclose post-conviction exculpatory evidence).

360. *See* Tyler v. Purkett, 413 F.3d 696, 703 (8th Cir. 2005) (*Youngblood* does not apply to evidence lost or destroyed after trial); Ferguson v. Roper, 400 F.3d 635 (8th Cir. 2005).

361. *See* Yarris v. County of Delaware, 465 F.3d 129, 142 (3d Cir. 2006) (applying *Youngblood* to post-conviction destruction of evidence and finding prima facie evidence of bad faith so as to deprive officers of qualified immunity in § 1983 claim); *Harvey*, 278 F.3d at 387 (King, J., concurring in part and concurring in the judgment) (adopting *Youngblood* in context of state's denial of post-conviction access to evidence); People v. Barksdale, 762 N.E.2d 669, 683 (Ill. Ct. App. 2001) (applying *Youngblood* to post-conviction destruction of evidence, for "[i]t would be illogical to relieve defendant of the requirement to show bad faith on the part of the State or the police where the evidence was destroyed after a fair trial, as opposed to during the trial"); Commonwealth v. Moss, 689 A.2d 259, 263 (Pa. Super. Ct. 1997) (applying *Youngblood* to post-conviction loss of evidence); Commonwealth v. Robinson, 682 A.2d 831, 837 (Pa. Super. Ct. 1996) (same). In a number of cases, courts have assumed arguendo that *Youngblood* applies to the post-conviction destruction of evidence. *See* Cress v. Palmer, 484 F.3d 844 (6th Cir. 2007) (holding that state court's decision as to lack of bad faith not unreasonable for purposes of habeas claim); Lovitt v. True, 403 F.3d 171, 187 (4th Cir. 2005) (test not met on facts of case); People v. Hobley, 696 N.E.2d 313, 331 (Ill. 1998) (finding prima facie showing of bad faith warranting evidentiary hearing); Thompson v. State, No. E2003-01089-CCA-R3-PC, 2004 WL 911279 (Tenn. Crim. App. Apr. 29, 2004) (defendant cannot meet standard even if it applies); Lovitt v. Worden, 585 S.E.2d 801, 815 (Va. 2003) (same).

innocence."[362] Similarly, a few courts have recognized a post-conviction due process right to access DNA evidence.[363] Overall, those developments are evidence of an evolving norm that, as a matter of fundamental fairness, overrides *Youngblood* even post-conviction in cases involving biological material amenable to forensic DNA typing.

C. State Judicial Disapproval

Quite apart from breakthroughs in forensic DNA typing and in the proliferation of innocence protection acts at the state and federal level, there has been one other significant development in state law. In the decade following *Youngblood*, ten states, either explicitly or implicitly, spurned *Youngblood*'s bad faith standard in interpreting due process under their own constitutions.[364] Accordingly, a clear majority of states—thirty-nine in all—plus the federal government and the District of Columbia, now either reject the bad faith standard under their own constitutions or have passed innocence protection acts that impose either a blanket or qualified post-conviction duty to preserve DNA evidence.

States have rejected *Youngblood* as a matter of state constitutional law for a variety of reasons. First, some states have stressed adjudicative fairness, not instrumentalism, in interpreting due process. A central concern is fairness to the accused: "Fairness dictates that when a person's liberty is at stake, the sole fact of whether the police or another state official acted in good or bad faith in failing to preserve evidence cannot be determinative of whether the criminal defendant has received due process

362. ABA CRIMINAL JUSTICE STANDARDS ON DNA EVIDENCE std. 1.2(a) (2006), *available at* http://www.abanet.org/crimjust/standards/dnaevidence.html.

363. *See supra* note 359.

364. *See supra* note 17; Illinois v. Fisher, 540 U.S. 544, 549 n.* (2004) (Stevens, J., concurring in the judgment) (noting that "a number of state courts have held as a matter of state constitutional law that the loss or destruction of evidence critical to the defense does violate due process, even in the absence of bad faith"); Dinger, *supra* note 4, at 348 ("[T]hirteen [states] have ruled that the defendant need not make an absolute showing of bad faith on the part of the police in order to successfully challenge the destruction or loss of evidence, but that a balancing test should be used to determine whether his or her due process rights have been violated."). Although Dinger identified thirteen states that did not follow *Youngblood*, three of those states—Idaho, Minnesota, and New Mexico—appear to have adopted a bad faith standard. *See* Garcia v. State Tax Comm'n, 38 P.3d 1266, 1271 (Idaho 2002) ("[A] specific showing of bad faith is required to constitute a due process violation."); State v. McDonough, 631 N.W.2d 373, 387 (Minn. 2001) ("[T]o determine whether [the defendant] is entitled to relief based on the state's failure to preserve evidence, we consider whether the destruction was intentional and whether the exculpatory value of the lost or destroyed evidence was apparent and material."); State v. Stills, 957 P.2d 51, 62 (N.M. 1998) ("In the absence of evidence that the State acted in bad faith, failure to preserve potentially exculpatory evidence for future testing is not grounds for excluding relevant, probative testimony regarding that evidence.").

of law."[365] Several state courts have cited to Justice Stevens's concurrence with approval.[366] The defendant should be entitled to protection greater than that afforded by *Youngblood*; even if the state did not act in bad faith, the loss of evidence could render the trial fundamentally unfair.[367]

Second, as a matter of policy, the bad faith rule of *Youngblood* may encourage the destruction of potentially exculpatory evidence. "[E]vidence destroyed becomes merely 'potentially useful' since its contents would be unprovable."[368]

Third, bad faith is extremely difficult to prove. "Short of an admission by the police, it is unlikely that a defendant would ever be able to make the necessary showing to establish the required elements for proving bad faith."[369]

Fourth, *Youngblood* fails to allow consideration of the lost evidence's materiality or its effect on the defendant's case. Negligently lost evidence might "critically prejudice" a defendant.[370] In some jurisdictions, the *Youngblood* test also puts the trial court to an "all-or-nothing" choice: either bad faith is found and the charges dismissed, or it is not found and the defendant is denied a favorable inference.[371]

In place of *Youngblood*'s bad faith standard, states have turned to a multi-factor balancing test that resembles then-Judge Kennedy's approach in *Loud Hawk*.[372] A typical formulation can be found in *Lolly v. State*.[373] There, the Delaware Supreme Court applied a three-pronged balancing test that examines the "type of evidence, the conduct of the police, and the

365. State v. Morales, 657 A.2d 585, 593 (Conn. 1995); *accord* State v. Ferguson, 2 S.W.3d 912, 917 (Tenn. 1999) ("[W]e deem the preservation of the defendant's fundamental right to a fair trial to be a paramount consideration here . . . .").

366. *Morales*, 657 A.2d at 593; *Ex Parte* Gingo, 605 So.2d 1337, 1241 (Ala. 1992) (adopting Stevens's concurrence in *Youngblood*); Thorne v. Dep't of Public Safety, 774 P.2d 1326, 1330 n.9 (Alaska 1989) (same); State v. Okumura, 894 P.2d 80, 99 (Haw. 1995) (same); Commonwealth v. Henderson, 582 N.E.2d 496, 497 (Mass. 1991) (same); State v. Osakalumi, 461 S.E.2d 504, 511 (W. Va. 1995) (same).

367. *See supra* note 366.

368. *Thorne*, 774 P.2d at 1330 n.9.

369. Lolly v. State, 611 A.2d 956, 960 (Del. 1992); *Ferguson*, 2 S.W.3d at 916 ("[P]roving bad faith on the part of the police would be, in the least, extremely difficult.").

370. State v. Delisle, 648 A.2d 632, 643 (Utah 1994). *Ferguson*, 2 S.W.3d at 916 ("[T]he *Youngblood* analysis apparently permits no consideration of the materiality of the missing evidence or its effect on the defendant's case."); *Lolly*, 611 A.2d at 960 ("[T]he focus is on the conduct of the police not the nature of the evidence.").

371. *Lolly*, 611 A.2d at 960.

372. United States v. Loud Hawk, 628 F.2d 1139, 1152 (9th Cir. 1979) (en banc) (Kennedy, J., concurring in the result and writing majority opinion on issue); *see also* Dinger, *supra* note 4, at 356–61 (describing various balancing tests).

373. 611 A.2d 956.

significance of the evidence . . . available at trial."[374] Under this "totality of circumstances approach," the trial court is able to engage in a nuanced balancing process that avoids the all-or-nothing result of *Youngblood* and may impose penalties short of dismissal.[375]

D. Doctrinal Incoherence

Now that two decades have passed since *Youngblood* was decided, it is possible to review how jurisdictions around the United States have interpreted its holding. Such a review reveals that the line it has drawn is less than bright; in fact, as the dissent in *Youngblood* forewarned,[376] it is blurry. Courts have differed on significant aspects of *Youngblood*, including the definition of bad faith, the availability of a missing evidence instruction, the relationship between *Trombetta* and *Youngblood* and whether the lost evidence must be potentially exculpatory or possess apparent exculpatory value, and the remedy for a due process violation. Collectively, those disparities undermine the legal framework established by *Youngblood* and result in a rule of law that defies consistent application in jurisdictions across the United States.

1. The Meaning of Bad Faith

Central to *Youngblood* is the meaning of bad faith. Even on such a fundamental issue, jurisdictions have formulated an assortment of

374. *Id.* at 959.

