ARIZONA V. YOUNGBLOOD: A BLUEPRINT TO CONVICT THE INNOCENT?

By

GLENN WALKER CUNNINGHAM

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Imagine the following hypothetical situation: A young boy is sexually assaulted by a middle-aged man. The boy is subsequently taken to a hospital where physicians take semen samples from the boy's body and refrigerate them for preservation. Although the boy's clothing contains significant semen stains, the police, after assuming custody of that clothing, fail to refrigerate it. Despite conflicting photographic identifications, despite discrepancies between the boy's account of the incident and the suspect's characteristics, despite the suspect's strong alibi, despite the lack of any physical evidence linking the suspect to the crime, the police arrest the suspect. An entire year passes before the police test the refrigerated samples. Because of the small size of the sample, however, the police chemist cannot identify the assailant's blood type. Fifteen months after the incident, the police finally test the unrefrigerated clothing, but the delay and lack of refrigeration has precluded their discerning any blood group substances. Although all other evidence in the case pales in importance to the semen samples, which if properly preserved could totally exonerate the defendant, the court convicted and sentenced him to prison. Further imagine that the United States Supreme Court upholds the conviction, ruling that the negligent failure of the police to preserve potentially exculpatory evidence does not constitute a denial of due process of law unless the defendant can show that the police acted in bad faith. Unfortunately, this scenario is not mere hypothesis; instead, it summarizes the facts and holding of *Arizona v. Youngblood*.[1]

Arizona v. Youngblood is the Court's latest attempt to define the duty that the due process clause[2] imposes upon the state to make evidence available to the defendant. Analogous in many ways to the theory of discovery in civil cases, the duty of disclosure in criminal cases is a constitutional burden imposed upon the prosecution to ensure the "truth-seeking function of the trial process."[3] While the Court has rejected the premise that a prosecutor be required to "make a complete and detailed accounting to the defense of all police investigatory work on a case,"[4] the Court has held that the prosecution, nonetheless, has a constitutional duty to disclose to the

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[1] 109 S. Ct. 333 (1988).

[2] U.S. CONST. amend. XIV, § 1 ("nor shall any State deprive any person of life, liberty, or property, without due process of law.").

[3] United States v. Agurs, 427 U.S. 97, 104 (1976).

[4] Arizona v. Youngblood, 109 S. Ct. 333, 336 (1988) (quoting Moore v. Illinois, 408 U.S. 786, 795 (1972)).

accused any evidence that is both favorable[5] and material[6] to his case. Requiring the prosecutor to assist the defendant in preparing his case results in a departure from a pure adversarial model;[7] yet, the Court has recognized that the prosecutor "is the representative not of an ordinary party to a controversy, but of a sovereignty . . . whose interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done."[8] By refusing to extrapolate from the duty of disclosure an additional duty to preserve potentially exculpatory evidence,[9] the Court in *Arizona v. Youngblood* has thwarted the "truth-seeking function of the trial process"[10] and the notion that "justice shall be done."[11]

The purpose of this Note is to examine the *Youngblood* decision and the negative implications that the bad faith standard will have on a defendant's ability to obtain a fair trial. Part I of this Note will trace the judicial history of the duties to disclose and preserve evidence; Part II will summarize the *Youngblood* decision, analyzing the viewpoints of the majority, concurrence, and dissent; and Part III will discuss the definable shortcomings of the bad faith standard, analyze the inconsistencies between *Youngblood* and Supreme Court precedent, and propose an alternative method for analyzing cases involving the destruction of potentially exculpatory evidence which will increase the likelihood that judicious results will be obtained, rather than possible convictions of the innocent.

I. Judicial History of the Duties to Disclose and Preserve Evidence

A. *Duty of Disclosure*

The Court has long interpreted the due process notion of fundamental fairness[12] as a requirement for the state to afford criminal defendants a meaningful opportunity to prepare and present a complete defense.[13] Theoretically, this requires a departure from a pure adversarial model[14] since the prosecutor must often provide the de-

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[5] Brady v. Maryland, 373 U.S. 83, 87 (1962).

[6] *Id.* For a definition of materiality, see *infra* notes 26, 42-44 and accompanying text.

[7] United States v. Bagley, 473 U.S. 667, 675 n.6 (1985).

[8] Berger v. United States, 295 U.S. 78, 88 (1935).

[9] *See* California v. Trombetta, 467 U.S. 479, 484 n.5 (1984).

[10] United States v. Agurs, 427 U.S. 97, 104 (1976). *See infra* note 148 and accompanying text.

[11] *Berger*, 295 U.S. at 88.

[12] *See supra* note 2 and accompanying text.

[13] California v. Trombetta, 467 U.S. 479, 485 (1984).

[14] *See supra* note 7.

fendant with certain evidence necessary to mount a complete defense. What constitutes a "complete defense," however, has concerned the judiciary for years. Efforts to ensure fundamental fairness, or adversarial equality, in criminal trials have resulted in the constitutional guarantee of access to evidence.[15] Acknowledging that the state's resources for investigating and discovering evidence are vastly superior to anything that an individual defendant could muster, the Court has provided criminal defendants with constitutional privileges intended to create a level adversarial playing field by compelling the prosecutor to deliver "exculpatory evidence into the hands of the accused."[16]

While the prosecutorial duty to disclose discoverable materials has broadened over time, originally the prosecution had the duty only to inform the defendant whenever a government witness had given perjured testimony.[17] The state's use of perjured testimony blatantly violates the notion of fundamental fairness: use of such testimony deliberately deceives the court and the jury and deprives the defendant of the right to a fair trial.[18] In an effort to decrease the adversarial inequality between the state and the defendant through heightened procedural fairness, the Court in *Brady v. Maryland*[19] greatly expanded the prosecutorial duty of disclosure, holding that governmental suppression of material evidence favorable to the accused violates due process.[20] In *Brady*, a defendant requested, prior to trial, that the prosecution allow him to examine a co-conspirator's extrajudicial statements.[21] Though disclosing several statements to the defendant, the prosecution suppressed a statement in which the companion actually confessed to killing the victim.[22] Not until after conviction and sentencing did the defendant

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[15] United States v. Valenzuela-Bernal, 458 U.S. 858, 867 (1982).

[16] *Trombetta*, 467 U.S. at 485.

[17] *See* Mooney v. Holohan, 294 U.S. 103, 112 (1935) ("a State has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured."); Pyle v. Kansas, 317 U.S. 213, 215-16 (1942) ("Petitioner's papers are inexpertly drawn, but they do set forth allegations that his imprisonment resulted from perjured testimony, knowingly used by the State authorities to obtain his conviction, and from the deliberate suppression by those same authorities of evidence favorable to him.").

