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Sarah M. Bernstein

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FOURTEENTH AMENDMENT—POLICE FAILURE TO PRESERVE EVIDENCE AND EROSION OF THE DUE PROCESS RIGHT TO A FAIR TRIAL

Arizona v. Youngblood, 109 S. Ct. 333 (1988).

I. INTRODUCTION

In *Arizona v. Youngblood*,[1] the United States Supreme 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."[2] After exploring precedent in "the area of constitutionally guaranteed access to evidence,"[3] this Note concludes that the Court's holding is unsupported by prior case law. This Note argues that the Court's bad faith requirement narrows a criminal defendant's due process rights to a fair trial by hindering his or her access to critical evidence and thereby denying presentation of a complete defense. Further, prior cases mandate the analysis of the constitutional materiality of withheld, lost, destroyed, or unpreserved evidence for the determination of due process violations regardless of the good or bad faith of the police or the state. Finally, this Note argues that the Court's bad faith requirement is not justified by the insulting belief that limiting police obligations of preserving evidence outweighs criminal defendants' due process rights to a fair trial, nor does it accomplish its purported goal of easing police burdens, thus enabling them to provide better service in the community.

II. FACTS AND PROCEDURAL HISTORY

A. THE ASSAULT

On the evening of October 29, 1983, a ten-year-old boy, David, was abducted from a church carnival around 9:30 p.m. after having

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1 109 S. Ct. 333 (1988).

2 *Id.* at 337.

3 United States v. Valenzuela-Bernal, 458 U.S. 858, 867 (1982). See *infra* note 120 and accompanying text for discussion of this case.

attended a service with his mother.[4] The assailant took David to a secluded area, molested him, drove him to a house, and sodomized him five times.[5] The attacker returned David to the carnival, threatening to kill him if he reported the assault.[6] David withstood the ordeal for approximately one and one-half hours.[7]

Afterwards, David's mother rushed him to a hospital for a physical examination.[8] Following standard procedure, the attending physician collected samples with a "sexual assault kit" for legal evidence of the attack.[9] He used a swab to gather tissue samples from David's mouth and rectum to identify the attacker's semen.[10] After the physician made a microscopic slide of these samples, he collected samples of David's saliva, blood, and hair.[11] The police stored the assault kit and samples in a police station refrigerator for subsequent testing and use as evidence.[12] Although the police con-

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4 *Youngblood*, 109 S. Ct. at 334.

5 *Id.*

6 *Id.*

7 *Id.*

8 *Id.*

9 *Id.* The Tucson Police Department distributed sexual assault kits to the county hospitals for collecting physical evidence of sexual assaults. *Id.* The kit typically contained paper to collect saliva samples, microscopic slides and Q-tip like swabs to produce smears of samples, and equipment to gather sample blood. *Id.*

10 *Id.* Five different tests used to identify semen samples were explained at trial. Brief for Petitioner at 3, *Youngblood* (No. 86-1904). The state explained these tests:

> Two of the tests, the ABO blood group test and the PGM enzyme test, are identification tests which aid in narrowing down the field of possible semen donors. The ABO test allows a person's blood type to be determined from other bodily fluids, such as semen. This technique is only successful on 80% of the population that secrete their blood types into their other bodily fluids. The ABO test is not successful on the remaining 20% of the population that are non-secretors, persons whose blood type are [sic] not secreted into other bodily fluids.
>
> The other identification test is the PGM enzyme test. The PGM test identifies a genetic marker, other than blood type. The secretor, nonsecretor status has nothing to do with the PGM test results. Every sample of semen, if the sample is sufficient enough, will have detectable PGM grouping.
>
> The other three tests serve to quantify the semen, not identify a donor. The first technique is a microscopic examination of the sample. Based upon the number of spermatozoa viewed, an estimate can be made of the amount of semen present. Another quantifying testing is the acid phosphatase test. This test measures the enzyme, acid phosphatase, which is present in the semen. Based upon how much of the enzyme is present an estimate can be made of the quantity of semen present. The test has some limited forensic usefulness since vagina fluid also contains this enzyme.
>
> The last quantifying test is the P-30 protein molecule that exists exclusively in the semen . . . . In 1985 only a little over half the crime labs in the country had become capable of performing this test. Based upon the amount of the P-30 protein present, an estimate can be made of the quantity of semen present in a sample. The Tucson Police began using the new P-30 protein technique in approximately January, 1985.

Brief for Petitioner at 3-4, *Youngblood* (No. 86-1904) (citations omitted).

11 *Youngblood*, 109 S. Ct. at 334-35.

12 *Youngblood*, 109 S. Ct. at 335.

fiscated David's underwear and T-shirt, the clothing was not refrigerated.[13]

B. THE SAMPLES

On November 8, 1983, a police criminologist[14] examined the contents of David's sexual assault kit.[15] He found semen in the samples indicating sexual contact had occurred.[16] He did not identify blood group substances.[17] He did not try to ascertain the amount of semen in the swab sample with a P-30 protein quantitative analysis because this test was not yet used at that laboratory.[18] David's clothing was also not tested at this time.[19]

On October 15, 1984, a year after the first examination of David's sexual assault kit, the same police criminologist performed an ABO blood group test on the rectal swab.[20] No blood group substances were detected in the sample.[21] In January, 1985, the criminologist first examined David's clothing with the newly avail-

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[13] *Id.*

[14] Edward Heller, the police criminologist, examined a smear slide made from the rectal swab sample in the sexual assault kit under a microscope to determine if spermatozoa existed in the sample. Brief for Petitioner at 4, *Youngblood* (No. 86-1904).

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

[16] *Id.*

[17] *Id.* The criminologist testified that he did not conduct a blood group substance test because such tests were not ordinarily conducted at this stage of the investigation. *Id.* For a discussion of blood group substances and the ABO test used to determine blood group type, see *supra* note 10.

[18] Brief for Petitioner at 4-5, *Youngblood* (No. 86-1904). For an explanation of the P-30 protein procedure and its availability in police labs, see *supra* note 10.

[19] Brief for Petitioner at 5, *Youngblood* (No. 86-1904).

[20] *Id.* Some people secrete substances indicating their blood group type into other bodily fluids, such as semen, while other people, non-secretors, do not secrete such blood group identifiers. *Id.* at 3. The semen samples in David's sexual assault kit could be tested for blood group types and compared with saliva and blood samples taken from Youngblood.

In October 1984, the prosecution had moved to require that Youngblood give blood and saliva samples for comparison with those taken from David the night of the attack. The Court had denied the motion for lack of sufficient samples from David for comparison. *Id.* at 5.

[21] *Youngblood*, 109 S. Ct. at 335 (1988). According to the criminologist, because of the small amounts of semen usually found on rectal swab samples, test results from these blood group samples are rare. Brief for Petitioner at 6, *Youngblood* (No. 86-1904). Absence of a blood type could have resulted because " the semen donor was a non-secreter. That alternative would have eliminated Youngblood as the semen donor since he was analyzed and found to be an A secreter. The second alternative . . . was that the secreter was of unknown bloodtype, because the sample was insufficient to determine the type." Arizona v. Youngblood, 153 Ariz. 50, 54, 734 P.2d 592, 596 (Ariz. Ct. App. 1986).

able P-30 protein procedure.[22] This test detected only a small trace of semen on the clothing.[23] An ABO blood group test failed to identify a blood group from the clothing stains.[24]

C. THE IDENTIFICATION

Although David did not wear his eyeglasses the night of his assault,[25] he rendered a fairly detailed description of his assailant. David described him as a middle-aged black man with greasy grey hair, facial hair, no facial scars, and one almost completely white eye.[26] The respondent, Larry Youngblood, was a thirty-year-old black man with dry black hair, a scar on his forehead, a bad left eye, and a noticeable limp.[27] He also always wore glasses in public.[28]

On November 7, 1983, nine days after the assault, the police showed David a photographic line-up of men who had fit David's description of his assailant.[29] After telling him that they had arrested the assailant, the police asked David to pick him from the line-up.[30] Absent his eyeglasses, David first picked Youngblood from the line-up, then identified a different man from the same photographic line-up.[31] The police then arrested Youngblood on December 9, 1983.[32]

D. THE CAR

David reported that his attacker had driven a white, medium-sized, two-door car with a faulty passenger door, and that the radio had played country music.[33] He stated that the car had started with

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22 *Youngblood*, 109 S. Ct. at 335; Brief for Petitioner at 6, *Youngblood* (No. 86-1904). For a discussion of the P-30 protein test, see *supra* note 10.

