

2017

## Big Budget Productions with Limited Release: Video Retention Issues with Body-Worn Cameras

Bradley X. Barbour

*Fordham University School of Law*

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### Recommended Citation

Bradley X. Barbour, *Big Budget Productions with Limited Release: Video Retention Issues with Body-Worn Cameras*, 85 Fordham L. Rev. 1725 (2017).

Available at: <http://ir.lawnet.fordham.edu/flr/vol85/iss4/8>

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## NOTES

### **BIG BUDGET PRODUCTIONS WITH LIMITED RELEASE: VIDEO RETENTION ISSUES WITH BODY-WORN CAMERAS**

*Bradley X. Barbour\**

*Since 2013, there has been growing support for police body-worn cameras in the wake of several high-profile and controversial encounters between citizens and law enforcement. The federal government has justified budgetary measures funding body-worn camera programs as a means to facilitate trust between law enforcement and the public through the objectivity of video footage—a sentiment supported by many lawmakers advocating for implementation of this technology. These policy goals, however, are stymied by a deficiency of police department policies and state statutes regulating the retention of footage and close adherence of states to the precedent of *Arizona v. Youngblood*, which holds that the destruction of potentially exculpatory evidence by the government not committed in “bad faith” does not violate due process. This Note analyzes the current landscape of body-worn camera video retention and argues for reform at the judicial and statutory level on how footage is preserved. It argues that courts should interpret *Youngblood* as allowing judges to impose the sanction of missing-evidence instructions—even in the absence of bad faith—as a remedy against the destruction of body-worn camera footage that occurs because of police policies and practices that limit protection of such footage. This Note also argues that states should move quickly to create statutes regulating the time periods in which body-worn camera footage must be retained while also balancing the logistical burden that high-volume video storage imposes on police departments.*

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\* J.D. Candidate, 2017, Fordham University School of Law; B.A., 2013, American University. Thank you to Professor Deborah Denno for your wisdom and infinite patience. Thank you to two generations of *Fordham Law Review* editors: Hopi, Brandon, Max, and Josh, who truly helped make this Note possible. Thank you to Mom and Dad for caring about me and the completion of this project more than I could ask for. And thank you to Kelsey for your love, support, seltzer, and constant sense of optimism about the Note; I could not have done it without you.

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## INTRODUCTION

“This office has probably reviewed 100 police shootings, and this is the first time we’ve thought, ‘This is without question a murder.’”<sup>1</sup> Under ordinary circumstances, one might not expect a prosecutor to speak to the press in such conclusive and damning terms about a police shooting that is barely one week old. But in the wake of several high-profile and controversial police killings of black men in 2015, and the widespread protests that followed, the circumstances surrounding Samuel DuBose’s death during a traffic stop in Cincinnati were anything but ordinary. Most notably, the entire violent confrontation took place under the impersonal gaze of a body-worn camera affixed to Officer Ray Tensing’s uniform, allowing the world to see the apparent contradictions in the officer’s testimony and the promise that widespread use of this technology could offer to society.<sup>2</sup> Without this video evidence, a unique perspective on the incident would have been lost, and it is doubtful that such an acute public reaction would have taken place.

There are many signs that the use of body-worn cameras will soon become ubiquitous in American police departments.<sup>3</sup> The widespread use of this technology is supported by nearly 90 percent of the population<sup>4</sup> and is growing in popularity among officers as a means of reducing costly lawsuits resulting from confrontations.<sup>5</sup> A survey of seventy-five large police departments in 2015 found that 95 percent had either implemented a body-worn camera program or had committed to the implementation of the technology.<sup>6</sup> The federal government has also expressed interest in the technology, as Barack Obama announced an ambitious plan at the end of 2014 to help fund the purchase of over 50,000 body-worn cameras for local police departments.<sup>7</sup> Since then, the Department of Justice (DOJ) awarded

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1. Richard Pérez-Peña, *University of Cincinnati Officer Indicted in Shooting Death of Samuel DuBose*, N.Y. TIMES (July 29, 2015), <http://www.nytimes.com/2015/07/30/us/university-of-cincinnati-officer-indicted-in-shooting-death-of-motorist.html> [https://perma.cc/HPF7-EQZ9].