375. *Id.* at 960. Other courts have adopted a similar multi-factor balancing test. *See* State v. Morales, 657 A.2d 585, 593 (Conn. 1995) (considering "the materiality of the missing evidence, the likelihood of mistaken interpretation of it by witnesses or the jury, the reason for its nonavailability to the defense and the prejudice to the defendant caused by its unavailability"); Commonwealth v. Henderson, 582 N.E.2d 496, 496 (Mass. 1991) ("the judge must consider and balance the degree of culpability of the government, the materiality of the evidence, and the potential prejudice to the defendant"); *Ferguson*, 2 S.W.3d at 917 (articulating three factors, including "[t]he degree of negligence involved," "[t]he significance of the destroyed evidence," and "[t]he sufficiency of the other evidence used at trial to support the conviction"); *Delisle*, 648 A.2d at 642–43 ("[I]f a defendant shows a reasonable probability that the lost evidence would be exculpatory, . . . then the proper sanctions depend 'upon a pragmatic balancing of three factors: (1) the degree of negligence or bad faith on the part of the government; (2) the importance of the evidence lost; and (3) other evidence of guilt adduced at trial.'") (internal citations omitted); State v. Osakalumi, 461 S.E.2d 504, 512 (W. Va. 1995) ("[A] trial court should consider (1) the degree of negligence or bad faith involved; (2) the importance of the missing evidence considering the probative value and reliability of secondary or substitute evidence that remains available; and (3) the sufficiency of the other evidence produced at the trial to sustain the conviction.").

376. Arizona v. Youngblood, 488 U.S. 51, 66 (1988) (Blackmun, J., dissenting) ("[T]he line between 'good faith' and 'bad faith' is anything but bright, and the majority's formulation may well create more questions than it answers.").

definitions. The two most common definitions equate bad faith with knowledge or wrongful intent.[377] Some jurisdictions focus on the Court's statement that bad faith "must necessarily turn on the police's knowledge of the exculpatory value of the evidence at the time it was lost or destroyed."[378] Other jurisdictions equate bad faith with wrongful intent or official animus.[379] The federal courts of appeals are no more consistent than the states; they offer a mix of definitions as well.[380]

In most instances, definitions based on knowledge or intent will reach the same result; a case that satisfies one will often satisfy the other. This is not necessarily so, however, and the use of the terms is imprecise, at least from a Model Penal Code perspective.[381] Knowledge applies to the attendant circumstance (or condition) that the evidence have exculpatory

377. *Id*. at 56 n.*. For examples of jurisdictions that focus on knowledge, see State v. O'Dell, 46 P.3d 1074, 1078 (Ariz. Ct. App. 2002); People v. Frye, 959 P.2d 183, 205 (Cal. 1998); State v. Finley, 42 P.3d 723, 727 (Kan. 2002); State v. Heath, 685 N.W.2d 48, 56 (Minn. Ct. App. 2004); State v. Smith, 157 S.W.3d 687, 691 (Mo. Ct. App. 2004); State v. Castor, 599 N.W.2d 201, 214 (Neb. 1999); State v. Werner, 851 A.2d 1093, 1105 (R.I. 2005); State v. Jackson, 396 S.E.2d 101, 102 (S.C. 1990); State v. Morales, 844 S.W.2d 885, 890 (Tex. Crim. App. 1993); Park v. Commonwealth, 528 S.E.2d 172, 179 (Va. Ct. App. 2000). For examples of jurisdictions that rely on wrongful intent, see Guzman v. State, 868 So.2d 498, 509 (Fla. 2003) ("[B]ad faith exists only when police intentionally destroy evidence they believe would exonerate a defendant."); People v. Gentry, 815 N.E.2d 27, 33 (Ill. Ct. App. 2004) ("'official animus . . . or . . . a conscious effort to suppress exculpatory evidence'"); Collins v. Commonwealth, 951 S.W.2d 569, 573 (Ky. 1997) ("ill motive or intention"); State v. Lindsey, 543 So.2d 886, 891 (La. 1989) ("'official animus . . . or . . . conscious effort to suppress exculpatory evidence'"); Murray v. State, 849 So.2d 1281, 1286 (Miss. 2003) ("'conscious doing of a wrong because of dishonest purpose or moral obliquity'"); State v. Hunt, 483 S.E.2d 417, 421 (N.C. 1997) ("bad faith or willful intent"); State v. Durnwald, 837 N.E.2d 1234, 1241 (Ohio Ct. App. 2005) ("'dishonest purpose, moral obliquity, conscious wrongdoing, breach of a known duty through some ulterior motive or ill will partaking of the nature of fraud'"); State v. Bousum, 663 N.W.2d 257, 263 (S.D. 2003) ("Bad faith . . . means the state deliberately destroyed the evidence with the intent to deprive the defense of information . . . ."); State v. Greenwold, 525 N.W.2d 294, 298 (Wisc. Ct. App. 1994) ("[B]ad faith can only be shown if: (1) the officers were aware of the potentially exculpatory value or usefulness of the evidence they failed to preserve; *and* (2) the officers acted with official animus or made a conscious effort to suppress exculpatory evidence.").

378. *Youngblood*, 488 U.S. at 56 n.*; *see supra* note 377.

379. *See* supra note 377.

380. *Compare* United States v. Bohl, 25 F.3d 904, 911 (10th Cir. 1994) (knowledge of the exculpatory value of the evidence at the time of destruction), *and In re* Sealed Case, 99 F.3d 1175, 1178 (D.C. Cir. 1996) (same), *and* United States v. Femia, 9 F.3d 990, 996 (1st Cir. 1993), *with* United States v. Estrada, 453 F.3d 1208, 1213 (9th Cir. 2006) ("malicious intent"), *and* United States v. Chaparro-Alcantara, 226 F.3d 616, 624 (7th Cir. 2000) (knowledge and "official animus" or a "conscious effort to suppress exculpatory evidence"), *and* United States v. Jobson, 102 F.3d 214, 218 (6th Cir. 1996) (equating "official animus" or "conscious effort to suppress exculpatory evidence" with police's knowledge of the evidence's exculpatory value at the time it was lost or destroyed).

381. *See* MODEL PENAL CODE §§ 2.02(2)(a)(i), (b)(i) (1962) (defining "purposely" with respect to "conduct" as "the conscious object to engage in conduct of that nature or to cause such a result" and "knowingly" with respect to "attendant circumstance" as an awareness that "such circumstances exist").

value;[382] wrongful intent appears to relate to conduct (the act of destroying the evidence).[383] As a result, one may have wrongful intent without having knowledge that lost or destroyed evidence has exculpatory value. Conversely, one may have knowledge that evidence has exculpatory value without intending that it be destroyed.

An even more fundamental problem characterizes the knowledge requirement: it is incongruous and unduly burdensome with respect to evidence that was never tested. It is incongruous in that *Youngblood* addresses the loss of potentially exculpatory evidence but defines bad faith in terms of knowledge of the evidence's exculpatory value.[384] But how can one know the exculpatory value of evidence that was untested? By definition, such evidence is, at most, potentially exculpatory.[385] This, in turn, imposes a formidable burden upon any accused who alleges a *Youngblood* violation. As Justice Blackmun argued in his dissent, the evidence's loss deprives the defendant of the opportunity to establish its constitutional materiality. In short, the state "has 'interfere[d] with the accused's ability to present a defense by imposing on him a requirement which the government's own actions have rendered impossible to fulfill.'"[386] In requiring the accused to prove that the police knew the evidence had exculpatory value, *Youngblood* provides an easy defense to the police whenever evidence remained untested, for in the absence of such testing the police will often lack the requisite knowledge.

Regardless of whether bad faith turns on knowledge or intent, the burden on the defendant is nearly impossible to bear.[387] Here, too, Justice Blackmun anticipated the problem: a defendant would have "inherent difficulty . . . in obtaining evidence to show a lack of good faith."[388]

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382. *Id.* § 1.13(d) ("element of an offense" is defined as conduct, attendant circumstance, or a result of such conduct).

383. *Id.* Of course, under the MPC, one can act "purposely" with respect to an attendant circumstance if one "is aware of the existence of such circumstances or he believes or hopes they exist." *Id.* § 2.02(2)(a)(ii).

384. Arizona v. Youngblood, 488 U.S. 51, 56 n.* (1988) ("The presence or absence of bad faith by the police for purposes of the Due Process Clause must necessarily turn on the police's knowledge of the exculpatory value of the evidence at the time it was lost or destroyed.").

385. *Id.* at 57 ("[W]e think the Due Process Clause requires a different result when we deal with the failure of the State to preserve evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant.").

386. *Id.* at 68–69 (Blackmun, J., dissenting). *See also Recent Developments*, *supra* note 4, at 539 ("In effect, *Youngblood* suggests that no due process violation is conceivable when the nature of the missing evidence is ambiguous.").

387. *See* GORELICK ET AL., *supra* note 19, § 6.8 (describing bad faith standard as "difficult, if not impossible, to meet").

388. *Youngblood*, 488 U.S. at 66 (Blackmun, J., dissenting).

Evidence of bad faith is likely to be within the peculiar control of the police, and an officer unprincipled enough to destroy evidence is unlikely to chronicle his actions.[389] "Short of an admission by the police, it is unlikely that a defendant would ever be able to make the necessary showing to establish the required elements for proving bad faith."[390] Moreover, a number of jurisdictions have held that destroying evidence pursuant to routine procedure is not bad faith.[391] Nor, under the facts of *Youngblood* itself, does mere negligence suffice to establish bad faith.[392] Not surprisingly, perhaps, regardless of whether the test is based on

389. *See The Supreme Court, 1988 Term*, *supra* note 4, at 166.