23 *Youngblood*, 109 S. Ct. at 335.

24 *Id.* The criminologist explained that the failure to find blood group substances was a result of insufficient semen samples on the clothing. Brief for Petitioner at 6, *Youngblood* (No. 86-1904).

25 *Youngblood*, 153 Ariz. at 52, 734 P.2d at 594.

26 *Id.* at 50, 734 P.2d at 592.

27 *Id.* at 51, 734 P.2d at 593.

28 *Id.* Although David was satisfied with the accuracy of a composite sketch drawn the evening of the attack, he later admitted that the sketch did not resemble the defendant. Brief for Respondent at 3, *Youngblood* (No. 86-1904). The United States Supreme Court majority did not raise or discuss the discrepancy between David's description of the assailant and the defendant's appearance.

29 *Id.* at 335.

30 *Youngblood*, 153 Ariz. at 52, 734 P.2d at 594.

31 *Id.* David's optometrist testified that David was supposed to wear glasses for school, watching television, and other close work. *Id.*

32 Brief for Petitioner at 5, *Youngblood* (No. 86-1904). The police did not locate the defendant until December.

33 *Youngblood*, 153 Ariz. at 51, 734 P.2d at 593.

an ordinary ignition key, had a messy interior with blankets or sheets on the seats, and had rattled with a noisy sound.[34] A month after the assault, the police showed David two blankets telling him that they came from his assailant's car.[35] Without touching them, David identified the blankets as from the assailant's car.[36]

Six weeks after the attack, the police seized and towed Youngblood's car, a white four-door Chrysler Imperial.[37] Although the police dusted it for fingerprints and searched it for clothing and hair fibers, no evidence existed of David's presence, only of Youngblood's.[38] The police then disposed of the car without notifying the defendant or his counsel.[39] The testimony of Youngblood revealed that Youngblood's car had been inoperative at the time of the assault, its battery had been removed and placed in another car, it had ran silently when operative, and it had started with a screwdriver, not a key.[40] The police, however, had failed to determine if Youngblood's car had been operative, had a noisy muffler, had a working radio tuned to a country station, or had started with a key.[41]

E. THE ALIBI

Youngblood had testified that he had been living with his girlfriend, Alice Whigham, at the time of David's assault.[42] The police had first questioned Whigham four or five weeks after the incident.[43] They had awaken her at 4:00 a.m. and had asked her if she knew where Youngblood had been " 'around Halloween.' "[44] She had told the police that Youngblood had not been with her on Halloween, but had been living with her during that time period.[45] Whigham later learned the actual date of the assault and telephoned the police and defense counsel repeatedly to give additional infor-

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34 *Id.*

35 *Id.*

36 *Id.*

37 *Id.* Youngblood's car was taken from the home of his former girlfriend, Alice Whigham. *Id.*

38 *Id.* at 51-52, 734 P.2d at 593-94.

39 *Id.* at 51, 734 P.2d at 593. The police justified their disposal of the car without notice because Youngblood did not have title transferred to his name when he acquired it. *Id.*

40 *Id.* at 51-52, 734 P.2d at 593-94. Testimony indicated that the battery had been placed in Alice Whigham's car. *Id.*

41 *Id.* at 51, 734 P.2d at 593. The majority did not raise the issue of the police seizure and investigation of Youngblood's vehicle. Arizona v. Youngblood, 109 S. Ct. 333 (1988).

42 *Youngblood,* 153 Ariz. at 52, 734 P.2d at 594.

43 *Id.*

44 *Id.*

45 *Id.*

mation concerning Youngblood's whereabouts.[46] Whigham testified at trial that on the night of the assault she had been at her mother's house; when she had returned home, the 10:00 p.m. television news had been beginning, and Youngblood had been asleep on her couch.[47] Her house was a thirty to forty-five minute drive from the site of David's abduction.[48]

F. THE TRIAL

During the trial which began on February 5, 1985, the defense asserted that David had misidentified Youngblood as the assailant.[49] Both sides produced criminologists who testified concerning the semen samples.[50] The police criminologist identified the tests that he had performed on the swab and clothing samples and the results.[51] The defense criminologist opined concerning the police tests performed on the samples and testified that the test results cast doubt on the identity of the attacker.[52] Both criminologists testified that the P-30 test or the acid test might have exonerated Youngblood.[53] They further claimed that absence of any ABO blood group identified in a sample indicated either the sample was insufficient to provide a valid test result or the semen donor was a nonsecretor.[54] After several days of trial, the jury found Youngblood guilty of sexual assault, child molestation, and kidnapping.[55]

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[46] *Id.* Neither the police nor defense counsel returned Whigham's calls. *Id.*

[47] *Id.*

[48] *Id.*

[49] Arizona v. Youngblood, 109 S. Ct. 333, 335 (1988).

[50] Brief for Petitioner at 6, *Youngblood* (No. 86-1904).

[51] *See generally* Brief for Petitioner at 6-8, *Youngblood* (No. 86-1904) (discussing tests that were performed by both the police and defense criminologists); see *supra* notes 14-24 and accompanying text for a description of the tests performed.

[52] Brief for Petitioner at 7, *Youngblood* (No. 86-1904). Keith Inmán, the defense criminologist, did not examine the sexual assault kit or David's clothing. Although he did not test the swab or clothing semen samples, he tested samples of Youngblood's saliva and blood and determined that Youngblood was a blood type A secretor.

Inman testified generally about the effect of time, temperature, and bacterial contamination on the reliability of the ABO blood group and P-30 protein tests. He stated that even if the police criminologist had found that the semen samples were large enough to do an ABO blood group test, the results might still be uncertain. *Id.* at 7-8.

[53] Arizona v. Youngblood, 153 Ariz. 50, 54, 734 P.2d 592, 596 (Ariz. Ct. App. 1986). The state never ran a P-30 protein test on the swab sample, which could have determined if the lack of ABO blood group results was from an insufficient sample or the assailant was a non-secretor. Youngblood was a blood type A secretor. The state never used acid phosphate quantifying tests on either sample. Brief for Petitioner at 6-8, *Youngblood* (No. 86-1904).

[54] Brief for Petitioner at 7, *Youngblood* (No. 86-1904).

[55] *Youngblood*, 109 S. Ct. at 335. The judge instructed the jury that if they found that the police had lost or destroyed evidence, they could " 'infer that the true fact is against the State's interest.' " *Id.* (quoting 10 Trial Manuscript at 90).