[18] *Mooney*, 294 U.S. at 112. Perjured testimony is the most blatant of disclosure violations as it "involve[s] a corruption of the truth-seeking function of the trial process." United States v. Agurs, 427 U.S. 97, 104 (1976).

[19] 373 U.S. 83 (1963).

[20] *Id.* at 87.

[21] *Id.* at 84.

[22] *Id.*

become aware of the suppressed statement.[23] The *Brady* Court, drawing from the holdings of the perjured testimony cases,[24] ruled that "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."[25] The Court subsequently defined the meaning of the term "material," explaining that suppressed evidence is material if prosecutorial disclosure of the evidence would have changed the outcome of the trial.[26] Thus materiality became the touchstone for analyzing whether the state's suppression of evidence favorable to the accused constituted a due process violation.

Following *Brady*'s lead, the Court expanded the duty to disclose favorable evidence in *United States v. Agurs*,[27] a case which involved a defendant who had *not* made a specific discovery request. The prosecution, taking advantage of the defendant's failure to request *Brady* evidence, did not disclose certain evidence favorable to the defendant.[28] After the court convicted the defendant of murder for stabbing a man to death,[29] the defendant's counsel moved for a new trial, asserting that the prosecution had suppressed guilty pleas for assault and carrying a deadly weapon from the victim's prior criminal record that might have supported a self-defense claim by the defendant.[30] The Court in *Agurs* stated that, in order for the suppressed evidence to be considered material, the defendant must show that the "omitted evidence create[d] a reasonable doubt that did not otherwise exist."[31] Further, the suppression must be "evaluated in the context of the entire record."[32] The Court evaluated the suppression of the victim's violent criminal record in the context

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[23] *Id.*

[24] *See supra* note 17.

[25] *Brady*, 373 U.S. at 87. The Court, finding that the suppression of the exculpatory statement affected only the punishment phase, not the guilt phase, of defendant's trial, affirmed the decision of the court of appeals, which had remanded the case on the question of punishment only.

[26] United States v. Agurs, 427 U.S. 97, 104 (1976). *See* United States v. Bagley, 473 U.S. 667, 681 n.12 (1984).

[27] 427 U.S. 97 (1976).

[28] *Bagley*, 473 U.S. at 680.

[29] *Agurs*, 427 U.S. at 100.

[30] *Id.* at 100-01.

[31] *Id.* at 112.

[32] *Id.* The Court explained this phrase through an example. If only one of two eyewitnesses to a crime had told the prosecutor that the defendant was not the perpetrator, and the prosecution failed to disclose this to the defense, a new trial would be justified. But if there were fifty eyewitnesses, forty-nine of whom identified the defendant as the perpetrator, and the prosecutor merely neglected to reveal that the other eyewitness was

of the full trial and found no violation of due process since the suppressed evidence consisted largely of evidence cumulative to that which already had been admitted at trial.[33] The suppression of the criminal record, therefore, did not materially affect the outcome of the defendant's trial. The Court clearly indicated, however, that even absent a specific defense request for evidence, the prosecution has a duty to turn over favorable (or exculpatory) evidence to the defendant if the nondisclosure of such evidence would create a reasonable doubt that did not otherwise exist.[34]

In an effort to further define the concept of materiality, the Court in *Agurs* stated that the *Brady* rule arguably applies in three different situations:[35] cases involving the knowing use of perjured testimony;[36] cases in which a request for specific exculpatory evidence is made prior to trial;[37] and, as in *Agurs*, cases in which only a general request, or no request, for *Brady* material has been made.[38] Recurring as a pattern in each of these situations, the defendant does not discover the prosecutor's misconduct until after trial.[39] Interestingly, however, the Court in *Agurs* recognized different standards of materiality for each situation.[40]

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uncertain because he needed glasses and only briefly saw the perpetrator, then the omission may not have been material. *Id.* at n.21.

[33] *Id.* at 113-14.

[34] *Id.* at 112. *See* California v. Trombetta, 467 U.S. 479, 485 (1984).

[35] *Agurs*, 427 U.S. at 103.

[36] *Id.* at 103-04. *See supra* note 17 and accompanying text.

[37] *Id.* at 104-07. This situation is illustrated by Brady v. Maryland. *See supra* notes 19-26 and accompanying text.

[38] *Id.* at 107.

[39] *Id.* at 103.

[40] In the first situation, where the suppressed evidence indicates that a government witness committed perjury, *Agurs* stated that the evidence is material "if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." *Id.* In other words, the materiality of perjured testimony is presumed unless "failure to disclose it would be harmless beyond a reasonable doubt." United States v. Bagley, 473 U.S. 667, 680 (1984). Thus, the state has the burden of showing that the perjured testimony was merely harmless error.

The *Agurs* Court noted that in the second situation, no standard of materiality had been established to govern situations involving a specific pretrial request for certain exculpatory evidence. Nor did the Court define the term "specific." The Court merely stated that the *Brady* request "gave the prosecutor notice of exactly what the defense desired." *Agurs*, 427 U.S. at 106. Although the meaning of the term "materiality" was explained in this context, the Court did not specify what quantum of likelihood there must be before the suppression of evidence affects the outcome of a trial, thus constituting a due process violation. *Bagley*, 373 U.S. at 681 n.12. Since the *Brady* Court was primarily concerned with rectifying the effects of adversarial inequality, however, the Court indicated that establishing materiality would be fairly easy to do as a prosecutor's failure to honor a specific request for evidence would "seldom, if ever, [be] excusable." *Agurs*, 427 U.S. at 106. Further, the specific request scenario is more lenient to the de-

Recognizing the inherent problems of having different materiality standards depending on the conduct of the defense, the Court in *United States v. Bagley*[41] consolidated the various standards of materiality as outlined in *Agurs*. The Court abandoned the tripartite approach and created one standard of materiality, a standard sufficiently flexible to cover situations in which the prosecution failed to disclose evidence after a defendant had made a specific or general request, or even if he had not made a request at all.[42] The Court held that "evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."[43] The Court defined a "reasonable probability" as "a probability sufficient to undermine confidence in the outcome."[44] Although the prosecutor has had the duty to disclose evidence, both favorable and material, since the *Brady* decision, the dilemma over what constituted material evidence was not resolved until *Bagley*. If the defendant can prove that exculpatory evidence was suppressed, which would have altered the result of the trial had the evidence been disclosed, then the notion of fundamental fairness requires that the defendant be afforded a new trial.