390. Lolly v. State, 611 A.2d 956, 960 (Del. 1992); *see also* DRESSLER & MICHAELS, *supra* note 8, at 39–40.

> People rarely act of a single mind: conflicting motivations, some proper and others not, often incite action. Even the most truthful officer may be unable to testify with certainty regarding his thought processes on an earlier occasion; and a dishonest officer has a strong incentive to perjure himself if his subjective beliefs will control the admissibility of the evidence. Realistically, a judge, forced to divine a police officer's motivations, is likely to give the officer the benefit of the doubt.

Amsterdam, *supra* note 141, at 436–37 ("[S]urely the catch is not worth the trouble of the hunt when courts set out to bag the secret motivations of policemen. . . . A subjective purpose to do something that the applicable legal rules say there is sufficient objective cause to do can be fabricated all too easily and undetectably."); *Recent Developments*, *supra* note 4, at 539 (noting the "tremendous burden" the bad faith standard imposes on the defendant).

391. *See* United States v. Gomez, 191 F.3d 1214, 1219 (10th Cir. 1999) ("'[D]estruction of evidence in accordance with an established procedure precludes a finding of bad faith absent other compelling evidence.'") (quoting United States v. Deaner, 1 F.3d 192, 202 (3d Cir. 1993)); State v. Casselman, 114 P.3d 150, 154 (Idaho Ct. App. 2005) (finding that police who destroy evidence while acting according to procedure are, at most, negligent); State v. Schexnayder, 685 So.2d 357, 366 (La. Ct. App. 1996) (use of "standard operating procedures" in handling evidence not bad faith); Patterson v. State, 741 A.2d 1119, 1129 (Md. 1999) (following "standard police procedure" not bad faith); State v. Hall, 768 P.2d 349, 350 (Nev. 1989) (no bad faith where chemist saved blood sample "for a reasonable period of time and then disposed of it in accordance with his routine practice and for a legitimate purpose"); State v. Wittenbarger, 880 P.2d 517, 522 (Wash. 1994) ("[C]ompliance with . . . established policy regarding the evidence at issue . . . [is] determinative of good faith.").

Commentators have argued that "[i]n an era of universal use of DNA evidence to both implicate and exonerate criminal suspects, it would be disingenuous for the prosecutor to claim that anything short of a truly accidental loss was not strong evidence of bad faith." Kreimer & Rudovsky, *supra* note 140, at 587; *see also Developments in the Law*, *supra* note 4, at 1567 ("In the contemporary evidentiary context, failure to develop express guidelines for routine preservation and storage of physical evidence should now be taken to indicate bad faith on the part of the state in an attempt to manipulate the pool of available evidence."). This argument may have even greater force in jurisdictions that require the preservation of DNA evidence under innocence protection acts or as a matter of state constitutional law.

392. *See, e.g.*, *Youngblood*, 488 U.S. at 58; *accord* United States v. Iron Eyes, 367 F.3d 781, 786 (8th Cir. 2004) (negligence is not bad faith); United States v. Wright, 260 F.3d 568, 571 (6th Cir. 2001) (gross negligence inadequate to establish bad faith); Land v. State, 802 N.E.2d 45, 51 (Ind. Ct. App. 2004); Collins v. Commonwealth, 951 S.W.2d 569, 573 (Ky. 1997); State v. Thill, 691 N.W.2d 230, 232 (N.D. 2005); State v. Engesser, 661 N.W.2d 739, 756 (S.D. 2003).

knowledge or intent, in the two decades since *Youngblood* was decided, there are few reported cases in which a court has found bad faith.[393]

2. Missing Evidence Instruction

There is another disparity in the law that undermines the overall fairness of the post-*Youngblood* legal regime. States differ in the requirements they impose before allowing a missing evidence instruction to be given. These instructions serve to mitigate the harm occasioned by the loss of evidence. Indeed, for Justice Stevens, the giving of a missing evidence instruction allowed Youngblood to turn to his advantage "the uncertainty as to what the evidence might have proved."[394] That no juror drew such an inference suggested that the lost evidence was immaterial.[395] Nevertheless, an examination of state law reveals that jurisdictions differ over the showing that must be made before the instruction is given. Many, if not most, jurisdictions require a showing of bad faith.[396] Other

393. *See* Pena v. State, 166 S.W.3d 274, 280 (Tex. Crim. App. 2005) (noting paucity of cases in which bad faith has been found), *vacated*, 191 S.W.3d 133 (Tex. Crim. App. 2006); Jones, *supra* note 15, at 1246 ("In the years since Youngblood, the requirement of demonstrating 'bad faith' has proven to be an almost insurmountable burden in establishing a due process violation based on the destruction of evidence."); GORELICK ET AL., *supra* note 19, § 6.8 ("[O]nly a handful of decisions have found that the bad faith standard is met."); Bawden, *supra* note 19 ("[T]here are a very limited number of cases where courts have found the presence of bad faith."). For examples of cases in which bad faith has been found, see United States v. Bohl, 25 F.3d 904, 911–14 (10th Cir. 1994); United States v. Cooper, 983 F.2d 928, 931 (9th Cir. 1993); State v. Blackwell, 537 S.E.2d 457, 463 (Ga. Ct. App. 2000); Stuart v. State, 907 P.2d 783, 793 (Idaho 1995); State v. McGrone, 798 So.2d 519, 523 (Miss. 2001); State v. Durnwald, 837 N.E.2d 1234, 1241–42 (Ohio Ct. App. 2004); State v. Benson, 788 N.E.2d 693, 696 (Ohio Ct. App. 2003); State v. Jordan, 597 N.E.2d 1165, 1169–71 (Ohio Ct. App. 1992); State v. Jackson, 396 S.E.2d 313, 315–16 (S.C. 1990). There are also a few reported cases in which appellate courts have found prima facie evidence of bad faith and remanded for further proceedings. *See* Yarris v. County of Delaware, 465 F.3d 129, 142 (3d Cir. 2006) (applying *Youngblood* to post-conviction destruction of evidence and finding prima facie evidence of bad faith so as to deprive officers of qualified immunity in § 1983 claim); People v. Hobley, 696 N.E.2d 313, 331 (Ill. 1998) (prima facie showing of bad faith so as to warrant evidentiary hearing).

394. *Youngblood*, 488 U.S. at 60 (Stevens, J., concurring in the judgment).

395. *Id.*; *see also Developments in the Law*, *supra* note 4, at 1566 ("*Youngblood* may be read to suggest that instructions of this sort are necessary to avoid a due process violation when potentially useful evidence, such as blood that could be tested for DNA identification, has been destroyed.").

396. For examples of such jurisdictions, see People v. Cooper, 809 P.2d 865, 886 (Cal. 1991) (in absence of bad faith, trial court not required to give missing evidence instruction); State v. Hulbert, 481 N.W.2d 329, 334–35 (Iowa 1992) (in absence of bad faith, failure to give missing evidence instruction not reversible error); Patterson v. State, 741 A.2d 1119, 1128–29 (Md. 1999) ("The *Youngblood* standard logically must extend to the refusal to instruct on the government's failure to preserve evidence."); People v. Davis, 503 N.W.2d 457, 463 (Mich. Ct. App. 1993) (in absence of bad faith, missing evidence instruction not warranted); Murray v. State, 849 So.2d 1281, 1287 (Miss. 2003) (same); State v. Davlin, 639 N.W.2d 631, 649 (Neb. 2002) (missing evidence instruction requires "that the party responsible for the destruction of the evidence did so intentionally and in bad faith"); Ochoa v. State, 963 P.2d 583, 595 (Okla. Crim. App. 1998) ("[I]nstruction may be an

jurisdictions, principally those that reject the bad faith standard as a matter of state constitutional law, allow the instruction to be given under a lesser showing.[397]

In jurisdictions that require a showing of bad faith, the accused faces the same difficulty as he would in trying to establish bad faith under *Youngblood*. The missing evidence instruction is "preclude[d] . . . in nearly every case unless the State actually admits to bad faith destruction."[398] The difficulty of establishing bad faith accordingly has a two-fold effect. Not only will the accused be unable to establish a due process violation for the loss of potentially exculpatory evidence, but he will be unable to obtain a curative instruction as well. In jurisdictions with such an approach, the bad faith standard imposes a double cost upon the accused, or, to put it another way, confers a double benefit upon the police.

3. A More Onerous Test

Yet another disparity in the law adds to the incoherence that characterizes the *Youngblood* regime. Jurisdictions at both the state and federal level are unable to agree on the relationship between *Trombetta* and *Youngblood*, as well as the analytical approach to be used in cases involving lost or destroyed evidence of varying exculpatory value.[399] This

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appropriate sanction where the defense has made a showing of bad faith."); State v. Vanover, 721 A.2d 430, 434 (R.I. 1998) ("[A]bsent a showing of bad faith on the part of the state, a lost evidence instruction is not required each time potentially exculpatory evidence has been lost."); State v. Bousum, 663 N.W.2d 257, 264 (S.D. 2003) ("[A]n adverse inference instruction is justified for the destruction of evidence only where the destruction was intentional and in bad faith."). *See generally* GORELICK ET AL., *supra* note 233, § 2.8 ("The commentators are unanimous in the judgment that some form of intent is a prerequisite to drawing the spoliation inference. Many cases which have considered the issue hold that spoliation requires an intentional act of destruction and that mere negligence is not enough to warrant drawing an adverse inference.").