2. *See id.*

3. *See* Radley Balko, *A New Report Shows the Limits of Police Body Cameras*, WASH. POST (Feb. 5, 2016), <https://www.washingtonpost.com/news/the-watch/wp/2016/02/05/a-new-report-shows-the-limits-of-police-body-cameras/> [https://perma.cc/H86K-YZKG].

4. *See* Peter Moore, *Overwhelming Support for Police Body Cameras*, YOUTUBE (May 7, 2015), <https://today.yougov.com/news/2015/05/07/body-cams/> [https://perma.cc/KG6W-4TXU].

5. *See* Matt Gutman & Seni Tienabeso, *Cop Cam: More Police Testing Micro-Cameras to Record Patrols*, ABC NEWS (June 18, 2013), <http://abcnews.go.com/US/cop-cam-police-testing-micro-cameras-record-patrols/story?id=19423994#.UcOHHvm1EmP> [https://perma.cc/N5UP-YWRP].

6. *See* MAJOR CITIES CHIEFS & MAJOR CTY. SHERIFFS, SURVEY OF TECHNOLOGY NEEDS: BODY WORN CAMERAS (2016), [http://www.policefoundation.org/wp-content/uploads/2016/01/BWC-Survey-Slides-Final\\_pptx.pdf](http://www.policefoundation.org/wp-content/uploads/2016/01/BWC-Survey-Slides-Final_pptx.pdf) [https://perma.cc/K44X-ZYDR].

7. *See* Carrie Dann & Andrew Rafferty, *Obama Requests \$263 Million for Police Body Cameras, Training*, NBC NEWS (Dec. 1, 2014), <http://www.nbcnews.com/politics/first-read/obama-requests-263-million-police-body-cameras-training-n259161> [https://perma.cc/9CKV-8P7G].

over \$23 million toward this ambitious goal.<sup>8</sup> And while on the campaign trail in 2015, President Donald Trump announced that he was in favor of federal body-worn camera funding for police departments, adding that “[body-worn cameras] can solve a lot of problems for police.”<sup>9</sup> Additionally, in the 2013 case *Floyd v. City of New York*,<sup>10</sup> Judge Shira Scheindlin held that the “stop-and-frisk” policies of the New York City Police Department (NYPD) violated the constitutional rights of the plaintiffs, and the NYPD was ordered to institute a robust body-worn camera pilot program that would precede wider implementation of this technology.<sup>11</sup>

Yet many police departments do not have written policies detailing how footage collected in the line of duty is retained,<sup>12</sup> and there are few state statutes directly controlling disclosure and retention of video footage by police.<sup>13</sup> Furthermore, the rapid implementation of body-worn cameras presents numerous logistical and budgetary concerns for police departments.<sup>14</sup> Without coherent and modernized policies for the uploading, labeling, and retention of police footage, there is a high risk of officers negligently losing or destroying potentially exculpatory video evidence. Nevertheless, lower courts have overwhelmingly found that instances of the mishandling or willful destruction of potentially exculpatory footage by police officers are not violations of a defendant’s right to due process.<sup>15</sup> These decisions are largely based on the controlling case of *Arizona v. Youngblood*,<sup>16</sup> which holds 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.”<sup>17</sup> While the DOJ has published a body-worn camera implementation

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8. See Press Release, U.S. Dep’t of Justice, Justice Department Awards over \$23 Million in Funding for Body Worn Camera Pilot Program to Support Law Enforcement Agencies in 32 States (Sept. 21, 2015), <https://www.justice.gov/opa/pr/justice-department-awards-over-23-million-funding-body-worn-camera-pilot-program-support-law> [https://perma.cc/H5TC-CASA].