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fense than the situation in which no request, or merely a general request, for *Brady*-type evidence is made. *Bagley*, 372 U.S. at 680.

The *Agurs* case itself typifies the third situation. The materiality standard set forth in *Agurs* represents a departure from *Brady* and its predecessors which seemed solely concerned with equalizing the inequalities between the state and the defendant in an effort to reach a reliable verdict. Capra, *Access to Exculpatory Evidence: Avoiding the Agurs Problems of Prosecutorial Discretion and Retrospective Review*, 53 FORDHAM L. REV. 391, 401 (1984). As scholars have noted, the *Agurs* Court sought to curb the potential ramifications of *Brady* that could have led to the total abandonment of the adversarial system of justice in the criminal arena. Because *Brady* required the prosecutor to aid the defendant in the interest of adversarial equality, the intent of *Agurs* was to require the defendant to earn that aid through a showing that the suppressed evidence constituted harmful error. *Id.* (summarizing Babcok, *Fair Play: Evidence Favorable to an Accused and Effective Assistance of Counsel*, 34 STAN. L. REV. 1133, 1145-55 (1982)).

[41] 473 U.S. 667 (1984). In *Bagley*, the defendant filed a discovery motion requesting information on "any deals, promises or inducements made to [government] witnesses in exchange for their testimony." *Id.* at 669-70. The government produced signed affidavits by their two key witnesses stating that, although each had participated in the undercover operation, neither was entitled to a reward. *Id.* at 670. After being convicted, the defendant learned that the witnesses had signed contracts with the government to pay money commensurate with the information furnished. *Id.* at 671. The Court remanded the case to the trial court to determine whether there was a reasonable probability that, had the government's monetary inducement to the witnesses been disclosed, the result of the trial would have been different. *Id.* at 684.

[42] *Id.* at 682.

[43] *Id.* *See* Strickland v. Washington, 466 U.S. 668, 694 (1984).

[44] *Id.* (quoting *Strickland*, 466 U.S. at 694).

B. *Duty of Preservation*

While the duty to *disclose* evidence turns exclusively on the concept of materiality, cases laying the historical foundation for the duty to *preserve* evidence emphasize the good faith of the police/prosecutor and minimize the concept of materiality.[45] In *Killian v. United States*,[46] F.B.I. agents, prior to trial, destroyed notes of a witness's oral interview after the majority of the data had been transferred to a formal report. The defendant asserted that a portion of the notes, which contained information regarding expenses and receipts, was not incorporated into the formal report. The defendant alleged that these notes would have been beneficial to him during cross-examination; therefore, the destruction violated his rights to due process of law.[47] The Court rejected this assertion, stating that no violation of due process occurs if: (1) the notes are made for the purpose of transferring the data, (2) the notes are destroyed in good faith, and (3) the notes are destroyed in accordance with normal practice.[48] The Court explained that, without such a rule, no evidence could ever be safely destroyed.[49]

In *California v. Trombetta*,[50] the Court added a materiality element to *Killian*'s good faith/normal practice standard. In *Trombetta*, police officers failed to preserve samples of the defendant's breath taken from an intoxilyzer which registered blood-alcohol level, even though it was technologically feasible for the police to do so.[51] The defendant argued that the failure to preserve the breath samples violated his due process rights by foreclosing his ability to impeach the test results.[52] The Court determined that the situations in *Kil-*

[45] It should be noted that in *Brady*, *Agurs*, and *Bagley*, the good faith of the prosecution was irrelevant. As stated in *Agurs*, "if the suppression of evidence results in constitutional error, it is because of the character of the evidence, not the character of the prosecutor." United States v. Agurs, 427 U.S. 97, 110 (1975). The Court in *Agurs* also stated that "the constitutional obligation is [not] measured by the moral culpability, or the willfulness, of the prosecutor." *Id.*

[46] 368 U.S. 231 (1961).

[47] *Id.* at 240-41.

[48] *Id.* at 242.

[49] *Id.* Similarly, in United States v. Augenblick, 393 U.S. 348 (1968), which concerned a tape recording of an interrogation session that could not be produced at trial, the Court relied upon the good faith/normal practice standard set forth in *Killian* and intimated that due process is not violated when the government adequately explains the destruction or disappearance of evidence. *Augenblick*, 393 U.S. at 355-56. *See also* Note, *The Right to Independent Testing: A New Hitch in the Preservation of Evidence Doctrine*, 75 COLUM. L. REV. 1355, 1358 (1975) (authored by Jay H. Newman).

[50] 467 U.S. 479 (1983).

[51] *Id.* at 482.

[52] *Id.* at 483.

lian and *Trombetta* were analogous. In each case, the notes and breath samples were merely preliminary data used to formulate a final report and test.[53] Citing *Killian*, the Court preliminarily stated that the police did not destroy the samples in an effort to circumvent the holding in *Brady*, but that they acted in "good faith and in accordance with their normal practice."[54] In order to fully ascertain whether a violation of due process had occurred, however, the Court conducted a materiality analysis using a standard tailored to resolve situations where the value of the lost evidence is known.[55] The Court stated that in order for evidence to be constitutionally material in this situation, 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."[56] In applying this standard, the Court found that no due process violation had occurred because, even without the breath sample, the defendant still had alternative means of demonstrating his innocence.[57] The defendant could attack the machine's calibration, assert that extraneous activity interfered with the machine's measurements, or even resort to cross-examination of the arresting officer to ascertain whether operational error had occurred.[58]

Although the *Trombetta* standard works well in assessing the materiality of lost evidence that is of a known quality, it is not ideally suited to resolve the issue presented to the Court in *Youngblood*.[59] Because the substance of the lost evidence was unknown in *Youngblood*, the Court could not discern the potential exculpatory value of the lost evidence.