397. *See* Gurley v. State, 639 So.2d 557, 569 (Ala. Crim. App. 1993) (noting that missing evidence instruction may be given even in absence of bad faith); State v. Lopez, 786 P.2d 959, 964 (Ariz. 1990) ("A *Willits* instruction is appropriate when the state destroys or loses evidence potentially helpful to the defendant."); Hammond v. State, 569 A.2d 81, 89–90 (Del. 1989) (missing evidence instruction should have been given when police negligence resulted in loss of evidence); People v. Camp, 815 N.E.2d 980, 984 (Ill. App. Ct. 2004) (finding adverse inference instruction appropriate for a discovery violation, even though no due process violation found); State v. Barnett, 543 N.W.2d 774, 778 (N.D. 1996) (bad faith or "systemic disregard" of State's duty to preserve evidence); State v. Gibney, 825 A.2d 32, 43–44 (Vt. 2003) (adverse inference instruction given despite lack of bad faith); State v. Paynter, 526 S.E.2d 43, 54 (W.Va. 1999) (upholding cautionary instruction where defendant failed to establish bad faith).

398. State v. Engesser, 661 N.W.2d 739, 761 (S.D. 2003) (Sabers, J., concurring in part and dissenting in part).

399. For commentary on these two different approaches, see Bawden, *supra* note 19, at 346–48 (noting different approaches and arguing that the more onerous one is correct). The Supreme Court has

results in two different understandings of *Youngblood*, one even more onerous than the other.

Some jurisdictions have read *Trombetta* and *Youngblood* as creating separate tests, each of which applies to different types of evidence.[400] In these jurisdictions, *Youngblood* applies if the evidence is potentially exculpatory. The defendant must establish bad faith on the part of the state. In contrast, *Trombetta* applies if the evidence has "apparent exculpatory value" and is otherwise unobtainable; no showing of bad faith is necessary.[401] This approach, in effect, establishes a sliding scale in which the two key variables are bad faith and exculpatory value: the greater or more apparent the exculpatory value, the less the need to establish bad faith.

Other jurisdictions use a single test that appears to conflate the holdings of *Trombetta* and *Youngblood*.[402] This approach reads *Youngblood* as simply adding a bad faith requirement to the standard articulated in *Trombetta*. Consequently, it fails to differentiate between evidence that is potentially exculpatory and evidence that has apparent exculpatory value; the same test applies to both types of evidence and bad faith must be demonstrated. A three-part test results in which the

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reiterated that the suppression of material exculpatory evidence constitutes a due process violation regardless of the prosecutor's good faith. *See* Illinois v. Fisher, 540 U.S. 544, 547 (2004) (per curiam).

400. *See* United States v. Wright, 260 F.3d 568, 572–74 (6th Cir. 2001) (Gilman, J., concurring); United States v. Bohl, 25 F.3d 904, 909–10 (10th Cir. 1994); People v. Farnam, 47 P.3d 988, 1031 (Cal. 2002); People v. Eagen, 892 P.2d 426, 429 (Colo. Ct. App. 1994); People v. Newberry, 652 N.E.2d 288, 291–92 (Ill. 1995); Williams v. State, 50 P.3d 1116, 1126 (Nev. 2002); State v. Benson, 788 N.E.2d 693, 695 (Ohio Ct. App. 2003); State v. Cheeseboro, 552 S.E.2d 300, 307 (S.C. 2001); State v. Parker, 647 N.W.2d 430, 433 (Wis. Ct. App. 2002); Whitney v. State, 99 P.3d 457, 476–77 (Wyo. 2004); *see generally* GORELICK ET AL., *supra* note 19, § 6.8 (listing cases that adopt this approach).

401. *See supra* note 400.

402. For federal cases, see United States. v. Stewart, 388 F.3d 1079, 1085 (7th Cir. 2004); United States v. Martinez-Martinez, 369 F.3d 1076, 1087 (9th Cir. 2004); United States v. Pearl, 324 F.3d 1210, 1215 (10th Cir. 2003); United States v. Newsome, 322 F.3d 328, 334 (4th Cir. 2003); United States v. Dumas, 207 F.3d 11, 15 (1st Cir. 2000); United States v. Thompson, 130 F.3d 676, 686 (5th Cir. 1997); United States v. Jobson, 102 F.3d 214, 218 (6th Cir. 1996); United States v. Chandler, 66 F.3d 1460, 1467 (8th Cir. 1995); *see generally* GORELICK ET AL., *supra* note 19, § 6.8 ("[M]ost courts seem to require the defendant to meet both the *Youngblood* bad faith standard and the *Trombetta* exculpatory value standard.").

For state cases, see Wenzel v. State, 815 S.W.2d 938, 941 (Ark. 1991); Hannah v. State, 599 S.E.2d 177, 180 (Ga. 2004); State v. Kremen, 754 A.2d 964, 968 (Maine 2000); State v. McDonough, 631 N.W.2d 373, 387 (Minn. 2001); Murray v. State, 849 So.2d 1281, 1286 (Miss. 2003); State v. Cox, 879 P.2d 662, 667 (Mont. 1994); State v. Hunt, 483 S.E.2d 417, 421 (N.C. 1997); State v. Werner, 851 A.2d 1093, 1105 (R.I. 2004); State v. Bousum, 663 N.W.2d 257, 262–63 (S.D. 2003); Simmons v. State, 100 S.W.3d 484, 494 (Tex. Crim. App. 2003).

defendant must show (1) the evidence had apparent exculpatory value, (2) was otherwise unobtainable, and (3) bad faith on the part of the state.[403]

Perhaps the differing interpretations of *Youngblood* are no surprise given its ambiguous relationship with *Trombetta*.[404] Be that as it may, as hard as it is to establish bad faith, to require enhanced proof of materiality—that the evidence was not just potentially exculpatory but had apparent exculpatory value and was otherwise unobtainable—only increases the burden upon the accused and serves to screen out what few cases survive the bad faith hurdle.

4. An Unclear Remedy

Jurisdictions have struggled with an additional post-*Youngblood* issue: in the event of a due process violation, what is the remedy? The issue is largely theoretical given the paucity of cases finding bad faith, yet it is important and demonstrates a startling lack of agreement on a basic question. On the facts of *Youngblood* itself, Youngblood sought reversal of his conviction and dismissal of the charges against him.[405] As a result, one approach holds that the only possible remedy under *Youngblood* is dismissal of the charges.[406] Nevertheless, *Trombetta* noted that "when evidence has been destroyed in violation of the Constitution, the court must choose between barring further prosecution or suppressing . . . the State's most probative evidence."[407] Along those lines, other jurisdictions allow for possible sanctions ranging from a missing evidence instruction to the suppression of evidence and dismissal of the indictment.[408]

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403. *See supra* note 402.

404. GORELICK ET AL., *supra* note 19, § 6.8 ("Because the *Youngblood* decision does not explicitly resolve the status of *California v. Trombetta*, the relationship between the two decisions is in some doubt.").

405. Arizona v. Youngblood, 488 U.S. 51, 52 (1988); State v. Youngblood, 734 P.2d 592, 592 (Ariz. Ct. App. 1986), *rev'd*, 488 U.S. 51.

406. *See* State v. Lang, 862 P.2d 235, 245 (Ariz. Ct. App. 1993) (construing *Youngblood* to require dismissal); Lolly v. State, 611 A.2d 956, 960 (Del. 1992) ("[T]he court is left with an all or nothing proposition . . . ."); United States v. Day, 697 A.2d 31, 36 (D.C. 1997) (dismissal the appropriate sanction under *Youngblood*).

407. California v. Trombetta, 467 U.S. 479, 487 (1984).

408. For federal cases, see United States v. Bohl, 25 F.3d 904, 914 (10th Cir. 1994) (citing *Trombetta* for the proposition that the court has the discretion to bar further prosecution or to suppress the most probative evidence); United States v. Cooper, 983 F.2d 928, 932–33 (9th Cir. 1993) (based on the facts of the case, suppression of evidence an inadequate remedy). For state cases, see Stuart v. State, 907 P.2d 783, 793 (Idaho 1995) ("In a criminal case, application of a favorable inference under the spoliation doctrine is the appropriate remedy for a *Youngblood* due process violation."); State v. Rains, 735 N.E.2d 1, 6 (Ohio Ct. App. 1999) (upholding suppression of evidence for due process violation).

III. IN DEFENSE OF *YOUNGBLOOD*

In spite of the critique that can be made of *Youngblood*, there is an argument on its behalf. Bad facts do not always result in bad law; Youngblood's innocence does not mean that the doctrine founded on his conviction is, of necessity, indefensible. This defense stresses an instrumental conception of due process and the costs associated with recognizing a broader duty to preserve evidence. Although developments in state law may have eroded *Youngblood*, for a number of reasons they do not compel its reversal. Moreover, principles of federalism counsel restraint in setting aside *Youngblood*, for states would be required to follow a rule of law interpreting the Due Process Clause. This would pre-empt any experimentation at the state level.

First, even though ten states have rejected *Youngblood*'s bad faith standard in interpreting due process under their constitutions, the fact remains that most states have reached a contrary result. They have adopted *Youngblood* in interpreting due process under their own constitutions.[409] For those states, at least, *Youngblood* has proven to be an acceptable rule of law. If anything, it may be the approach that "has evolved into a baseline for due process."[410]

Second, one might argue that *Youngblood* strikes the appropriate balance between fairness to the accused and society's interest in public safety. This interest includes the need for effective law enforcement and avoiding the imposition of an undue burden upon the state. As Justice Stevens noted, the police surely have an incentive to preserve evidence[411]: "In cases such as this, even without a prophylactic sanction such as dismissal of the indictment, the state has a strong incentive to preserve the evidence."[412] Advances in forensic DNA typing have only increased the power of this incentive.