Youngblood claimed for the first time on appeal that the charges should be dismissed because of police failure to preserve and properly test the semen samples.[56] The Court of Appeals of Arizona reversed, claiming that had the state properly preserved the semen samples they might have proved Youngblood's innocence.[57] The Supreme Court of Arizona denied the state's petition for review.[58] The United States Supreme Court granted certiorari "to consider the extent to which the Due Process Clause of the Federal Constitution requires the State to preserve evidentiary material that might be useful to a criminal defendant."[59]

III. BACKGROUND

The due process clauses of the fifth and fourteenth amendments of the Constitution[60] prohibit governmental actions that deprive an individual of "life, liberty or property, without due process of law."[61] Two distinct components of due process exist. First, substantive due process protects individual freedom from legislative limitation by placing constitutional limits on the contents of legislative action.[62]

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56 Brief for Petitioner at 15, *Youngblood* (No. 86-1904). "As the evidence showed, the samples taken from the clothing would have contained more semen than the rectal swab because of 'natural drainage and leakage.' The testimony also showed that since samples on clothing dry more quickly, there would be less chance for deterioration because of moisture." *Youngblood,* 153 Ariz. at 54, 734 P.2d at 596.

57 *Youngblood,* 153 Ariz. at 55, 734 P.2d at 596. The court relied on its previous decision in State v. Escalante, 153 Ariz. 55, 734 P.2d 597 (1986), holding that " 'when identity is an issue at trial and the police permit 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.' " *Youngblood,* 153 Ariz. at 54, 734 P.2d at 596 (quoting *Escalante,* 153 Ariz. at 61, 734 P.2d at 603 (state had duty to take routine steps to preserve semen samples taken from victims of sexual assault)).

58 *Youngblood,* 109 S. Ct. at 335.

59 *Id.* at 334.

60 "[N]or shall any person . . . be deprived of life, liberty or property, without due process of law . . . ." U.S. CONST. amend. V.

"[N]or shall any State deprive any person of life, liberty, or property without due process of law . . . ." U.S. CONST. amend. XIV, § 1.

61 These procedural safeguards have their historical origins in the notion that conditions of personal freedom can be preserved only when there is some institutional check on arbitrary government action. The Supreme Court has analogized due process to the Magna Carta's "guaranties against the oppressions and usurpations" of the royal prerogative, in support of the basic conclusion that due process "is a restraint on the legislative as well as on the executive and judicial powers of the government, and cannot be so construed as to leave congress [or the states] free to make any process 'due process of law,' by its mere will."

L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 10-7, at 664 (2d ed. 1988) (citations omitted) (quoting Hurtado v. California, 110 U.S. 516, 531 (1884)).

62 2 R. ROTUNDA, J. NOWAK & J. YOUNG, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 17.1, at 200 (1986) [hereinafter TREATISE].

Second, procedural due process guarantees that individuals enjoy certain processes when the government deprives them of life, liberty, or property.[63] Procedural due process defines the constitutional limits on judicial, executive, or administrative enforcement of legislative or other governmental decisions.[64] For example, a trial is required where the government seeks to deprive a person of his physical liberty for a significant period of time. "The adjudicative process itself is governed by the specific guarantees of the Bill of Rights and an independent concept of fundamental fairness which is imposed by the due process clause."[65] However, governmental actions that are not a result of intentional governmental choices or policies do not necessarily entail deprivations without due process though they cause loss of life, liberty or property.[66]

While the fifth amendment's due process requirement applies to the federal government, the fourteenth amendment directs due process to state actions. However, the Court's initial interpretation of the fourteenth amendment only conferred rights equal to those enjoyed by other citizens to the newly emancipated slaves.[67] The Court declined to create new rights for citizens generally and refused to review most state actions.[68]

In the mid-1870s the Court decided the *Slaughter-House Cases*,[69]

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63 *Id.*

64 L. TRIBE, *supra* note 61, § 10-7, at 664.

65 TREATISE, *supra* note 62, § 17.4, at 214.

> The [Supreme] Court has demonstrated a consistent belief that the adversary process is best designed to safeguard individual rights against arbitrary action by the government. The justices determine the scope of trial type procedures required for any particular deprivation by balancing the worth of the procedure to the individual against its cost to the society as a whole.

Id. § 17.8, at 249.

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> Due process functions only to curb governmental abuse, unfairness, or oppression, not to compensate for injury caused by unintentional official behavior . . . . "Not 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.'. . . Far from an abuse of power, lack of due care suggests no more than a failure to measure up to the conduct of a reasonable person. To hold that injury caused by such conduct is a deprivation within the meaning of the Fourteenth Amendment would trivialize the centuries-old principle of due process of law." Mere negligence of an official, then, does not implicate a due process violation.

L. TRIBE, *supra* note 61, § 10-7, at 664-65 (quoting Daniels v. Williams, 474 U.S. 327 (1986) (no deprivation or cause of action for damages under 42 U.S.C. § 1983 when deputy sheriff negligently left a pillow on a flight of prison stairs which prisoner slipped on causing injury); Davidson v. Cannon, 474 U.S. 344 (1986) (no deprivation and no cause of action under 42 U.S.C. § 1983 when prison officials negligently failed to protect a prisoner who told them his life was in imminent danger)).

67 J. MADDEX, CONSTITUTIONAL LAW: CASES AND COMMENTS 19 (2d ed. 1979).

68 *Id.* at 19-20.

69 83 U.S. (16 Wall.) 36 (1873) (New Orleans butchers had no fourteenth amend-

the first challenge, under the fourteenth amendment, to state legislative action restricting the freedoms of state citizens. The Court declined to break down the distinction between national and state citizenship. That majority stated, "Such a construction . . . would constitute this court a perpetual censor upon all legislation of the States, on the civil rights of their own citizens, with authority to nullify such as it did not approve . . . ."[70] For at least twenty years following *Slaughter-House*, the Court held fast to this interpretation of the fourteenth amendment.[71]

From 1887 to 1934, the Court reviewed and restricted state actions by recognizing individual rights almost identical to those guarantees protected by the Bill of Rights.[72] However, in these cases, the Court held that the state activity violated due process rights because the action arbitrarily limited individual interests in liberty.[73] In 1897, the Court decided that the fourteenth amendment prohibited states from taking private property for public use without just compensation, similar to the fifth amendment prohibition against like federal action.[74] The Court held that due process required this protection, not the just compensation clause of the fifth amendment.[75]

By the late nineteenth century, the fundamental fairness doctrine had emerged.[76] First, it espoused that the due process clause

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ment claim for protection against Louisiana law granting a monopoly to a slaughterhouse company within the city limits of New Orleans).

[70] *Id.* at 78.

[71] *See, e.g.*, Hurtado v. California, 110 U.S. 516 (1884) (grand jury indictment, jury trial, and self-incrimination provisions of the Bill of Rights are not contained in the due process clause of the fourteenth amendment); Munn v. Illinois, 94 U.S. 113 (1876) (Court refused to review article of Illinois Constitution making private grain elevators public property and giving the general assembly the right to regulate the storage of grain; legislature determined the amount of permissible regulation, not Court).

[72] TREATISE, *supra* note 62, § 15.6, at 71.

[73] *Id.*

[74] Chicago, B. & Q.R.R. v. Chicago, 166 U.S. 226 (1897) (private property taken for public use by the state without compensation is a violation of fourteenth amendment due process, although Court found that railroad should receive only nominal compensation for public street crossing its tracks).

[75] TREATISE, *supra* note 62, § 15.6, at 72.

[76] The theories of total incorporation, fundamental fairness and selective incorporation emerged in the late nineteenth and early twentieth centuries. They supported the extension of certain rights to citizens against the states through the fourteenth amendment. Although the first theory advocating the total incorporation of the Bill of Rights into the fourteenth amendment never received majority acceptance, it was nevertheless the subject of heated debate. 1 W. LAFAVE & J. ISRAEL, CRIMINAL PROCEDURE § 2.3, at 60 (1984) [hereinafter CRIMINAL PROCEDURE]. In the early 1890s, three cases involving claims of infliction of cruel and unusual punishment by states reached the Court presenting the total incorporation theory. In O'Neil v. Vermont, 144 U.S. 323 (1892), McElvaine v. Brush, 142 U.S. 155 (1881), and *In re* Kemmler, 136 U.S. 436 (1880), the

forbids state action that violates individual "fundamental" rights.[77] Second, although it may include some of the rights in the Bill of Rights, fourteenth amendment due process was separate from the Bill of Rights.[78] The Court expanded its application of the fourteenth amendment to state actions by selectively including rights based on fundamental fairness.[79]

Until the 1920s, the Court continued to hold that the fourteenth amendment placed no specific requirements on state criminal procedure. Rather, the Court reviewed state criminal trials only to test for state court jurisdiction and for provision of a corrective process for trial error.[80] In the 1920s, the Court used the fundamental fairness theory to incorporate the Bill of Rights protections into the fourteenth amendment, applying them to state criminal procedure.