II. *Arizona v. Youngblood*: A Disturbing Precedent

In 1983, a middle-aged black man[60] kidnapped, molested, and sexually assaulted David L., a ten year old boy.[61] David L. had attended an evening church service with his mother and had gone to a nearby carnival when a stranger approached and abducted him.[62]

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[53] *Id.* at 487-88.
[54] *Id.* at 488 (quoting Killian v. United States, 368 U.S. 231, 242 (1961)).
[55] *Youngblood*, 109 S. Ct. at 343 (Blackmun, J., dissenting).
[56] *Trombetta*, 467 U.S. at 489.
[57] *Id.* at 490.
[58] *Id.*
[59] *Youngblood*, 109 S. Ct. at 343 (Blackmun, J., dissenting).
[60] State v. Youngblood, 153 Ariz. 50, 734 P.2d 592 (1986), *rev'd*, 109 S. Ct. 333 (1988).
[61] *Youngblood*, 109 S. Ct. at 334.
[62] *Id.*

Having persuaded David to enter a car, the assailant molested David near a ravine before driving to an unidentified house where he sodomized the boy four times in a ninety-minute period.[63] After threatening to kill David if he told anyone about the attack, the assailant returned the boy to the carnival.[64] When the boy arrived home, his mother took him to the hospital where he was treated for rectal injuries.[65] The physician used a "sexual assault kit"[66] to collect evidence of the attack; he took samples from the boy's rectum and mouth and placed them on microscopic slides.[67] The physician did not examine the samples at the hospital,[68] but the police placed them in a refrigerator at the police station to preserve the biological properties contained in the semen.[69] At the hospital, the police also collected the boy's semen-soiled clothing, but did not refrigerate or freeze them.[70]

Approximately five weeks after the attack, the police arrested Larry Youngblood for the crime.[71] As the police had yet to test the samples to determine immutable characteristics of the assailant, a dubious photographic identification of Youngblood became the primary basis for the arrest.[72] Although he was not wearing his glasses at the time of the attack or during the photographic lineup session with police,[73] David identified Youngblood in the lineup, stating he was "pretty sure" that Youngblood was the assailant.[74] In a subsequent lineup, David identified a different man as the possible assailant.[75] Contributing to the arrest were David's statements to the

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[63] *Id.*

[64] *Id.*

[65] *Id.*

[66] *Id.* The Tucson Police Department provided the sexual assault kit which contained a tube to collect blood samples, paper to collect saliva samples, swabs used to obtain smears, and microscopic slides to examine the smears. The kit also contained a medical examination report.

[67] *Id.* The physician also obtained samples of the boy's saliva, blood, and hair.

[68] *Id.* at 335.

[69] *Id.*

[70] *Id.*

[71] *Id.*

[72] *See* State v. Youngblood, 153 Ariz. 50, 734 P.2d 592, 594, *rev'd*, 109 S. Ct. 333 (1988).

[73] David's optometrist testified that the boy had an astigmatism and "was instructed to wear glasses whenever he was in school [or] doing close work, [or watching] T.V." *Youngblood*, 734 P.2d at 594.

[74] *Id.*

[75] *Id.* Justice Blackmun noted in his dissent that "studies show that children are more likely to make mistaken identifications than are adults, especially when they have been encouraged by adults." *Youngblood*, 109 S. Ct. at 345 n.8 (Blackmun, J., dissenting) (citing Cohen and Harnick, *The Susceptibility of Child Witnesses to Suggestion*, 4 LAW AND HUMAN BEHAVIOR 201 (1980)). Moreover, "[c]ross-racial identifications are much less likely to

police about the incident and the assailant's physical appearance, the most damaging evidence being David's description of the assailant's almost completely white right eye.[76] Youngblood does have a bad left eye.[77] What David did *not* mention, however, were other conspicuous qualities Youngblood possessed, such as a large scar on the forehead, and a noticeable-childhood limp.[78] Other information David offered about the incident was totally inconsistent with Youngblood's appearance and alibi.[79]

Although a police criminologist made a preliminary examination of the sexual assault kit ten days after the attack to verify that sexual conduct had occurred,[80] he did not examine blood group substances until one year[81] after the assault.[82] When tested, no blood group substances could be discerned from the sample.[83] Likewise, the criminologist did not test the unrefrigerated clothing until fif-

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be accurate than same race identifications." *Youngblood*, 109 S. Ct. at 345 n.8 (Blackmun, J., dissenting) (quoting Rahaim and Brodsky, *Empirical Evidence versus Common Sense: Juror and Lawyer Knowledge of Eyewitness Accuracy*, 7 LAW AND PSYCHOLOGY REV. 1, 2 (1982)).

[76] *Youngblood*, 734 P.2d at 592-93.

[77] *Id.*

[78] *Id.*

[79] David reported that the assailant was named Damien or Carl, not Larry Youngblood. *Id.* at 592. David recalled that the assailant was a middle-aged black man with greasy grey hair; however, Youngblood is a 32-year-old black man with dry black hair. *Id.* at 592-93. David also described the assailant's car as being a white, medium-sized, two-door sedan; however, Youngblood's car is a white, large, four-door sedan that, according to Youngblood and others, was not even operational around the time of the incident due to electrical problems. *Id.* at 593. David testified that the car required a jumper cable to start, was then started with a key, and that the car radio played country music. *Id.* Youngblood asserted that, since his car was not working during the time of the incident, his battery was in his girlfriend's car, that the car could only be started with a screwdriver, and that the car radio had never worked. *Id.* at 593-94. Because the car was dismantled and sold after the police merely took pictures of it and dusted for fingerprints, Youngblood's testimony can not be verified or impeached. *Id.* at 593. Further, even though police examined the car for David's fingerprints, hair, and clothing fibers, they found none. *Id.* In addition, Youngblood's girlfriend testified that Youngblood was asleep on her living room sofa at the time of the incident. *Id.* at 594.

[80] *Youngblood*, 109 S. Ct. at 335.

[81] *Youngblood*, 734 P.2d at 593.

[82] *Youngblood*, 109 S. Ct. at 335. After Mr. Youngblood's indictment, the state moved to compel him to provide blood and saliva samples for comparison to the evidence gathered in the sexual assault kit. *Id.* The trial court denied this motion, stating that the state had not obtained a large enough sample in the kit to make a valid comparison. *Id.* The state then asked a state criminologist to perform an ABO blood group test on the rectal swab sample to ascertain the blood type of the assailant. *Id.*

[83] This could mean one of two things: a) that the assailant was a nonsecreter (an individual who secretes no blood type substances in their body fluids) which would have exculpated Youngblood as he was found to be an A secreter; or b) that the assailant was a secreter of unknown blood type because the sample was insufficient to ascertain the type. *Youngblood*, 734 P.2d at 596.

teen months after the attack.[84] As the clothing contained only a small quantity of semen, the blood group analyses performed were also inconclusive.[85]

The trial court instructed the jury to "infer that the true fact [was] against the State's interest"[86] if they found the state had lost or destroyed potentially exculpatory evidence. The jury nonetheless convicted Youngblood for molestation of a child, sexual assault, and kidnapping, sentencing him to two concurrent ten-and-one-half year prison terms.[87]

The court of appeals reversed the decision of the trial court, finding that Youngblood may have been exonerated if the state had refrigerated the clothing and tested the samples sooner.[88] Relying heavily on Arizona case precedent[89] and on the Court's reasoning in *Brady v. Maryland*,[90] *United States v. Agurs*,[91] and *California v. Trombetta*,[92] the court of appeals analogized that the constitutional duty to disclose exculpatory evidence encompassed the duty to preserve *potentially* exculpatory evidence as well.[93] The Arizona Supreme Court denied the state's petition for review.