Third, the bad faith requirement allows sanctions to be imposed in the most egregious cases. In other cases, a defendant who cannot establish bad faith is hardly rendered defenseless. The existing legal regime can mitigate *Youngblood*'s potential harshness.[413] Before trial, the defense may be able

409. *See* Dinger, *supra* note 4, at 343 n.95 (listing state court decisions following *Youngblood*).
410. Clark v. Arizona, 548 U.S. 735, 752 (2006).
411. Arizona v. Youngblood, 488 U.S. 51, 59 (1988) (Stevens, J., concurring in the judgment).
412. *Id.*
413. *See Trombetta*, 467 U.S. at 490 & n.11 (in evaluating due process claim, taking into account availability of cross examination and other procedures that protect accused); Daniels v. Williams, 474 U.S. 327, 339 (1986) (Stevens, J., concurring) ("In a procedural due process claim, it is not the

to seek sanctions under local discovery rules.[414] At trial, through vigorous cross-examination of prosecution witnesses, the presentation of evidence in the defense case, and opening and closing argument, the defense ought to be able to hammer home the significance of lost evidence. A judge might also issue a missing evidence instruction to the jury. In short, zealous advocacy may be enough to create a reasonable doubt that results in an acquittal, even in the absence of a due process violation.

Fourth, *Youngblood*'s bright-line test has the advantage of being easy to apply and minimizes the need for protracted pre-trial evidentiary hearings. If *Youngblood* were overturned, numerous difficult line-drawing issues would arise, the types of issues that Justice Blackmun sought to resolve with his proposed four-part test. Must evidence be preserved in all cases, whatever the crime, or only with respect to more serious crimes? What type of evidence would be covered by the new rule? Would it be DNA evidence or all types of physical evidence? Does the duty to preserve imply a duty to collect evidence at a crime scene?[415] Could police

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deprivation of property or liberty that is unconstitutional; it is the deprivation of property or liberty *without due process of law*—without adequate procedures.").

414. For example, Federal Rule Of Criminal Procedure 16(a)(1)(E) provides that:

> Upon a defendant's request, the government must permit the defendant to inspect and to copy or photograph books, papers, documents, data, photographs, tangible objects, buildings or places, or copies or portions of any of these items, if the item is within the government's possession, custody, or control and: (i) the item is material in preparing the defense; (ii) the government intends to use the item in its case-in-chief at trial; or (iii) the item was obtained from or belongs to the defendant.

FED. R. CRIM. P. 16(a)(1)(E). Rule 16 has been influential at the state level, and many states have adopted discovery rules based on it. 2 NANCY HOLLANDER ET AL., WHARTON'S CRIMINAL PROCEDURE § 12:6 (14th ed. 2005). Many states and the District of Columbia have rules that require the preservation of certain types of evidence. *See* Abdulbaqui v. State, 728 P.2d 1211, 1217 (Alaska Ct. App. 1986); Martinez v. United States, 762 A.2d 931, 934 (D.C. 2000); People v. Newberry, 652 N.E.2d 288, 292 (Ill. 1995); State v. Antwine, 636 P.2d 208, 210 (Kan. Ct. App. 1981); State v. Tanner, 448 N.W.2d 586, 588 (Neb. 1989) State v. Robinson, 488 S.E.2d 174, 180 (N.C. 1997); State v. Steffes, 500 N.W.2d 608, 612 (N.D. 1993); State v. Bousum, 663 N.W.2d 257, 262 (S.D. 2003).

Similarly, the Jencks Act may also provide relief in some cases. 18 U.S.C. § 3500 (2000). The Act requires the government to produce statements of a witness to the defense. Failure to produce the statements may result in sanctions, including striking the witness's testimony or a mistrial. 18 U.S.C. § 3500(d).

The destruction of evidence may also be a crime, but these laws typically require proof of specific intent to obstruct a proceeding. GORELICK ET AL., *supra* note 19, § 5.1. One commentator has suggested that state tampering with evidence laws may apply to the willful destruction of evidence but she discounts the likelihood of prosecution. *See* Jones, *supra* note 15, at 1259–60. In addition, prosecution of the wrongdoer is an option for the state, not a remedy for the accused. *Id*. at 1260.

415. Some courts have already grappled with these questions. *See* Lolly v. State, 611 A.2d 956, 960 (Del. 1992); State v. Ware, 881 P.2d 679, 683–85 (N.M. 1994) (police have no general duty to collect all potential evidence from a crime scene, but "this rule is not absolute"); State v. Steffes, 500 N.W.2d 608, 612 (N.D. 1993) ("Police generally have no duty to collect evidence for the defense.");

negligence in failing to collect evidence at a crime scene give rise to a due process claim? How long would the duty to preserve last? Would due process require the post-conviction preservation of evidence?[416] Those questions may prove increasingly difficult to answer as DNA evidence is successfully collected and tested from an ever greater variety of objects and surfaces.[417]

Whatever the parameters of the rule, creating a broader duty to preserve evidence would undoubtedly impose greater costs upon the police and the courts. At a time of scarce public resources, police departments around the United States would be forced to deal with the expense associated with collecting and storing evidence in a plethora of cases. Judicial resources would also be required. Undoubtedly, setting aside *Youngblood* and adopting a balancing test would spawn litigation that would require courts to determine on an ad hoc basis whether the loss of evidence resulted in a due process violation. Courts would also be pressed to define the parameters of the duty to preserve evidence.

Fifth, one cannot overlook federalism concerns. "[P]reventing and dealing with crime is much more the business of the States than it is of the Federal Government, and . . . we should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual States."[418] Moreover, states can and should be laboratories for experimentation.[419] A reversal of *Youngblood* would create a constitutional rule pre-empting any experimentation at the state level in which states, through statutes and interpretations of their own constitutions, are empowered to afford their citizens different and greater protections than those required by the U.S. Constitution. This pre-emption would be

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March v. State, 859 P.2d 714, 716 (Alaska Ct. App. 1993) ("[T]he due process clause has never required officers to undertake a state-of-the-art investigation of all reported crimes.").

416. *See supra* note 359.

417. Gautam Naik, *The Gene Police*, WALL ST. J., Feb. 23–24, 2008, at A1 (reporting that Britain's Forensic Science Service "can isolate DNA profiles from an object such as a light switch, that has been touched by many people and could contain dozens of different DNA sequences").

418. Patterson v. New York, 432 U.S. 197, 201 (1977). *See also* Clark v. Arizona, 548 U.S. 735, 749 (2006) (noting reluctance "to limit the traditional recognition of a State's capacity to define crimes and defenses"); *Trombetta*, 467 U.S. at 491 (O'Connor, J., concurring) ("Rules concerning preservation of evidence are generally matters of state, not federal constitutional law.").

419. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 307–08 (2d ed. 2002); *see also* Fed. Energy Regulatory Comm'n v. Mississippi, 456 U.S. 742, 788 (1982) (O'Connor, J., dissenting) ("Courts and commentators frequently have recognized that the 50 states serve as laboratories for the development of new social, economic, and political ideas."); New State Ice Co. v. Liebman, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

particularly improvident when there is no clear consensus at the state level that *Youngblood* is inconsistent with prevailing notions of fundamental fairness to the accused. States should retain the option of being able to pass laws that afford enhanced procedural protection to their criminal defendants and that explicitly impose a duty to preserve evidence.

Finally, innocence protection acts do not necessarily undermine *Youngblood*'s rationale. In general, they apply to biological material gathered in connection with the prosecution of certain types of serious crime.[420] In contrast, *Youngblood* extends to all types of evidence and crime. Similarly, innocence protection acts apply post-conviction;[421] *Youngblood* applies pre-conviction. There is arguably a rational basis to distinguish between pre- and post-conviction duties to preserve evidence. The post-conviction duty creates a fail-safe mechanism of sorts to ensure that the wrongfully convicted have recourse. The conviction serves as a screening device to determine, when, as a statutory matter, the duty to preserve is triggered. A broader duty—one that applies to all evidence collected after the commission of a crime—would impose far greater costs on the state and place an undue burden on the police.

IV. RESOLUTION: APPLICATION OF THE *CASEY* FACTORS

On balance, despite the arguments in defense of *Youngblood*, subsequent developments have so eroded its essential rationale that it no longer merits stare decisis effect. In *Planned Parenthood v. Casey*, the Supreme Court noted that "the rule of stare decisis is not an 'inexorable command,' and certainly it is not such in every constitutional case."[422] The Court discussed five factors to consider in determining whether precedent should be set aside: (1) whether the rule has proven to be "unworkable";[423] (2) whether the rule can be changed without "serious inequity to those who have relied upon it or significant damage to the stability of the society governed by it";[424] (3) whether there have been changes in the law since the case was decided that have rendered the rule a "doctrinal anachronism

420. For examples of laws that apply to non-biological evidence, see ARK. CODE ANN. § 12-12-104(a) (2005) ("any physical evidence"); 725 ILL. COMP. STAT. 5/116-4(a) (2004) ("any physical evidence . . . likely to contain forensic evidence, including but not limited to, fingerprints or biological material"). It is important to note that "the vast majority of criminal cases lack . . . biological evidence." Garrett, *supra* note 3, at 116.

421. *See supra* note 351 for exceptions to this general rule.

422. 505 U.S. 833, 854 (1992) (quoting Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 405–11 (1932) (Brandeis, J., dissenting)).

423. *Id.* at 855.