During the 1960s, the Court shifted from the fundamental fairness doctrine to the selective incorporation doctrine.[81] In 1968, the

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Court flatly rejected the total incorporation doctrine as inconsistent with the *Slaughter-House* decision, despite strenuous dissent. Total incorporation theory was raised and again rejected in the early 1900s in, among other cases, Twining v. New Jersey, 211 U.S. 78 (1908), and as late as 1947 in Adamson v. California, 332 U.S. 46 (1947). CRIMINAL PROCEDURE, *supra*, § 2.3, at 65-66. The fundamental fairness doctrine was accepted by the Court until the 1960s. *Id.* § 2.4, at 82.

77 CRIMINAL PROCEDURE, *supra* note 76, § 2.4, at 69. Fundamental rights had been defined as those rights that are " 'implicit in the concept of ordered liberty,' " that are " 'so rooted in the traditions and conscience of our people as to be ranked fundamental,' " and that "deprive the defendant of 'that fundamental fairness essential to the very concept of justice.' " *Id.* (quoting Palko v. Connecticut, 302 U.S. 319 (1937); Hebert v. Louisiana, 272 U.S. 312 (1926); Hurtado v. California, 110 U.S. 516 (1884)).

78 CRIMINAL PROCEDURE, *supra* note 76, § 2.4, at 69. "Clearly as a 'standard for judgment in the progressive evolution of the institutions of a free society,' due process may impose limits beyond those found in the specifics of the Bill of Rights." *Id.* § 2.4, at 71 (quoting Malinski v. New York, 324 U.S. 401, 414 (1945) (Frankfurter, J., concurring)).

79 *See, e.g.*, Wolf v. Colorado, 338 U.S. 25 (1949) (due process requires the fourth amendment protection of privacy from arbitrary intrusions by police but does not order the exclusion of illegally seized evidence); Mooney v. Holohan, 294 U.S. 103 (1935) (prosecutor's knowing reliance on perjured testimony violates due process); Powell v. Alabama, 287 U.S. 45 (1932) (failure to provide sufficient legal representation for defendants violated due process not because the sixth amendment grants the right to counsel but because effective appointed counsel was a prerequisite for a fair hearing); Tumey v. Ohio, 273 U.S. 510 (1927) (due process violated where trial judge compensated only by fees collected when the defendant is found guilty); Pierce v. Society of Sisters, 268 U.S. 510 (1925) (due process invalidated a state law prohibiting private religious schools); Moore v. Dempsey, 261 U.S. 86 (1923) (fourteenth amendment due process violated when trial conducted within a public mob atmosphere).

80 A. MASON & D. STEPHENSON, AMERICAN CONSTITUTIONAL LAW 352 (8th ed. 1987).

81 The two doctrines are alike in many ways. "Both read the due process clause as encompassing only those rights deemed fundamental under an ordered liberty standard. . . . Both agree also that the ordered liberty standard may encompass rights found in the specific Bill of Rights guarantees, as well as rights that extend beyond those guarantees." However, "[t]he fundamental fairness doctrine focuses on that aspect of the guarantee that was denied by the state in the particular case. . . . The selective incorpora-

Court incorporated the sixth amendment right to a jury trial.[82] The Court held that this inclusion depended on whether that right was " 'fundamental to the American scheme of justice.' "[83] Under this theory, the "new test meant that the Court would be willing to enforce values which the justices saw as having a special importance in the development of individual liberty in American society, whether or not the value was one that was theoretically necessary in any system of democratic government."[84]

The Court's due process criminal procedure decisions became far more inclusive than those decided under the fundamental fairness doctrine. Today, most of the protections of the Bill of Rights, including those of criminal process, have been incorporated into the fourteenth amendment due process clause.[85] A provision of the Bill of Rights extended to citizens against the states applies with identical force in both federal and state actions.[86]

The Court recognizes the right to fairness in the criminal process as a fundamental right, although no specific decision defines fairness.[87] Fundamental rights "hav[e] a value so essential to individual liberty in our society that they justify the justices reviewing

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tion doctrine, on the other hand, focuses on the total guarantee rather than on the particular aspect presented in an individual case." CRIMINAL PROCEDURE, *supra* note 76, § 2.5, at 82-83.

For example, under the fundamental fairness doctrine, the Court in Powell v. Alabama, 287 U.S. 45 (1932), included the right to counsel in due process. However, it included this right because effective appointment of counsel was a prerequisite for a fair hearing in that case, not because the sixth amendment grants the right to counsel. CRIMINAL PROCEDURE, *supra* note 76, § 2.4, at 76.

[82] Duncan v. Louisiana, 391 U.S. 145 (1968).

[83] TREATISE, *supra* note 62, § 15.6, at 75 (quoting *Duncan*, 391 U.S. at 149).

[84] *Id.* at 75.

[85] *See, e.g.*, Benton v. Maryland, 395 U.S. 784 (1969) (fifth amendment double jeopardy provision incorporated); *Duncan*, 391 U.S. at 145 (incorporated the sixth amendment right to trial by jury); Washington v. Texas, 388 U.S. 14 (1967) (incorporated sixth amendment right to compulsory process); Pointer v. Texas, 380 U.S. 400 (1965) (extended sixth amendment right of confrontation to states); Malloy v. Hogan, 378 U.S. 1 (1964) (self-incrimination protection of the fifth amendment applied to states); Gideon v. Wainwright, 372 U.S. 335 (1963) (applied the sixth amendment right to counsel to states); Robinson v. California, 370 U.S. 660 (1962) (fourteenth amendment included eighth amendment protection against cruel and unusual punishment); Mapp v. Ohio, 367 U.S. 643 (1961) (overruling Wolf v. Colorado, 338 U.S. 25 (1949)); fourth amendment regulation of searches and seizures held applicable to the states); Irvin v. Dowd, 366 U.S. 717 (1961) (incorporated sixth amendment right to an impartial jury); *In re* Oliver, 333 U.S. 257 (1948) (incorporated sixth amendment rights to notice and a speedy and public trial).

[86] TREATISE, *supra* note 62, § 15.6 at 78. "This concept is sometimes known as the 'bag and baggage' theory for it holds that when a provision of the Bill of Rights is made applicable to the states it is applied with all of its previous federal interpretation—it comes to the states complete, with its 'bag and baggage.' " *Id.*

[87] *Id.* § 15.7, at 78.

the acts of other branches of government" in a manner similar to the fundamental fairness method.[88] These individual rights do not have a specific basis in the Constitution or its amendments.[89]

The Court has continually held that " 'a fair trial in a fair tribunal is a basic requirement of due process.' "[90] The criminal protections included in the Bill of Rights make up only part of the fair trial protection; a fair trial includes many other guarantees. For example, a criminal defendant has a right to material exculpatory evidence withheld by the state.[91]

The Court often weighs the prospective right against its practical costs on the criminal justice system.[92] The Court has found in some cases that a provision extends a " 'constitutional command that . . . is unequivocal,' " in which case balancing "the practical costs incurred in applying the command become[s] irrelevant."[93] Where the Constitution does not command the right, the Court tends to balance the guarantee against the practical costs of its implementation.[94]

Some justices favor withholding a guarantee if it greatly burdens the state or justice system.[95] Others give weight to practical costs only where the burden is "substantial and clear, relates to an important state interest, and cannot be offset by other measures."[96] These differences lead to inconsistent treatment of practical costs by the Court. Some opinions hold practical costs as a reason to deny the application of a particular provision.[97] Other cases either mention practical costs yet dismiss them or fail to acknowledge them completely.[98] The Court is continuously confronted with cases that

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88 *Id.* § 15.7, at 79.