The United States Supreme Court granted certiorari and reversed the court of appeals in a 5-1-3 decision.[94] Ruling that the due process clause requires a different result when the exculpatory value of

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[84] *Id.* at 593.

[85] *Youngblood*, 109 S. Ct. at 335. The police criminologist used the ABO technique and also a new P-30 protein molecule test on the clothing stains.

[86] *Id.* (quoting trial record).

[87] *Youngblood*, 734 P.2d at 592.

[88] *Id.* at 596.

[89] The court of appeals quoted State v. Escalante, 153 Ariz. 55, 61, 734 P.2d 597, 603 (1986) which stated:

> We therefore rule that when 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. Dismissal is the appropriate remedy unless the evidence against the defendant is so strong that a court can say beyond a reasonable doubt that the destroyed evidence would not have proved exonerating.

Youngblood, 734 P.2d at 596.

[90] *See supra* notes 19-26 and accompanying text.

[91] *See supra* notes 27-40 and accompanying text.

[92] *See supra* notes 50-58 and accompanying text.

[93] *Youngblood*, 734 P.2d at 594.

[94] Chief Justice Rehnquist delivered the opinion for the majority, joined by Justices White, O'Conner, Scalia, and Kennedy. *Youngblood*, 109 S. Ct. at 333. Justice Stevens filed a concurring opinion that agreed with the majority's result but not with the means employed to reach the result, i.e., the bad faith standard. *Id.* at 338-39. Justice Blackmun filed a dissenting opinion in which Justices Brennan and Marshall joined. *Id.* at 339. The net effect was a 5-4 decision in favor of employing a bad faith standard.

lost evidence is unknown,[95] the Court declined to follow case precedent that emphasized the concept of materiality.[96] Citing *Trombetta*, the Court acknowledged that establishing materiality would be a "treacherous task"[97] when potentially exculpatory evidence is permanently lost before the exculpatory value of the evidence can be determined. In such a case, the exculpatory value of the evidence would be forever unknown. Thus, as there is no way to ascertain whether the evidence would have affected the result of the proceeding had it been preserved, the majority stated that, in loss of evidence situations, the good or bad faith of the government is the pivotal consideration.[98] Consequently, the Court 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."[99]

In arriving at this holding, the Court distinguished its prior cases involving the duty to preserve and disclose exculpatory evidence. Conceding that the good or bad faith of the state is irrelevant in *Brady* situations involving the nondisclosure of exculpatory evidence, the majority stated that no *Brady/Agurs* violation of due process had occurred in *Youngblood* because the state had disclosed all relevant police and laboratory reports to the defendant. Moreover, the defendant's expert had potential access to the actual evidence at

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[95] *Id.* at 337 ("[W]e 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.").

[96] *Id.* at 337. *See supra* notes 43-44 and accompanying text.

[97] *Id.* (quoting *Trombetta*, 467 U.S. at 486).

[98] *Id.* The Court cited three cases as authority for this proposition. In United States v. Marion, 404 U.S. 307 (1971), the defense alleged that the government's failure to indict the defendants until three years after the offense denied defendants of their rights to due process of law because evidence favorable to the defense was irreparably lost during the delay. Noting that the statute of limitations did not provide an exclusive right to the defendants and that the due process clause may be applicable to excessive indictment delay, the Court held that no due process violation had occurred because "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." *Id.* at 325. The Court in United States v. Lovasco, 431 U.S. 783 (1977), held that no due process violation had occurred following a good faith preindictment investigative delay of eighteen months, even if the defense might have been somewhat prejudiced by the delay. *Id.* The Court also stated in *Lovasco* that a showing of prejudice is "generally a necessary but not sufficient element of a due process claim, and that the due process inquiry must consider the reasons for the delay as well as the prejudice to the accused." *Id.* at 790. In United States v. Valenzuela-Bernal, 458 U.S. 858 (1982), the Court held that the government's good faith deportation of potentially beneficial defense witnesses was held not to be a violation of due process unless the defense could show how the testimony "would have been favorable and material. *Id.* at 872-73.

[99] *Youngblood*, 109 S. Ct. at 337.

all times.[100] Likewise, as *Trombetta* dealt with evidence whose exculpatory value was known or "apparent"[101] before the evidence was destroyed, the majority found the *Trombetta* standard[102] inapplicable because the defendant had "not shown that the police knew the semen samples would have exculpated him when they failed to perform certain tests or to refrigerate the boy's clothing."[103] Thus, the majority found the duties imposed by *Brady* and *Trombetta* to be inapplicable to cases in which the potential exculpatory value of lost evidence is unknown.

Recognizing how difficult it is to ascertain materiality from untested evidence[104] and how impractical it is to require police to preserve all material that might possibly be significant until testing can take place,[105] the majority narrowly limited the police's duty to preserve evidence by obligating the defendant to prove bad faith on the part of the police.[106] The Court imposed the bad faith standard as means of limiting the duty to preserve evidence to "that class of cases where the interests of justice most clearly require it."[107] The majority defined "that class" as cases in which police indicate through their conduct that the evidence could prove exculpatory.[108]

The concurring opinion agreed with the majority's result, but criticized the bad faith standard as much more deferential to police practice than necessary to decide the case.[109] The concurrence theorized that fundamentally unfair criminal trials could result from the loss or destruction of evidence even when defendants are unable to prove bad faith.[110] Basing the decision on three critical factors, the concurrence did not consider *Youngblood* to be such a case. First, Justice Stevens stated that when the potentially exculpatory evidence was "negligently"[111] lost, the police had great incentive for preserving evidence of unknown value because the police were still

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[100] *Id.* at 336. The majority stated that Youngblood's expert declined to perform any independent tests on the evidence. *Id.* at 337.

[101] California v. Trombetta, 467 U.S. 479, 489 (1983).

[102] *See supra* notes 54-56 and accompanying text.

[103] *Youngblood*, 109 S. Ct. at 336 n.**.

[104] *See* California v. Trombetta, 467 U.S. 479, 486 (1983)).

[105] *Youngblood*, 109 S. Ct. at 337.

[106] *Id.*

[107] *Id.*

[108] *Id.*

[109] *Id.* at 339 (Stevens, J., concurring).