424. *Id.*

discounted by society";[425] (4) whether the factual premises for the decision "have so far changed . . . as to render its central holding somehow irrelevant or unjustifiable in dealing with the issue it addressed";[426] and (5) whether setting aside the precedent would call into question the Court's legitimacy.[427] An application of those factors demonstrates that *Youngblood* ought to be overruled.

A. Factual Change

A powerful argument in favor of setting aside *Youngblood* arises from factual changes—advances in forensic science—that have occurred in the twenty years since *Youngblood* was decided. The advances have been nothing short of extraordinary. They render *Youngblood*'s central holding "unjustifiable in dealing with the issue it addressed."[428] On the facts of *Youngblood*, given the science of the time, there was a chance that prompt testing might have exculpated Youngblood, but there was also a significant chance, even under the best of circumstances, that it would not. Issuing a missing evidence instruction to counteract the loss of evidence that was, perhaps, inconclusive may have seemed an acceptable bargain at the time. But unlike two decades ago, we know today that the semen samples could exculpate the accused to a scientific certainty. Thus, the due process calculus must change.

Scientific advances affect the analysis in other ways as well. In 1988, when *Youngblood* was decided, forensic DNA typing was in its early stages. The Court could only speculate as to its reach.[429] DNA testing was time-consuming and costly.[430] The first generation DNA test—multi locus restriction fragment length polymorphism—is no longer used.[431] Unlike the visual comparisons used in the past, matches are now based on computerized analysis.[432] Samples once too degraded to be tested can now

425. *Id.*
426. *Id.*
427. *Id*. at 865–69.
428. *Id*. at 855.
429. Arizona v. Youngblood, 488 U.S. 51, 70 (1988) (Blackmun, J., dissenting) (noting "the potential for this type of evidence"). At oral argument, Youngblood's counsel also alluded to advances in forensic testing that made the testing conclusive in a way it was not in the past. *See* Transcript of Respondent's Oral Argument, *supra* note 73.
430. BUTLER, *supra* note 319, at 11 ("[T]he ability of laboratories to perform DNA typing methods has improved dramatically along a similar timeline [as personal computers] due to rapid progress in the areas of biology, technology, and understanding of genetic theories.").
431. GIANNELLI & IMWINKELRIED, *supra* note 304, at 10.
432. *Id*. at 29–30.

be analyzed, and far smaller amounts of biological material are needed.[433] As demonstrated by the facts of *Youngblood*, a swab that could not be reliably tested in 1984 resulted in exoneration in 2000 and the actual perpetrator's conviction. Moreover, although it is true that *Youngblood* applies to all types of evidence, and not just to DNA evidence, the development of forensic DNA typing poses the greatest challenge to its legitimacy.

B. Legal Change

Judicial and legislative changes in the law also militate against *Youngblood*. Arguably, it has become a "doctrinal anachronism," undercut by significant changes in state and federal law. We now have the benefit of two decades worth of post-*Youngblood* law. Ten states have rejected *Youngblood*'s bad faith standard in interpreting due process under their constitutions. Almost all states and the federal government have passed innocence protection acts, which explicitly recognize the power of DNA testing to right wrongful convictions and to bring about more just and reliable results. What matters is fairness to the accused, not an officer's subjective state of mind in losing evidence. Thirty-three states, the federal government, and the District of Columbia require the preservation of evidence either upon conviction or upon the defendant's motion.[434] This represents an implicit repudiation of *Youngblood* in a post-conviction context. Under *Youngblood*, if states need not preserve evidence pre-conviction, they surely need not preserve it post-conviction when the presumption of innocence has been cast aside. The overwhelming passage of innocence protection acts may fairly be viewed as an evolving norm of due process that erodes *Youngblood*'s rationale.[435]

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433. BUTLER, *supra* note 319, at 80.

434. *See supra* notes 16, 354–55.

435. *See* Cooper v. Oklahoma, 517 U.S. 348, 360 (1996) (Oklahoma's presumption of competency unless defendant proved otherwise by clear and convincing evidence violated due process, in part because it was inconsistent with "[c]ontemporary practice"); Israel, *supra* note 198, at 361–67 (describing Supreme Court precedent that views due process as an "evolving concept"), *Id.* at 413–16 (considering contemporary practice and consensus). Beyond the scope of this Article is whether the more demanding fundamental fairness approach of *Medina v. California*, 505 U.S. 437 (1992), or the balancing approach of *Mathews v. Eldridge*, 424 U.S. 319 (1976), should be applied to determine the requirements of due process. With respect to post-conviction access to DNA evidence, some courts have applied the *Mathews* standard. *See* McKithen v. Brown, 481 F.3d 89, 106–07 (2d Cir. 2007) (remand to district court based on application of *Mathews*); Grayson v. King, 460 F.3d 1328, 1340–41 (11th Cir. 2006) (finding no due process right under a *Mathews* balancing); Harvey v. Horan, 285 F.3d 298, 315 n.6 (4th Cir. 2002) (Luttig, J., respecting the denial of rehearing en banc) (arguing that

C. Unworkability

If *Youngblood* is not "unworkable" per se, at a minimum, it is deeply flawed. First, *Youngblood* has the wrong focus. As between competing visions of due process, an instrumental focus on deterring official misconduct should not be allowed to trump adjudicative fairness. There is a place for both visions, but the paramount concern of the Due Process Clause must be on ensuring fairness to the accused through reliable fact finding that protects the innocent from wrongful conviction.[436] *Youngblood*, in contrast, focuses exclusively on an officer's subjective state of mind. The presence or absence of bad faith is dispositive; prejudice to the accused is disregarded, even if the evidence could have led to his exoneration.[437] The harm to the accused is the same regardless of the officer's state of mind.[438] *Youngblood*'s cramped view of due process cannot stand if requiring the preservation of evidence is viewed as a matter of ensuring fairness to the accused instead of preventing police misconduct.

Second, *Youngblood* fails to satisfy even its instrumental rationale; it overestimates its benefits and underestimates its costs. On the one hand, *Youngblood* provides little prophylactic value in deterring police misconduct. In a sense, it works too well; it prevents courts from granting relief to the accused. It is almost impossible to establish bad faith, and there are few reported cases in which a due process violation has been found. On the other hand, *Youngblood* imposes significant costs. Its overly deferential standard may encourage sloppy police work, for there are no

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Mathews applies but reaching same result under *Medina* to recognize right to post-conviction access to DNA evidence).

436. Kreimer & Rudovsky, *supra* note 140, at 588–89 ("The central and common ground for declaring certain rights fundamental under the Due Process Clause is the protection those rights provide against conviction of innocent persons."); *The Supreme Court, 1988 Term*, *supra* note 4, at 165 ("[T]he Court's precedents emphasize that bad faith is wholly irrelevant to the defendant's right to a fair trial."); Lembke, *supra* note 4, at 1238 (in this area of the law, "fairness to the defendant is the primary concern"); *Recent Developments*, *supra* note 4, at 529 ("*Youngblood*'s bad faith test bypasses the constitutionally required task of assessing the harm to the defendant when law enforcement officials act negligently.").

437. *See* Arizona v. Youngblood, 488 U.S. 51, 58 (1988) ("[U]nless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law.").

438. *See* Daniels v. Williams, 474 U.S. 327, 341 (1986) (Stevens, J., concurring) ("'Deprivation' . . . identifies, not the actor's state of mind, but the victim's infringement or loss. The harm to . . . [an individual] is the same whether . . . [the official acts] negligently, recklessly, or intentionally . . . . In each instance, the . . . [individual] is losing—being 'deprived' of—an aspect of liberty as the result, in part, of a form of state action."); Lembke, *supra* note 4, at 1238 (arguing that "fairness to the defendant is the primary concern," not deterrence of police misconduct).

due process consequences when the police lose potentially exculpatory evidence in a negligent or reckless manner.[439] This unremediated loss of evidence, in turn, undermines the reliability of the fact-finding process, as well as public confidence in adjudications of guilt. To the extent that *Youngblood* leads to wrongful conviction, it exacts a terrible double cost. One cost is to the individual wrongfully convicted. Another cost is to society, for the actual perpetrator remains at large, as happened in *Youngblood* itself.[440]

Third, an examination of two decades worth of post-*Youngblood* case law reveals startling inconsistencies in its interpretation by courts across the United States. Substantial disparities exist on a number of fundamental issues, including the meaning of bad faith, whether evidence need only be potentially exculpatory or possess apparent exculpatory value, and what remedy follows a due process violation.

Fourth, *Youngblood* is simply too categorical in its approach. It fails to differentiate between the seriousness of charges facing an accused and the nature of the potentially exculpatory evidence.[441] The bad faith standard fails to distinguish between a misdemeanor drunk driving charge or a capital case; it applies equally to both cases in spite of the disparity in potential punishment. Nor does *Youngblood* adequately differentiate among types of evidence; not all evidence has the same value or power to inculpate or exculpate to a scientific certainty. Few forms of forensic testing are as precise as DNA typing. For that matter, in focusing on bad faith alone, *Youngblood* fails to allow for developments in forensic science that may enhance the probative value of certain types of evidence.

Fifth, that other potential remedies may be available to the accused—including discovery sanctions, argument to the jury, cross-examination, and a missing evidence instruction—is insufficient. *Youngblood* should stand or fall on its own. Its merit is at issue, not whether its severity or shortcoming can be mitigated by the happenstance of other rules. Moreover, depending on the facts of the case and the laws of a particular

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439. *See* Pena v. State, 166 S.W.3d 274, 281 (Tex. App. 2005), *vacated*, 191 S.W.3d 133 (Tex. Crim. App. 2006) (theorizing that "the *Youngblood* standard may have contributed to the negligent actions of . . . [several Texas] crime labs"); *Developments in the Law*, *supra* note 4, at 1571 (noting "incentives for the state to destroy or avoid preserving physical evidence").