89 *Id.*

90 *Id.* § 17.8, at 259 (quoting *In re* Murchison, 349 U.S. 133 (1965)).

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

92 CRIMINAL PROCEDURE, *supra* note 76, § 2.8 at 117.

93 *Id.* § 2.8 at 117-18 (quoting Payton v. New York, 445 U.S. 573, 602 (1980)). "The command itself strikes a balance between the rights of the accused and society's need for effective enforcement of the criminal law, and the Court is bound to accept that balance." *Id.*; *see, e.g.,* Smith v. Hooey, 393 U.S. 374 (1969) (prosecution cannot justify denial of constitutional right to a speedy trial by the expense involved in transporting the defendant incarcerated in one jurisdiction to the jurisdiction of prosecution).

94 CRIMINAL PROCEDURE, *supra* note 76, § 2.8, at 118.

95 *Id.*

96 *Id.*

97 *Id.* at 119; *see, e.g.,* United States v. Calandra, 414 U.S. 338 (1974) (grand jury process would not be disrupted by allowing witness to challenge question as based on unconstitutionally seized evidence).

98 CRIMINAL PROCEDURE, *supra* note 76, § 2.8, at 119. *Compare* Gagnon v. Scarpelli, 411 U.S. 778, 787 n.11 (1973) (noting "the scope of the practical problem which would be occasioned by a requirement of counsel in all revocation cases") with Morrissey v.

demand a determination of whether a state practice or procedure violates the due process right to a fair trial.

IV. Supreme Court Opinions

A. THE MAJORITY—THE DEVELOPMENT OF THE BAD FAITH RULE

Writing for the majority,[99] Chief Justice Rehnquist stated that *Youngblood* required consideration of " 'what might loosely be called the area of constitutionally-guaranteed access to evidence.' "[100] 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."[101] The Chief Justice expounded on the meaning of such bad faith:

> We think that requiring 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, *i.e.*, those cases in which the police themselves by their conduct indicate that the evidence could form a basis for exonerating the defendant.[102]

The majority followed *Brady v. Maryland,*[103] which declared that a defendant's right to due process was violated when state prosecutors failed to fulfill the defendant's request for receipt of prosecutorial evidence favorable to the defendant and material to either his guilt or punishment.[104] The *Brady* Court stated that a due process violation exists regardless of the prosecution's good or bad faith in failing to produce the evidence.[105] The *Youngblood* Court also referred to *United States v. Agurs,*[106] which requires the prosecu-

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Brewer, 408 U.S. 471 (1972) (no discussion of costs of requiring a preliminary hearing in all parole revocation cases).

[99] Chief Justice Rehnquist was joined by Justices White, O'Connor, Scalia, and Kennedy.

[100] Arizona v. Youngblood, 109 S. Ct. 333, 336 (1988) (quoting United States v. Valenzuela-Bernal, 458 U.S. 858, 867 (1982)).

[101] *Id.* at 337.

[102] *Id.*

[103] 373 U.S. 83 (1963). In *Brady*, the petitioner and an accomplice were guilty of first degree murder. *Id.* at 84. Although the petitioner had admitted taking part in the murder, he had claimed that because his accomplice had committed the actual killing, he should not have been sentenced to capital punishment. Petitioner's counsel had requested from the prosecution access to the accomplice's extrajudicial statements. Although the petitioner's companion had stated several times that he had committed the actual killing, the prosecution withheld these statements from the petitioner. The United States Supreme Court affirmed the Maryland Court of Appeals' ruling that the prosecution's suppression of evidence violated petitioner's due process protections. *Id.* at 86.

[104] *Brady*, 373 U.S. at 87.

[105] *Id.*

[106] 427 U.S. 97 (1976). In *Agurs*, the respondent was convicted of second-degree mur-

tion to disclose material evidence to the defendant regardless of his or her request, although the entire file need not be revealed.[107]

The Chief Justice argued that the *Youngblood* prosecution had complied with the *Brady* and *Agurs* requirements by disclosing to the respondent the existence of the samples and the relevant information concerning testing.[108] To require the state to preserve evidence for the defendant would expand the state's constitutional duty beyond that imposed by *Brady* and *Agurs*.[109]

Regarding preservation of evidence, the Court observed that in *California v. Trombetta*,[110] the defendants had moved to suppress breathalyzer test results based on the state's failure to preserve the tested breath samples.[111] The Court had denied the motion because 1) the police had acted in good faith according to their normal procedure, 2) the chances that the breath samples would have exculpated the defendants had been slight, and 3) the defendants had alternative methods for proving their innocence.[112]

Chief Justice Rehnquist distinguished the Arizona Court of Appeal's reasoning in *Arizona v. Youngblood* and *Arizona v. Escalante*[113] from *Trombetta*.[114] The *Trombetta* standard of constitutional materiality spoke to evidence with exculpatory value apparent before the evidence was destroyed. The majority argued, "Here, respondent has 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; this evidence was simply an avenue of

der. *Id.* at 98. The respondent moved for a new trial based on his subsequent discovery of the victim's criminal record, which would have supported his self-defense theory, and on the prosecution's failure to disclose this record. *Id.* at 100. The trial court denied the respondent's motion finding that the evidence had not been material to his case. *Id.* at 101-02. The Court ruled that the prosecution's failure to turn over the evidence had not been a violation of the respondent's due process rights where he had not requested such evidence from the prosecution. *Id.* at 114.

107 *Id.* at 111.

108 Arizona v. Youngblood, 109 S. Ct. 333, 336 (1988). Chief Justice Rehnquist observed that the state had disclosed to Youngblood the relevant police reports containing information about the swab and clothing samples and had provided him the police criminologist's laboratory reports and notes. The respondent's expert also had access to the swab and clothing samples. *Id.*

109 *Id.*

110 467 U.S. 479 (1984).

111 *Id.* at 482.

112 *Youngblood*, 109 S. Ct. at 336 (citing *Trombetta*, 467 U.S. at 488-90). Although the Chief Justice conceded that the evidence in *Youngblood* probably had more exculpatory value than the evidence in *Trombetta*, he distinguished the cases by the state's failure to use the evidence against Youngblood. *Youngblood*, 109 S. Ct. at 336.

113 See *supra* note 57 for an explanation of the Arizona Court of Appeals' use of *Escalante* in its *Youngblood* opinion.

114 *Youngblood*, 109 S. Ct. at 336 n.**.

investigation that might have led in any number of directions."[115]

The Chief Justice observed that the *Brady* interpretation of the fourteenth amendment due process clause "makes the good or bad faith of the State irrelevant when the State fails to disclose to the defendant material exculpatory evidence."[116] He asserted that for the respondent to state a due process violation his claim must be based on a duty beyond the constitutional duty imposed on states by *Brady* and *Agurs*.[117] He stated, "We 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."[118] He extended to the states the duty to act in good faith when considering the preservation of evidence; criminal defendants must show bad faith by the state to demonstrate a due process violation.[119]

To support the bad faith requirement, the Chief Justice cited several cases where the Court considered the good or bad faith of the federal government's actions when handling evidence.[120] In addition, he weighed the police obligation to preserve evidence against the "fundamental fairness" requirement of the due process clause and determined that limiting the police burden necessitated the bad faith requirement.[121]

Applying then this test to the present case, the majority held that the police had acted in good faith, thereby negating the due process claim.[122] The majority also noted that the police had not been constitutionally obligated to perform any specific or particular test on evidentiary material.[123]

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[115] *Id.* at 336-37 n.**.