[110] *Id.*

[111] *Id.* at 338. While the concurrence conceded that the police were negligent in failing to preserve the evidence, the majority stated that this failure could "at worst be described as negligent." *Id.* at 337.

searching for the assailant.[112] It would have also benefited the police to preserve the evidence in order to aid the prosecutor in establishing guilt beyond a reasonable doubt.[113] The concurring Justice therefore asserted that a "prophylactic sanction such as dismissal"[114] would not enhance the state's enthusiasm to protect evidence of unknown value when incentives of this magnitude are present. Second, the concurrence asserted that the defendant was not prejudiced by the loss of evidence because an adequate jury instruction[115] was given which ultimately turned the loss of evidence to the defendant's advantage.[116] Third, since the jurors convicted the defendant despite being given a jury instruction, the jurors must have considered the available evidence "so overwhelming that it was highly improbable that the lost evidence was exculpatory."[117]

Conversely, the dissent argued that the majority misread the "import of its prior cases and unduly restrict[ed] the protections of the Due Process Clause"[118] by disregarding the concept of materiality and relying solely on a bad faith standard.[119] Although conceding that bad faith is a plausible way in which a due process violation could occur, the dissent asserted that any "police action that results in a defendant's receiving an unfair trial constitutes a deprivation of due process."[120]

From the dissent's perspective, materiality has always been the determinative factor in evaluating due process violations. Having traced the evolution of due process privileges from their origins in the perjury cases,[121] to the nondisclosure cases,[122] and through the

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[112] *Id.* at 338.

[113] *Id.*

[114] *Id.*

[115] *Id.* (quoting trial record) ("If you find that the State has . . . allowed to be destroyed or lost any evidence whose content or quality are in issue, you may infer that the true fact is against the State's interest.").

[116] *Id.*

[117] *Id.*

[118] *Id.* at 339 (Blackman, J., dissenting).

[119] *Id.*

[120] *Id.*

[121] *Id.* at 339 n.1 (quoting Napue v. Illinois, 360 U.S. 264, 270 (1959) ("not the result of guile or a desire to prejudice")).

[122] *Id.* at 340 (quoting Brady v. Maryland, 373 U.S. 83, 87 (1963) ("irrespective of the good faith or bad faith of the prosecution")); *id.* (quoting United States v. Agurs, 427 U.S. 97, 110 (1976) ("Nor do we believe the constitutional obligation is measured by the moral culpability, or the willfulness, of the prosecutor.")); *id.* at 339-40 n.1 (quoting Giglio v. United States, 405 U.S. 150, 154 (1972) ("whether the nondisclosure was a result of negligence or design, it is still the responsibility of the prosecutor")).

destruction of preliminary evidence cases,[123] the dissent concluded that the prosecutor's state of mind has never been an essential element of the due process analysis;[124] rather, if good faith was considered at all, it merely prefaced the primary inquiry of "constitutional materiality."[125] Citing *California v. Trombetta*[126] as authority, the dissent argued that even in cases where good faith had been established, the defendant traditionally has been given an opportunity to prove that the lost evidence "would be both material and favorable to the defense."[127] Finally, the dissent criticized the *Youngblood* standard as wholly depriving the defendant of the opportunity to carry the materiality burden.[128]

Although the dissent acknowledged that the *Trombetta* standard[129] is not adequate in situations like *Youngblood*, in which the potential exculpatory value of the lost evidence is unknown, it argued that the general principles of *Trombetta* are still controlling.[130] Using *Trombetta* as a foundation, the dissent proposed a standard that more liberally construed the due process clause. The dissent articulated the standard as follows: "[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 immutable characteristics of the criminal, and hence to exculpate a defendant charged with the crime."[131] By imposing upon police a duty to preserve evidence of a particular type,

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[123] *Id.* at 341 (quoting Killian v. United States, 368 U.S. 231, 242 (1961), *quoted in* California v. Trombetta, 467 U.S. 479, 488 (1984) ("in good faith and in accord with their normal practice")). The dissent stated that the majority had misconstrued this phrase by emphasizing "in good faith" instead of the fuller phrase which deals with usual procedure. The dissent asserted that "in both *Killian* and *Trombetta*, the importance of police compliance with *usual procedures* was manifest." *Id.*

[124] *Id.* at 341.

[125] *Id. See* California v. Trombetta, 467 U.S. 479, 489 (1984); United States v. Valenzuela-Bernal, 458 U.S. 858, 873 (1982).

[126] 467 U.S. 479 (1984). *See supra* notes 50-58 and accompanying text. *See also* United States v. Valenzuela-Bernal, 458 U.S. 858 (1982). *See supra* note 98 for the majority reliance on *Bernal*.

[127] *Youngblood*, 109 S. Ct. at 340-41 n.3 (quoting *Valenzuela*, 458 U.S. at 873).

[128] *Youngblood*, 109 S. Ct. at 340-41 n.3.

[129] *See supra* note 56 and accompanying text.

[130] *Youngblood*, 109 S. Ct. at 342.

[131] *Id.* at 343. Within this standard, the dissent stated that two inquiries must be made. The first is whether the physical evidence is of a type that is clearly relevant in a case where identity is at issue. *Id.* Examples of relevant evidence are samples of blood, body fluids, hair, fingerprints and tissue. *Id.* Although not all evidence need be saved, there is a presumption that if the sample came from the defendant, it must be preserved. *Id.* at 343-44. The second inquiry is whether the evidence "is of a type likely to be independently exculpatory." *Id.* at 344. In determining the type, a court may consider the available technology to test the evidence, and the circumstances surrounding the case. *Id.*

the dissent intended to alleviate a situation in which "a State's ineptitude [could] saddle a defendant with an impossible burden"[132] of proving bad faith.[133]

Finding that the court of appeals correctly concluded that the nonpreservation of the clothing constituted a destruction of material evidence and that without this evidence the defendant had no other means to conclusively exonerate himself, the dissent concluded that the defendant had been deprived of a fair trial.[134]

III. BAD FAITH: AN INCONSISTENT AND INADEQUATE STANDARD

A. *What is Bad Faith?*

Although the majority utilized a bad faith standard to resolve situations in which the potential exculpatory value of lost evidence is unknown, what the Court meant by bad faith[135] is not discernible from its opinion. The Court offered only a few clues. According to the majority in *Youngblood*, the failure to preserve the semen samples was not bad faith because it could at "worst be described as *negligent*."[136] The majority also indicated that a showing of *intent* would constitute bad faith. The standard was designed for "those cases in which the police themselves by their conduct indicate that the evidence could form a basis for exonerating the defendant."[137] Because the majority addressed only negligent and intentional conduct, representing the outer extremes of the culpability spectrum,[138] several definitional questions arise. Of primary concern is

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[132] *Id.* at 343.