440. *See* Lembke, *supra* note 4, at 1239–40 ("[E]ncouraging police to take great care in preserving potentially exculpatory evidence has a tremendous payoff for innocent defendants at the margin who have no other way to prove their innocence. In addition, society benefits because governmental resources are not expended on the imprisonment of an innocent defendant.").

441. *Cf. The Supreme Court, 1988 Term*, *supra* note 4, at 164–65 (arguing that bad faith standard is underinclusive and overinclusive).

jurisdiction, other potential remedies for the loss of evidence may be illusory. Discovery sanctions may not be available;[442] presumably, this explains why many of the reported cases involving *Youngblood* claims only raise a due process challenge. Many jurisdictions require a showing of bad faith before a missing evidence instruction can be granted. Cross examination and jury argument may not cure the extent of the prejudice suffered by the accused. Indeed, in *Youngblood*, those measures plus a missing evidence instruction were insufficient to safeguard Youngblood's liberty. When a heinous crime is charged, the jury may unduly discount the loss of evidence against the seriousness of the charges out of fear of letting a monster go free.[443]

Finally, *Youngblood* may detract from the law's normative message. Rules of law send such messages, especially, perhaps, when the rule is based on a Supreme Court decision that interprets the Due Process

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442. It is beyond the scope of this Article to explore fully the relationship between discovery rules and *Youngblood*. The Jencks Act, for example, only applies to "statements" by a witness. 18 U.S.C. § 3500 (2000). Nor does Rule 16 on its face create a general, undifferentiated duty to preserve all evidence in a case. Under Rule 16(a), the defendant has the ability to inspect, copy, or photograph evidence "material" to the preparation of the defense. FED. R. CRIM. P. 16(a)(1)(D)(i). To do this, however, the defendant must first make "a request," and the evidence must be in the "possession, custody, or control of the government." *Id. See also* United States v. Armstrong, 517 U.S. 456, 461–63 (1996). Lower federal courts have interpreted this to mean that the defendant must first make a specific prima facie showing of materiality—i.e., that the evidence is helpful to the defense. *See* United States v. Jordan, 316 F.3d 1215, 1230–31 (11th Cir. 2003); United States v. Olano, 62 F.3d 1180, 1203 (9th Cir. 1995); United States v. Vue, 13 F.3d 1206, 1208 (8th Cir. 1994); United States v. Thompson, 944 F.2d 1331, 1341 (7th Cir. 1991); *see generally* 25 JAMES W. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 616.05[1][b] (3d ed. 2007). One court has held that Rule 16 does not apply to evidence destroyed prior to indictment, for it is no longer in the possession, custody, or control of the government. *See* United States v. Gomez, 191 F.3d 1214, 1218 (10th Cir. 1999). A defense request under Rule 16 also triggers a reciprocal discovery obligation "upon government request." FED. R. CRIM. P. 16(b)(1). In some jurisdictions, state courts have conflated *Youngblood* with the applicable discovery rule so that the defendant must show that the police acted in bad faith in destroying evidence to establish a violation of the rule. *See* State v. Robinson, 488 S.E.2d 174, 180–81 (N.C. 1997) (applying bad faith standard to determine if state discovery rule violated by loss of evidence); State v. Bousum, 663 N.W.2d 257, 262 (S.D. 2003) (same).

443. For an illustration of this point, see State v. Fain, 774 P.2d 252 (Idaho 1989). In *Fain*, the defendant was charged with kidnapping, molesting, and killing a nine-year-old child. *Id*. at 254. The state failed to preserve swabs of the victim's body, and the defendant moved to dismiss charges. *Id*. at 257–59. The trial court denied the motion. *Id*. at 259. Fain was subsequently convicted and sentenced to death. *Id*. at 254. The Idaho Supreme Court upheld the conviction, applying a balancing test to hold that no due process violation had occurred. *Id*. at 266–67. After spending seventeen years on death row, Fain was exonerated when DNA evidence showed that someone else had committed the crime. Betsy Z. Russell, *Panel Backs Bill to Restore Death Penalty*, SPOKESMAN REVIEW, Jan. 18, 2003, at A1. *Cf.* House v. Bell, 126 S.Ct. 2064, 2079 (2006) ("Law and society, as they ought to do, demand accountability when a sexual offense has been committed . . . ."); Frank v. Mangum, 237 U.S. 309, 349 (1915) (Holmes, J., dissenting) ("Any judge who has sat with juries knows that in spite of forms they are extremely likely to be impregnated by the environing atmosphere.").

Clause.[444] What message is sent when the accused has no claim for relief for the loss or destruction of potentially exculpatory evidence? Or, to put it another way, why privilege the police over the accused in the name of due process, which, after all, is supposed to represent fundamental fairness?[445] An inconsistency has developed in the law's message. *Youngblood* has the practical effect of shielding police conduct in the absence of bad faith; innocence protection acts seek to free the wrongfully convicted even if the police acted in good faith. Many of those laws also require the post-conviction preservation of evidence, a requirement not imposed pre-conviction under *Youngblood* when the evidence might help prevent a wrongful conviction in the first instance. Indeed, to the extent *Youngblood* fails to ensure the preservation of evidence, it undercuts the very purpose of the innocence protection acts, which is to afford access to biological material for post-conviction DNA testing.

D. Detrimental Reliance

Nor has there been such reliance on *Youngblood* that the cost of its repudiation would be excessive. *Youngblood*, after all, is not deeply rooted in American jurisprudence. Rather, it was an innovation of the Rehnquist Court that trumped the law prevailing in most jurisdictions (including the federal courts of appeals), which used a multi-factor balancing test to determine if the loss of evidence resulted in a due process violation.[446] In cases involving the constitutional right of access to evidence, *Youngblood* also shifted the focus from fairness to the accused, to an exclusive examination of the officer's subjective intent. This, too, broke with precedent.[447]

Moreover, to the extent police already have an incentive to preserve evidence, a reversal of *Youngblood* would impose little additional burden upon them. In states that have rejected *Youngblood*'s bad faith standard as a matter of state constitutional law, the police are already required to preserve evidence.[448] Most innocence protection acts require the post-

444. *See* Anthony G. Amsterdam, *The Supreme Court and the Rights of Suspects in Criminal Cases*, 45 N.Y.U. L. REV. 785, 786 (1970) (noting the power of Supreme Court pronouncements "to shake the assembled faithful with awful tremors of exultation and loathing").

445. *See Bell*, 126 S. Ct. at 2732; Cooper v. Oklahoma, 517 U.S. 348, 355 (1996); Patterson v. New York, 432 U.S. 197, 201–02 (1977).

446. *See supra* note 232.

447. *See* California v. Trombetta, 467 U.S. 479 (1984); United States v. Agurs, 427 U.S. 97 (1976); Brady v. Maryland, 373 U.S. 83 (1963).

448. *See supra* note 17.

conviction preservation of DNA evidence. Even in states that follow *Youngblood*, advances in forensic science, as well as the law of spoliation and various discovery rules, create a general incentive for the police to preserve physical evidence. A reversal of *Youngblood* would only strengthen pre-existing incentives. In short, a return to the pre-*Youngblood* legal regime would not impose a "special hardship" or "add inequity to the cost of repudiation."[449]

Federalism concerns should not preclude a reversal of *Youngblood*. In deciding *Youngblood*, the Court, in effect, imposed its view of due process on the states. Many states follow the lead of the Supreme Court in interpreting due process under their own constitutions.[450] *Youngblood* supplanted the balancing test used in many states, and a reversal of *Youngblood* would presumably allow a return to the status quo ante. There must also be limits to the deference shown states in matters of criminal law or to the desire to allow states to serve as laboratories for experimentation.[451] Otherwise, state laws could never be found unconstitutional; the Bill of Rights would not have been incorporated through the Due Process Clause of the Fourteenth Amendment to apply to

449. Planned Parenthood v. Casey, 505 U.S. 833, 854 (1992).

450. 1 WAYNE LAFAVE ET AL., CRIMINAL PROCEDURE § 2.11, at 715 (1999) ("[W]hen state courts turned to their state constitutions, the vast majority of the rulings (by a 2–1 ratio) read the state guarantee as imposing the same standard as the Supreme Court had adopted under a counterpart federal guarantee.") (citing BARRY LATZER, STATE CONSTITUTIONAL CRIMINAL LAW 160–61 (1995)); Barry Latzer, *The Hidden Conservatism of the State Court "Revolution"*, 74 JUDICATURE 190, 194 (1991) ("[A]doptionism is the dominant feature of state constitutional law."). For specific examples of states following the Supreme Court's view of due process in interpreting state constitutions, see Stoker v. State, 692 N.E.2d 1386, 1390 (Ind. Ct. App. 1998) ("[T]he Indiana Due Course of Law requirement is analogous to the Due Process Clause of the Fourteenth Amendment.") (internal quotations omitted); State v. Finley, 42 P.3d 723, 728 (Kan. 2002) ("The constitutional rights granted an accused under our state constitution are coextensive with those rights granted an accused under the United States Constitution."); State v. Anderson, 724 A.2d 1231, 1234 (Me. 1999) ("This Court has held repeatedly that due process under the Maine Constitution provides no greater protection to individuals than does due process under the United States Constitution."); State v. Davlin, 639 N.W.2d 631, 647 (Neb. 2002) ("Because the due process requirements of Nebraska's Constitution are similar to those of the federal Constitution, we apply the same analysis to . . . [the] state and federal constitutional claims."). Other states have adopted *Youngblood* in interpreting the due process provisions of their own constitutions. *See* State v. Youngblood, 844 P.2d 1152, 1157–58 (Ariz. 1993); People v. Pecoraro, 677 N.E.2d 875, 887 (Ill. 1997); State v. Vanover, 721 A.2d 430, 433 (R.I. 1998); State v. Wittenbarger, 880 P.2d 517, 524 (Wash. 1994). At least one state does not have a due process provision in its constitution and, as a result, relies upon *Youngblood*'s view of the U.S. Constitution's Due Process Clause. *See* State v. Zinsli, 966 P.2d 1200, 1202 n.1 (Or. Ct. App. 1998). In other areas of constitutional criminal procedure, state courts have abandoned their precedent to follow the lead of the Supreme Court. *See* Ronald F. Wright, *How the Supreme Court Delivers Fire and Ice to State Criminal Justice*, 59 WASH. & LEE L. REV. 1429, 1447 (2002) ("[T]he Rehnquist Court's decisions sometimes have the effect of ice. They chill growth and movement in the states.").