[116] *Id.* at 337.

[117] *Id.* at 336.

[118] *Id.* at 337.

[119] *Id.*

[120] *Id.* The Court cited United States v. Marion, 404 U.S. 307 (1971) (defendant was unable to show that pre-indictment delay was a due process violation or that the government intentionally delayed the indictment); United States v. Lovasco, 431 U.S. 783 (1977) (due process not violated by the government's good faith pre-indictment investigative delay); and United States v. Valenzuela-Bernal, 458 U.S. 858 (1982) (government's deportation of illegal alien witnesses on its good-faith determination that they did not possess favorable evidence for defendant was not a due process violation where there was no evidence that their testimony would be material to defendant's case).

[121] *Youngblood*, 109 S. Ct. at 337 (quoting Lisenba v. California, 314 U.S. 219, 236 (1941) ("due process purpose of prohibiting use of involuntary confession is to prevent fundamental unfairness").

[122] *Id.* The Chief Justice stated that the police failure to preserve the semen samples on the clothing could "at worst be described as negligent." *Id.*

[123] *Id.* at 338. The Arizona Court of Appeals had obliquely referred to both the

B. CONCURRING OPINION—THE OVERBROAD BAD FAITH RULE

Concurring with the majority, Justice Stevens agreed that the respondent's rights under the due process clause had not been violated.[124] He disagreed, however, insofar as the Court "announce[d] a proposition of law that is much broader than necessary to decide this case."[125]

Justice Stevens first observed that at the time when the state had failed to refrigerate the clothing, it "had at least as great an interest in preserving the evidence as did the person later accused of the crime."[126] Second, he conjectured unlikely that the state's failure to preserve the clothing prejudiced Youngblood.[127] The defense counsel had enlightened fully the jury of the state's actions and the possibility that the tests could have proved the respondent's innocence.[128] Furthermore, the jury instructions buffered against prejudice.[129] Third, Justice Stevens asserted that the lost evidence was " 'immaterial' " because "no juror chose to draw the permissive inference that proper preservation of the evidence would have demonstrated that the defendant was not the assailant . . . ."[130]

Justice Stevens rejected the majority's broad requirement that police bad faith must exist to establish a due process violation for failure to preserve evidence.[131] He countered, "[T]here 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."[132]

C. DISSENTING OPINION—THE CONSTITUTIONAL MATERIALITY TEST

Writing the dissent, Justice Blackmun[133] protested that the ma-

state's delay in administering P-30 tests until late in the investigation and its failure to conduct any acid phosphate testing. That court had stated that such tests might have exonerated Youngblood. Arizona v. Youngblood, 153 Ariz. 50, 54, 734 P.2d 592, 596 (Ariz. Ct. App. 1986).

124 *Youngblood,* 109 S. Ct. at 339 (Stevens, J., concurring).

125 *Id.* (Stevens, J., concurring).

126 *Id.* at 338 (Stevens, J., concurring).

127 *Id.* (Stevens, J., concurring).

128 *Id.* (Stevens, J., concurring).

129 *Id.* (Stevens, J., concurring). The trial judge had instructed the jury: " '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.' " *Id.* (Stevens, J., concurring) (quoting 10 Trial Manuscript 90).

130 *Id.* (Stevens, J., concurring).

131 *Id.* at 339 (Stevens, J., concurring).

132 *Id.* (Stevens, J., concurring).

133 Justice Blackmun was joined by Justices Brennan and Marshall.

jority's ruling "improperly limits the scope of due process, and ignores its proper focus in a futile pursuit of a bright-line rule."[134] He noted that the unpreserved evidence was " 'constitutionally material' " and that the state's failure to preserve it "significantly prejudiced respondent" thereby depriving him of due process.[135] Justice Blackmun both protested the majority's claim that precedent supported a bad faith requirement and remonstrated the Court's failure to inquire into the constitutional materiality of the evidence mandated by prior cases.[136]

He contended that *Brady* and *Agurs* did not merely require the state to disclose material evidence favorable to his case to the defendant, but rather they mandated disclosure regardless of whether the prosecutor acted in good or bad faith.[137] Quoting *Agurs*, he stated, " 'Nor do we believe the constitutional obligation is measured by the moral culpability, or the willfulness, of the prosecutor. . . . If the suppression of evidence results in constitutional error, it is because of the character of the evidence, not the character of the prosecutor.' "[138] Justice Blackmun contended that the *Agurs* Court had established the constitutional materiality of the evidence as the proper due process standard which must be used when considering preservation of evidence as well as withholding evidence claims.[139]

Justice Blackmun rejected the majority's contention that *Trombetta*[140] alluded to the good faith versus bad faith standards.[141] He claimed that the *Trombetta* Court's "in good faith" referred to normal police procedures,[142] thereby it "merely prefaced the pri-

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134 *Id.* at 345 (Blackmun, J., dissenting). Justice Blackmun scoffed the majority's ability to create a bright-line rule, citing examples such as the difficulty in differentiating between good and bad faith. *Id.* at 342 (Blackmun, J., dissenting).

135 *Id.* at 339 (Blackmun, J., dissenting).

136 *Id.* at 340-42 (Blackmun, J., dissenting). Justice Blackmun cited Brady v. Maryland, 373 U.S. 83 (1963), United States v. Agurs, 427 U.S. 97 (1976), and California v. Trombetta, 467 U.S. 479 (1984), in support of the materiality requirement. For further discussion of these cases, see *supra* notes 103-112 and accompanying text.

137 *Youngblood,* 109 S. Ct. at 340 (Blackmun, J., dissenting).

138 *Id.* (Blackmun, J., dissenting) (quoting United States v. Agurs, 427 U.S. 97, 110 (1976)). Justice Blackmun justified his interpretation by repeating the majority's quotation from *Brady*: " '[The] suppression by the prosecution of evidence favorable to the 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.' " *Id.* (Blackmun, J., dissenting) (quoting Brady v. Maryland, 373 U.S. 83, 87 (1963)).

139 *Id.* at 340 (Blackmun, J., dissenting).

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

141 *Id.* at 341 (Blackmun, J., dissenting). He asserted, "There is nothing in *Trombetta* that intimates that good faith alone should be the measure." *Id.* (Blackmun, J., dissenting).

142 *Id.* (Blackmun, J., dissenting). The *Trombetta* Court adopted "in good faith and in

mary inquiry, which centers on the 'constitutional materiality' of the evidence itself."[143] Justice Blackmun refuted the majority's foundation for the bad faith requirement.[144]

Justice Blackmun advocated the analysis of the constitutional materiality of the unpreserved evidence:

> To put it succinctly, where 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.[145]

Applying this rule to *Youngblood,* he determined that the semen samples on David's clothing were relevant, material evidence of the identity of the assailant: the semen could have been tested to show a characteristic of the assailant thereby possibly exonerating Youngblood, and the respondent had no equivalent evidence available.[146] Thus, Justice Blackmun concluded that Youngblood had been deprived of a fair trial and consequently was denied due process of law.[147]

V. Analysis

The majority decision is a massacre of precedent and constitutional protection of a fair trial. The Court's bad faith requirement inadequately protects criminal defendants' due process rights to

accord with their normal practice" from Killian v. United States, 368 U.S. 231, 241-42 (1961) (the Court stressed the importance of compliance with usual police procedure where it was held there was no due process violation by the police following the practice of destroying notes used to prepare reports received into evidence). *Youngblood,* 109 S. Ct. at 341 (Blackmun, J., dissenting).

[143] *Id.* (Blackmun, J., dissenting).