[133] Not only is bad faith a virtually impossible burden of proof because the defendant is in confinement, without any way of determining the *mens rea* of police, it is also next to impossible because the majority never defined what constitutes bad faith. *Id.* at 342. *See infra* notes 135-43 and accompanying text.

[134] *Youngblood*, 109 S. Ct. at 345.

[135] *Id.* at 342 (Blackmun, J., dissenting).

[136] *Id.* at 337 (emphasis added).

[137] *Id.*

[138] MODEL PENAL CODE § 2.02 (1962). The Code characterizes the culpable mental states as negligent conduct, reckless conduct, knowing conduct, and purposeful conduct. A person acts negligently if "he should be aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct." *Id.* § 2.02(2)(d). The actor's failure to perceive this risk "involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation." *Id.* A person acts recklessly "when he consciously disregards a substantial and unjustifiable risk." *Id.* § 2.02(2)(c). The actor's disregard for the risk "involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation." *Id.* A person acts knowingly when he is "aware that it is practically certain that his conduct will cause . . . a result." *Id.* § 2.02(2)(b)(ii). A person acts purposefully if "it is his conscious object to engage in conduct . . . to cause such a result." *Id.* § 2.02(2)(a)(i). The Texas Penal Code refers to intentional, rather than purposeful conduct. TEX. PENAL CODE

whether the median culpable states of grossly negligent, reckless, and knowing conduct rise to the level of bad faith. These, too, should be included within the standard. Reasonable police conduct, by definition, should not embrace any of the culpable mental states. Since in various fourth amendment situations, such as search and seizure, the Court has imposed the duty upon police to act reasonably by providing strict guidelines which police must follow when interacting with the citizenry, surely it is not unjust to obligate police to an equal or heightened standard of conduct when a defendant's liberty or due process rights are at stake.

In addition to the definitional questions concerning culpability, several situational questions were left unanswered in *Youngblood* as well. Would the Court find a due process violation where an investigatory police officer collected evidence, knowing that it was potentially exculpatory, but another policeman intentionally destroyed it? Would bad faith ensue when police intentionally destroy non-exculpatory evidence which they perceive to be potentially exculpatory? Does *Youngblood* apply only to situations involving the intentional destruction of evidence known to be exculpatory? Could bad faith ensue merely because police had failed to establish reasonable standards for maintaining and preserving evidence?[139] Does good faith "require a certain minimum of diligence"[140] on the part of police? As the dissent noted, the majority left these questions for another day.[141] One result, however, seems certain. The Court has effectively provided law enforcement officials with a blueprint to convict the innocent. Since bad faith will be extremely difficult, if not impossible, for an incarcerated defendant to prove,[142] police now have little incentive to preserve potentially exculpatory material. In fact, police have arguably been given a green light to destroy evidence without fear of having to suffer the consequences of their conduct. By wrapping a bad faith noose around a criminal defendant's neck, the majority ensured that in situations like *Youngblood*, the notion that "justice shall be done"[143] will be forever frustrated.

ANN. § 6.03(a) (Vernon 1985). This difference between the Texas and Model Penal Codes does not appear to be a substantive one.

[139] *Youngblood*, 109 S. Ct. at 342 (Blackmun, J., dissenting).

[140] *Id.*

[141] *Id.*

[142] *See supra* note 133.

[143] Berger v. United States, 295 U.S. 78, 88 (1935).

B. *Inconsistencies Between the Bad Faith Standard and Case Precedent*

While a majority of the Court acknowledged the pervasive theme that runs throughout the "guaranteed access to evidence"[144] cases—criminal defendants are entitled to a fair trial—*Arizona v. Youngblood* can only be characterized as a departure from case precedent and the constitutional mandate of due process of law. Although the majority relied on *Brady* and *Agurs*, stating that the state in *Youngblood* had complied with applicable rules of disclosure,[145] the adversarial inequality theory[146] that underlies these holdings was completely disregarded in *Youngblood*. By insisting that the defendant prove bad faith and consequently relieving police of the duty to preserve evidence,[147] the majority disserved the "truth-seeking function of the trial process"[148] by advocating a standard overly favorable to the prosecution. By neglecting the traditional materiality analysis and focusing exclusively on a bad faith standard, the majority in essence ruled that, unless a defendant can prove bad faith, the non-preservation of evidence is harmless error. While the good faith standard served an important function in *Killian* and *Trombetta*, which involved the destruction of preliminary data, such a standard blurs the line between justice and injustice when the lost evidence may be the absolute proof of guilt or innocence.[149] Because the majority's bad faith standard inhibits a defendant's ability to obtain a fair trial, due process requires a more effective standard.

C. *An Alternative to the Bad Faith Standard*

In *Youngblood*, the Court held that the state's duty to preserve evidence is contingent upon a showing of bad faith. Thus, in situations where potentially material evidence is destroyed and the defendant is unable to carry the burden of proving bad faith, an unfair trial is a probable result. Because the majority's primary concern was to limit "the extent of the police's obligation to preserve evidence,"[150] the criminal defendant's constitutional rights to due process of law seem to be of secondary concern. This is irrational. Protecting a

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[144] United States v. Valenzuela-Bernal, 458 U.S. 858, 867 (1982). *See supra* text accompanying notes 12-16.

[145] *Youngblood*, 109 S. Ct. at 336. *See supra* text accompanying note 100.

[146] *See supra* text accompanying notes 14-16, 40.

[147] *Youngblood*, 109 S. Ct. at 337. *See supra* text accompanying notes 105-08.

[148] United States v. Agurs, 427 U.S. 97, 104 (1976). *See supra* text accompanying note 10.

[149] Note, *The Right to Independent Testing: A New Hitch in the Preservation of Evidence Doctrine*, 75 COLUM. L. REV. 1355, 1361 (1975).

[150] *Youngblood*, 109 S. Ct. at 337.

criminal defendant's constitutional rights must be the higher priority.[151] Since the police are the gatherers and caretakers of evidence until trial, police should have a duty to preserve evidence until they determine whether or not the evidence has exculpatory qualities. Imposing a duty to preserve evidence would benefit the prosecution and society as a whole. The prosecution would benefit from a duty to preserve potentially exculpatory evidence, at least until materiality is ascertained, because incriminating evidence would be available at trial to convict the guilty.[152] Society would also receive the benefit of improved police procedures because the preserved evidence would contribute to exonerating the innocent and incarcerating the guilty.[153]

Better results would have been reached in *Youngblood* if the following standard had been employed:

(1) Police have the duty to "preserve physical evidence of a type[154] that they reasonably should know has the potential, if tested, to reveal immutable characteristics of the criminal. . . ."[155]

(2) If, while in the custody of police, evidence of a potentially exculpatory type is destroyed before the exculpatory value of the evidence is ascertained, whether it is destroyed intentionally, knowingly, recklessly, or with gross negligence,[156] a rebuttable presumption arises that the evidence was exculpatory.