451. *See* Kreimer & Rudovsky, *supra* note 140, at 612 ("[T]he freedom of states to structure their criminal processes is not unbounded.").

the states.[452] Constitutional criminal procedure would be frozen in place, even when a state's practice was unsound and unfair. Indeed, in an Eighth Amendment context, the Supreme Court has acknowledged that an evolving consensus in state law may require a change in federal constitutional law.[453] The same is true for the Due Process Clause.[454]

E. Court's Legitimacy

This is not a case in which a reversal of precedent would call into question the Supreme Court's legitimacy. The Court in no sense is "under fire" for its decision in *Youngblood*.[455] Nor could anyone accuse the Court of "surrender[ing] to political pressure."[456] In fact, because of developments in forensic science not available when *Youngblood* was decided, as well as concurrent developments in state law that reject *Youngblood* on the one hand and enact innocence protection acts on the other, a decision to set aside *Youngblood* could hardly be viewed as unprincipled. On the contrary, doing so would be consistent with the Court's recognition that stare decisis is not an "inexorable command"[457] and would demonstrate fidelity to one of the most basic constitutional principles of all: due process of law.

In reversing *Youngblood*, the Court need not strain to find an alternative. One option would be Justice Stevens's conclusion that even in the absence of bad faith the loss or destruction of evidence may be "so critical to the defense as to make a criminal trial fundamentally unfair."[458]

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452. All but five provisions of the Bill of Rights have been incorporated through the due process clause of the Fourteenth Amendment so as to apply to the states: (1) the Second Amendment "right to bear arms"; (2) the Third Amendment right not to have soldiers quartered in one's home; (3) the Fifth Amendment right to grand jury indictment in criminal cases; (4) the Seventh Amendment right to jury trial in civil cases; and (5) the Eighth Amendment prohibition of excessive fines. CHEMERINSKY, *supra* note 419, at 504–05.

453. *See* Roper v. Simmons, 543 U.S. 551, 564–68 (2005) (Eighth Amendment prohibits execution of juveniles); Atkins v. Virginia, 536 U.S. 304, 314–16 (2002) (Eighth Amendment prohibits execution of individuals with mental retardation).

454. *See* Clark v. Arizona, 126 S. Ct. 2709, 2719–22 (2006) (rejecting challenge to state law based on examination of common law and state statutes for "no particular formulation has evolved into a baseline for due process"); Cooper v. Oklahoma, 517 U.S. 348, 360–61 (1996) (striking down state law as violating Due Process Clause, because it was contrary to common law practice and followed by only four States); *see generally* LAFAVE ET AL., *supra* note 449, § 2.7(b) ("Where a very strong contemporary consensus rejects a procedure (i.e., where all but a few states reject it), and that rejection follows a position well established at common law, that consensus will contribute significantly to the case against the procedure.").

455. Planned Parenthood v. Casey, 505 U.S. 833, 867 (1992).

456. *Id.*

457. *Id.* at 854.

458. Arizona v. Youngblood, 488 U.S. 51, 61 (1988) (Stevens, J., concurring in the judgment).

This approach fashions a safety net of sorts but leaves for another day the development of standards to determine when the loss or destruction of evidence renders a trial unfair.

Another possibility would be Justice Blackmun's proposal, which cabins the duty to preserve to cases in which the evidence (1) is "clearly relevant," (2) embodies an "immutable characteristic of the assailant," and (3) is of a type "likely to be independently exculpatory."[459] This approach takes into account the burden on the police in preserving evidence.[460] While it has the virtue of abandoning the bad faith requirement and of being tailored to cover advances in forensic DNA typing, the duty it creates may be too narrow insofar as the evidence protected must embody an immutable characteristic of the accused. This approach appears to be limited to DNA evidence and other unique physical identifiers. Depending on the circumstances of the case, some evidence may be exculpatory without reflecting such a trait.

Perhaps, then, the most reasonable approach of all would simply return to the multi-factor balancing test commonly used by state and federal courts before *Youngblood*. Then-Judge Kennedy's approach in *Loud Hawk* is as sound as any in that it balances "the quality of the Government's conduct and the degree of prejudice to the accused."[461] Indeed, courts are well suited for such inquiries, as they are called upon to engage in a similar type of balancing in deciding whether to impose sanctions for discovery violations under Rule 16.[462] Under this approach, courts would also have the discretion to fashion the appropriate remedy given the circumstances of the case; dismissal would not be the only possibility.

CONCLUSION

Two decades ago the Supreme Court decided *Arizona v. Youngblood*. The presence or absence of bad faith became dispositive in determining whether the loss of potentially exculpatory evidence violated due process.

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459. *Id*. at 70 (Blackmun, J., dissenting).

460. *Id.* at 71.

461. United States v. Loud Hawk, 628 F.2d 1139, 1152 (9th Cir. 1979) (Kennedy, J., concurring in the result and writing majority opinion on the issue). *See also* Lembke, *supra* note 4, at 1215 (proposing a test that examines materiality and police culpability); Dinger, *supra* note 4, at 383 (advocating adoption of a balancing test).

462. Two key factors include the reasons for the government's failure to disclose, including whether the government acted intentionally or in bad faith, and the extent of prejudice to the accused. *See* FED. R. CRIM. P. 16 advisory committee's note; United States v. Ganier, 468 F.3d 920, 927 (6th Cir. 2006); United States v. Hastings, 126 F.3d 310, 317 (4th Cir. 1997); *see generally* 36 GEO. L.J. ANN. REV. CRIM. PROC. 355–57 (2007).

This test overrode the balancing approach then being used in both state and federal courts. More than that, in crafting *Youngblood*, the Court disregarded important principles in its own precedent that had focused on materiality and prejudice to the accused, not the officer's subjective state of mind. As between two competing visions of due process, instrumentalism trumped adjudicative fairness; the emphasis shifted from the individual to the state and from furthering fairness to the accused to punishing the state for official misconduct.

The passage of time has not treated *Youngblood* kindly either on the facts of the case or as a doctrinal matter. As a factual matter, Youngblood was innocent, and the actual perpetrator subsequently convicted. As a doctrinal matter, *Youngblood* was decided on the cusp of a revolution in forensic science. Dramatic advances in forensic DNA typing have undermined *Youngblood*'s assumption that, as a matter of due process, the officer's subjective state of mind should matter more than materiality and prejudice to the accused when potentially exculpatory evidence is lost. Almost all states and the federal government have recognized the power of DNA testing and, in an implicit repudiation of *Youngblood*, have enacted innocence protection acts, many of which impose a duty to preserve DNA evidence.

Youngblood has also spawned incoherence among the state and federal courts that have tried to make sense of it. Disparities exist on such fundamental issues as the definition of "bad faith," whether the evidence must be potentially exculpatory or, in a nod to *Trombetta*, possess apparent exculpatory value and be otherwise unobtainable, and what the remedy is for a due process violation. Of course, the issue of remedy is largely theoretical. No matter how *Youngblood* is interpreted, bad faith is nearly impossible to prove.

The long arc of a constitutional doctrine is not always easy to trace. Some are enduring and deservedly so; they withstand the test of time. *Marbury v. Madison*[463] and *McCulloch v. Maryland*,[464] for example, are deeply embedded within our constitutional order. Other constitutional doctrines, however well intentioned, do not hold up when tested by the complexities of fact patterns that arise in countless cases across the United States.[465] Societal changes, or changes in the factual or legal foundations

463. 5 U.S. (1 Cranch) 137 (1803).

464. 17 U.S. (4 Wheat.) 316 (1819).

465. *See* Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 597 n.13 (1993) ("'The work of a judge is in one sense enduring and in another ephemeral . . . . In the endless process of testing and retesting, there is a constant rejection of the dross and a constant retention of whatever is

of a doctrine, often prompt a critical re-examination. Or the doctrine itself may prove to be unworkable. In some instances, the doctrine itself must be refined; in others, it must be abandoned. *Youngblood* falls into the latter category. When it comes to the constitutional right of access to evidence, it is time to end *Youngblood*'s myopic focus on bad faith and instrumentalism, to the detriment of an alternative vision of due process that promotes adjudicative fairness.

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pure and sound and fine.'") (quoting BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 178, 179 (1921)).