[144] *Id.* at 340-41 nn.3 & 5 (Blackmun, J., dissenting). Justice Blackmun argued that United States v. Valenzuela-Bernal, 458 U.S. 858 (1982), did not support the majority's bad faith requirement. *Id.* at 340-41 n.3 (Blackmun, J., dissenting). First, the Government's deportation of illegal alien witnesses was not negligent or malicious but rather was in accord with immigration policy. Second, the Court went further than a good faith analysis and required the defendant to show that the lost evidence was material to his defense. *Id.* (Blackmun, J., dissenting).

Justice Blackmun discounted the majority's reliance on United States v. Marion, 404 U.S. 307 (1971), and United States v. Lovasco, 431 U.S. 783 (1977), both of which had involved pre-indictment delays. He stated, "The harm caused by such delay is certainly more speculative than that caused by the deprivation of material exculpatory evidence, and in such cases statutes of limitations, not the Due Process Clause, provide the primary protection for defendants' interests." *Youngblood,* 109 S. Ct. at 341 n.5 (Blackmun, J., dissenting).

[145] *Id.* at 343 (Blackmun, J., dissenting).

[146] *Id.* at 344-45 (Blackmun, J., dissenting). Justice Blackmun noted that the swab sample was the incorrect size for proper testing. *Id.* at 345 (Blackmun, J., dissenting).

[147] *Id.* (Blackmun, J., dissenting).

present a complete defense and receive a fair trial. The Court should have continued to apply the constitutional materiality standard supported by prior case law to uphold due process rights. Finally, the Court's weak attempt to justify its bad faith requirement with public policy unconscionably limited police burdens to the detriment of due process.

Due process insures that a criminal defendant will be accorded "that fundamental fairness essential to the very concept of justice. In order to declare a denial of it we must find that the absence of that fairness fatally infected the trial; the acts complained of must be of such quality as necessarily prevents a fair trial."[148] Fundamental fairness requires that criminal defendants "be afforded a meaningful opportunity to present a complete defense."[149]

A. PRECEDENT: BAD FAITH VERSUS MATERIALITY

When a criminal defendant is deprived of material evidence, he is deprived of the fundamental right to a fair trial because he cannot likely present a complete defense. Prior case law concerning state withholding, state destruction, and police preservation of evidence requires a materiality analysis of the evidence to determine due process violations. The Court wrongly discarded the materiality standard in favor of a bad faith requirement that seriously narrows criminal defendants' due process protections.

Chief Justice Rehnquist failed to reconcile adequately the Court's bad faith requirement with existing criminal procedure case law and the due process fair trial guarantee. His analysis of " 'the area of constitutionally guaranteed access to evidence' "[150] recalled *Brady*[151] and *Agurs*,[152] which controlled prosecutorial suppression of evidence. In the former, the Court held that the suppression by the prosecution of requested evidence favorable to defendant and material to his guilt or punishment violated due process.[153] The *Brady* Court specifically indicated that such a violation may exist "irrespec-

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[148] Lisenba v. California, 314 U.S. 219, 236 (1941).

[149] California v. Trombetta, 467 U.S. 479, 485 (1984). The Court continued:

> To safeguard that right, the Court has developed "what might loosely be called the area of constitutionally guaranteed access to evidence." Taken together, this group of constitutional privileges delivers exculpatory evidence into the hands of the accused, thereby protecting the innocent from erroneous conviction and ensuring the integrity of our criminal justice system.

Id. (quoting United States v. Valenzuela-Bernal, 458 U.S. 858, 867 (1982)).

[150] *Youngblood*, 109 S. Ct. at 336 (quoting *Valenzuela-Bernal*, 458 U.S. at 867).

[151] Brady v. Maryland, 373 U.S. 83 (1963).

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

[153] *Brady*, 373 U.S. at 87. See *supra* note 103 for a discussion of *Brady*.

tive of the good faith or bad faith of the prosecution."[154]

In the latter case, the Court held that the prosecution had a duty to disclose to the defendant material evidence regardless of his request.[155] Evidence is material when its admission would create a reasonable doubt not otherwise present.[156] The *Agurs* Court observed, "[I]f the suppression of evidence results in constitutional error, it is because of the character of the evidence, not the character of the prosecutor."[157] Both cases indicate that the key analysis of evidence withheld from the defendant is of its materiality, not the good or bad faith of the state.

The Chief Justice asserted that a constitutional duty to preserve evidence must be imposed by more than the mere materiality of the destroyed evidence. This assertion is not supported by precedent and narrows due process protections for criminal defendants.

He justifies his point by interpreting *Trombetta*,[158] as excusing the state from a due process challenge because it had acted in "good faith and in accord with their normal practice."[159] However, the *Trombetta* Court did not stop its analysis at the absence of bad faith by the state. After acknowledging the state had acted in good faith, the Court continued, "More importantly, California's policy of not preserving breath samples is without constitutional defect. 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."[160] The primary inquiry of that Court was the constitutional materiality of the evidence as "an exculpatory value that was apparent before the evidence was destroyed."[161] Justice Blackmun argued in *Youngblood*, "There is nothing in *Trombetta* that intimates that good faith alone should be the measure."[162]

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154 *Id.*

155 *Agurs*, 427 U.S. at 107. See *supra* note 106 for a discussion of *Agurs*.

156 *Id.* at 112-13. The Court did not include the more recent definition of materiality found in United States v. Bagley, 473 U.S. 667 (1985) (court of appeals must decide whether the result of defendant's trial would have been different if the prosecutor had disclosed evidence that could have been used to impeach government witness). Evidence is material if there is a "reasonable probability" that it "would" alter the trial result. *Id.* at 682.

157 *Agurs*, 427 U.S. at 110.

158 California v. Trombetta, 467 U.S. 479 (1984) (breath sample test results not suppressed on the ground that the state had failed to preserve the tested breath samples). See *supra* notes 110-12 and accompanying text for further discussion of *Trombetta*.

159 *Arizona v. Youngblood*, 109 S. Ct. 333, 336 (quoting *Trombetta*, 467 U.S. at 488 (quoting Killian v. United States, 368 U.S. 231, 242 (1961))).

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

161 *Id.* at 489.

162 *Youngblood*, 109 S. Ct. at 341 (Blackmun, J., dissenting).

The Chief Justice maintained that a good or bad faith determination was necessary where a claimed loss of evidence was attributable to the government.[163] *United States v. Marion*[164] and *United States v. Lovasco*[165] included claims that pre-indictment delay violated due process. Yet, as Justice Blackmun argued, "The harm caused by such delay is certainly more speculative than that caused by the deprivation of material exculpatory evidence, and in such cases statutes of limitations, not the Due Process Clause, provide the primary protection for defendants' interests."[166]

Chief Justice Rehnquist, still searching for support of a bad faith requirement, butchered the import of his opinion in *United States v. Valenzuela-Bernal.*[167] He interpreted *Valenzuela-Bernal* as requiring "the prompt deportation of the witnesses [be] justified 'upon the Executive's good-faith determination that they possess no evidence favorable to the defendant in a criminal prosecution.' "[168] This statement is the only reference to good faith in *Valenzuela-Bernal.*

He continued his analysis in *Valenzuela-Bernal,* even in light of the apparent good faith of the government, by investigating the materiality of the evidence that the witness could have provided the defendant. He stated, "Sanctions may be imposed on the Government for deporting witnesses *only if the criminal defendant makes a plausible showing that the testimony of the deported witnesses would have been material and favorable to his defense. . . .*"[169] The Court tested the government's deliberate exportation of evidence by a materiality standard. Thus even Chief Justice Rehnquist does not assert that the good faith/bad faith analysis is enough to protect the due process rights of criminal defendants in access-to-evidence cases.