(3) The prosecution may rebut this presumption by showing that other inculpatory evidence precludes the possibility that the destroyed evidence was exculpatory, or by proving that the destroyed evidence was in fact

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[151] As mentioned *supra* text accompanying note 138, police are made to follow strict procedure in the fourth amendment search and seizure context. Surely it is not overly taxing upon police to preserve potentially exculpatory evidence in an effort to ensure fair trials.

[152] Imposing upon police a duty to preserve evidence until materiality can be ascertained would alleviate the concurrence's first concern. *See supra* notes 111-14 and accompanying text.

[153] *See* People v. Nation, 26 Cal. 3d 169, 176, 604 P.2d 1051, 1055, 161 Cal. Rptr. 299, 303 (1980).

[154] As the dissent stated, focusing on the type of evidence destroyed, rather than the loss of a particular piece of evidence, enables the defendant to prove materiality without being required to "prove the content of something he does not have because of the State's misconduct." *Youngblood*, 109 S. Ct. at 344 (Blackmun, J., dissenting).

[155] *Id.* at 343 (Blackmun, J., dissenting). *See supra* text accompanying note 131. Although the standard proposed by the dissent is a workable alternative to the bad faith dilemma, its analysis is somewhat incomplete, and thus represents only the first element of the standard proposed in this Note.

[156] *See supra* note 138.

tested prior to its destruction and the results indicated that the evidence was not exculpatory.

(4) If the prosecution is unsuccessful in rebutting the presumption, the criminal defendant must still establish the materiality of the evidence by proving that no comparable evidence was reasonably available to the defendant, and that, had the evidence been preserved, a reasonable probability exists that "the result of the proceeding would have been different."[157]

Had this standard been applied in *Youngblood*, a more judicious result would have been achieved. Since the police recklessly,[158] or with gross negligence, breached their duty by not preserving physical evidence that was of a type reasonably known to be potentially exculpatory,[159] the rebuttable exculpatory presumption would have arisen. This presumption operates to restore adversarial equality between the police/prosecutor, who have control over the evidence, and the criminal defendant, whose access to evidence is seemingly at their mercy. The prosecution may have attempted to rebut this presumption, but would have been unsuccessful. In *Youngblood*, the destruction of evidence occurred because adequate samples were not obtained, preserved, or timely tested. Even though police did eventually test the evidence that was in their possession, the results were inconclusive. Thus, it cannot be said that the evidence was tested and found not to be exculpatory. Moreover, there was no other inculpatory evidence in the case that precluded the possibility that the destroyed semen samples were exculpatory.

Although the prosecution would not have been able to overcome the exculpatory presumption, the defendant would nevertheless have had to establish the materiality of the destroyed evidence. This would have posed no great obstacle. It is hard to imagine a type of evidence that could be more material in a rape case than seminal fluid,[160] especially since the presumption is that it is exculpatory.

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[157] United States v. Bagley, 473 U.S. 667, 682 (1985). *See supra* text accompanying notes 41-44. Although *Bagley* dealt with the disclosure of evidence, the materiality standard it proposed is applicable in situations involving the loss of evidence.

[158] The majority failed to properly characterize the police's conduct when it was described as being negligent at worst. *Youngblood*, 109 S. Ct. at 337. By failing to refrigerate the clothing and by waiting an exorbitant amount of time to test the clothing, the police at best acted recklessly. *See supra* note 136.

[159] Although the majority indicated that the police did not know that the seminal evidence could have exonerated the defendant, this seems profoundly naive. *See supra* text accompanying note 103. There is nothing more material in a rape case than seminal fluid.

[160] *Youngblood*, 109 S. Ct. at 344-45 (Blackmun, J., dissenting). *See supra* notes 72-85 and accompanying text.

No comparable evidence was available for the benefit of the defendant because the slides contained inadequate samples and no other exculpatory evidence of any kind was available.[161] Further, had the seminal fluid been tested, it would have "reveal[ed] immutable characteristics of the criminal,"[162] and if these characteristics were not in accord with the defendant's, "the result of the proceeding would have been different."[163] Thus, this alternative approach would serve not only to ensure the "truth-seeking function of the trial process"[164] and the notion that "justice shall be done,"[165] but also to maintain the "fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free."[166]

IV. Conclusion

In *Arizona v. Youngblood*, the United States Supreme Court departed from traditional interpretations of the due process clause by mandating that a bad faith standard govern cases in which the potential exculpatory value of lost evidence is unknown. Abandoning the concept of materiality and relying solely on a bad faith standard, the Court in essence ruled that unless a defendant can prove bad faith, the non-preservation of evidence is harmless error. Because bad faith is a virtually impossible burden for the criminal defendant to meet, police now have little incentive to preserve potentially exculpatory material. Therefore, an alternative to the majority's standard is warranted, an alternative that more liberally construes the protections of the due process clause. Imposing upon police a duty to preserve evidence that is of an exculpatory type until materiality can be ascertained would benefit both the state and society. Timely tested and preserved evidence would provide incriminating evidence to convict the guilty and exculpatory evidence to exonerate the innocent. Should police breach this proposed duty by destroying potentially exculpatory evidence, a rebuttable presumption would arise that the evidence was exculpatory. This rebuttable presumption would further the goal of American criminal jurisprudence that justice be done by obligating police to a heightened standard of conduct when a defendant's liberty or due process rights are at stake. Affording the criminal defendant an opportunity

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[161] *See supra* note 159.
[162] *Youngblood*, 109 S. Ct. at 343.
[163] United States v. Bagley, 473 U.S. 677, 682 (1985).
[164] United States v. Agurs, 427 U.S. 97, 104 (1976).
[165] Berger v. United States, 295 U.S. 78, 88 (1935).
[166] In re Winship, 397 U.S. 358, 372 (1970) (Harlan, J., concurring).

to establish the materiality of the destroyed evidence would be consistent with Supreme Court precedent. Had this standard been applied in *Youngblood*, a more judicious result would have been achieved, a result not providing law enforcement officials with a blueprint to convict the innocent, but a result following the precedent that it is far better to free the guilty than to incarcerate the innocent.

Glenn Walker Cunningham