B. LIMITATION OF DUE PROCESS AND THE MATERIALITY SOLUTION

By discarding the materiality standard, the Court seriously narrowed criminal defendants' fourteenth amendment rights to a fair trial. Although Chief Justice Rehnquist went to great lengths to erect a foundation for his bad faith requirement, he failed to cite a single prior case that supported the proposition that the state's good faith precluded an analysis of the materiality of the evidence in

[163] *Id.* at 337.
[164] 404 U.S. 307 (1971). See *supra* note 120 for further discussion of *Marion.*
[165] 431 U.S. 783 (1977). See *supra* note 120 for further discussion of *Lovasco.*
[166] *Youngblood,* 109 S. Ct. at 341 n.5 (Blackmun, J., dissenting).
[167] 458 U.S. 858 (1982). See *supra* note 120 for further discussion of *Valenzuela-Bernal.*
[168] *Youngblood,* 109 S. Ct. at 337 (quoting *Valenzuela-Bernal,* 458 U.S. at 872).
[169] *Valenzuela-Bernal,* 458 U.S. at 873 (emphasis added).

controversy. The Court had no basis to refuse to evaluate unpreserved evidence by the materiality standard and to extend a bad faith standard to the preservation of evidence issue. Indeed, *Trombetta* mandates that the constitutional materiality of evidence be considered to establish a due process violation for failure to preserve evidence.[170]

In *Youngblood*, the exact character of the lost evidence was unknown.[171] Unlike the analyzed breath samples in *Trombetta*, the unpreserved semen samples were untested. Lost evidence requires courts to imagine the nature of the destroyed information and the extent of its import on the defendant's case. However, the bad faith requirement unsatisfactorily addresses the problem of unknown evidence. This standard improperly limits due process. Lessening the standard by which the state must act to preserve evidence will likely lead to negligent[172] loss of vital defense evidence without penalizing police. As both Justices Stevens and Blackmun pointed out, although the state may act in good faith, even negligently, the defendant may nevertheless be denied a fair trial where lost, destroyed, or uncollected evidence is vital to his or her case.[173] Furthermore, the defendant should not have to suffer from the state's procedural errors; the state certainly does not run the risk of suffering procedurally from a defendant's mistake. If a defendant is denied access to material evidence necessary to a complete defense, he or she suffers from an unfair trial regardless of whether or not the state intended to withhold the evidence.

Justice Blackmun constructed a variation of the strict materiality standard to be applied in *Youngblood* situations where the character of the unpreserved evidence is unknown. He stated, "[W]here no comparable evidence is likely to be available to the defendant, po-

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170 See *supra* note 161 and accompanying text for the *Trombetta* definition of materiality.

171 This Note does not attempt to consider the full range of issues posed by unpreserved evidence. *See* Comment, *The Prosecution's Duty to Preserve Evidence Before Trial*, 72 CALIF. L. REV. 1019 (1984), for a more complete discussion of the difficulties of dealing with lost or destroyed evidence and determining its probable effect on the defendant's case.

172 As the majority implies by imputing that the police in *Youngblood* were at most negligent, negligent police actions resulting in the loss of evidence are not considered in bad faith for due process claims. *Youngblood*, 109 S. Ct. at 337.

173 Justice Stevens argued, "In my opinion, 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." *Youngblood*, 109 S. Ct. at 339 (Stevens, J., concurring). Likewise, "As *Agurs* points out, it makes no sense to overturn a conviction because a malicious prosecutor withholds information that he mistakenly believes to be material." *Id.* at 341 (Blackmun, J., dissenting).

lice must preserve 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."[174] Regardless of whether the *Trombetta* strict materiality analysis or a variation such as that proposed by Justice Blackmun is implemented, the most important factor to consider in preservation of evidence cases is the quality of the unpreserved evidence. A criminal defendant refused access to critical evidence for any reason is denied a fair trial.

C. BALANCING DUE PROCESS AND POLICE BURDENS

The Court weighed the right to a fair trial against the cost to police of preservation of evidence and determined that the costs tipped the scales of justice.[175] By limiting the police burden, the Court unjustly narrowed due process protections of a fair trial. The Court thus eroded a valuable criminal protection by mandating the evaluation of the good or bad faith of state action, a standard that fails to accomplish its proported policy goals of easing police burden and providing society with greater protection from crime.

Upon observing the practical considerations of limiting police responsibility, the majority rightly concluded that the police should not carry the onus of preserving all remotely relevant evidence.[176] Such a burden on the police—especially when crime rates skyrocket and police and prosecution are severely unprepared to meet society's needs—is impracticable, unenforceable, and unnecessary.[177] However, while limiting some mandated preservation of evidence, the majority's bad faith standard failed to accommodate adequately the competing consideration of the due process right to a fair trial. The preservation of this right far outweighs the competing need to limit the state's burden. "The Constitution requires that criminal defendants be provided with a fair trial, not merely a 'good faith' try at a fair trial . . . . Regardless of intent or lack thereof, police action

[174] *Id.* at 343 (Blackmun, J., dissenting).

[175] The majority marked its "unwillingness to read the 'fundamental fairness' requirement of the Due Process Clause 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." *Id.* at 337 (citation omitted).

[176] See *supra* note 121 and accompanying text for the majority's balance of due process and police burden.

[177] For example, the Court has held that the prosecution is not constitutionally mandated to reveal its entire file to the defendant, United States v. Agurs, 427 U.S. 97, 111 (1976), nor is it under a constitutional duty to disclose a "complete and detailed accounting to the defense of all police investigatory work on a case," Moore v. Illinois, 408 U.S. 786, 795 (1972).

that results in a defendant's receiving an unfair trial constitutes a deprivation of due process."[178]

Additionally, the majority's bad faith standard fails to respond adequately to society's crime protection needs. Although easing the police burden of preserving evidence possibly allows them more time to attack other crime problems, the bad faith standard merely causes ambiguity and decreases police incentives to take due care in investigations of criminal conduct.

A bad faith test of the preservation of evidence is ambiguous. Does a defendant have to show actual malice on the part of the state or is a showing of recklessness sufficient? "Does 'good faith police work' require a certain minimum of diligence, or will a lazy officer, who does not walk the few extra steps to the refrigerator, be considered to be acting in good faith?"[179]

Furthermore, the police lack the incentives present under the materiality standard to consider carefully the importance and relevance of all evidence. Such care could increase the accuracy of investigations. However, with the demolition of this incentive by *Youngblood*, police can in "good faith" disregard or neglect evidence that does not immediately appear useful to the defendant without considering its materiality. This neglect can impair the accuracy of investigations.

The Court wrongly established a standard that both decreases police incentives to conduct accurate investigations and narrows unjustly criminal defendants' due process rights to a fair trial. The materiality standard would better accomplish the Court's goal of aiding police in meeting society's crime protection needs. It would do so while, more importantly, protecting criminal defendants' due process rights.

VI. Conclusion

The majority limited criminal defendants' due process rights to a fair trial by requiring bad faith on the part of the state without inquiring into the materiality of the evidence and its affect on the trial. The majority's bad faith standard is not supported by precedent and is ambiguous. Both the quality of the lost or destroyed evidence and its effect on the defendant's case indicate whether or not the defendant has been deprived of a fair trial, not the good or bad faith of the state in failing to preserve the evidence. The materi-

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178 *Youngblood*, 109 S. Ct. at 339 (Blackmun, J., dissenting).

179 *Id.* at 342 (Blackmun, J., dissenting).

ality test[180] is the most acceptable standard by which to judge state failure to preserve evidence for the defendant.

SARAH M. BERNSTEIN

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[180] A suitable variation of the materiality standard, such as that proposed by Justice Blackmun, would adequately meet criminal defendants' due process rights. See *supra* note 145 and accompanying text for Justice Blackmun's proposal.