9. Ben Jacobs, *Donald Trump Tells the Guardian Police Body Cameras ‘Need Federal Funding,’* GUARDIAN (Oct. 13, 2015), <https://www.theguardian.com/us-news/2015/oct/13/donald-trump-police-body-cameras-federal-funding> [https://perma.cc/DLE5-JU6F].

10. 959 F. Supp. 2d 668 (S.D.N.Y. 2013).

11. *Id.* at 684–86.

12. See Christopher Moraff, *Will New DOJ Guide Take the Guesswork out of Policy Body Cameras?*, NEXT CITY (June 8, 2015), <https://nextcity.org/daily/entry/police-body-camera-rules-doj-guidelines> [https://perma.cc/TM9E-XKW8].

13. See Martina Kitzmueller, Essay, *Are You Recording This?: Enforcement of Police Videotaping*, 47 CONN. L. REV. 167, 181 (2014).

14. See POLICE EXEC. RESEARCH FORUM, IMPLEMENTING A BODY-WORN CAMERA PROGRAM: RECOMMENDATIONS AND LESSONS LEARNED 32–35 (2014), <http://www.justice.gov/iso/opa/resources/472014912134715246869.pdf> [https://perma.cc/MCN9-F4LR].

15. See, e.g., *United States v. Matthews*, 373 F. App’x 386, 391 (4th Cir. 2010) (“At best, the failure to request the tape for purposes of evidence preservation would appear to be negligence, and [m]ere negligence is not sufficient to establish . . . bad faith” in this context.” (quoting *United States v. Bohl*, 25 F.3d 904, 912 (1994))).

16. 488 U.S. 51 (1988).

17. *Id.* at 58.

manual that provides some guidance on retention policies, the novelty of body-worn camera technology and the rapid pace of national acceptance for widespread implementation has left several open questions about how police departments should retain and release video footage.<sup>18</sup> There is a good chance that federal, state, and local governments will spend a large amount of taxpayer funds on body-worn camera programs that are permitted by statute and case law to operate with extremely limited video retention policies, which could conflict with the public policy reasons for providing these funds in the first place.<sup>19</sup>

Part I of this Note discusses the rise of video use in police work, starting with dashboard camera footage and its use in DUI arrests. It then examines the rise of body-worn cameras in police departments, starting with small pilot programs across the United States and continuing with the court-ordered program of *Floyd* and expanded federal funding of body-worn camera programs. Part I also analyzes the development of the current law on the due process considerations of withholding evidence or failing to retain evidence, focusing on the core U.S. Supreme Court cases of *Brady v. Maryland*<sup>20</sup> and *Youngblood*, and assessing the effect that the *Youngblood* “bad faith” standard has had on cases involving lost or destroyed evidence. Next, Part II examines the unique challenges regarding police retention of video footage, which coincide with the rise of body-worn cameras in the United States. It then analyzes the strict adherence to the “bad faith” standard of *Youngblood* at the state level and how it affects the destruction of police video footage. Part II then discusses the role that sanctions play as a remedy to the destruction of evidence in jurisdictions strictly adhering to, as well as deviating from, the bad faith standard of *Youngblood* before concluding with an appraisal of state statutes regulating the government’s retention of body-worn camera footage. Finally, Part III argues that courts should interpret *Youngblood* to permit the sanction of missing-evidence instructions to juries as a remedy when video is destroyed in accordance with police practices that provide limited protections toward the preservation of footage, even in the absence of bad faith. It argues that federal and state governments should establish clear standards on body-worn camera video retention that balance expansive retention of footage with the logistical burdens that expansive video processing and storage practices impose on police departments.

#### I. THE HISTORY OF POLICE BODY-WORN CAMERA USE AND THE EFFECT OF *YOUNGBLOOD* ON THE RETENTION OF VIDEO FOOTAGE

This part starts by discussing the origins of filmed police encounters through the emergence of dashboard cameras in police vehicles and the

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18. See Balko, *supra* note 3.

19. See *infra* Part II.A.1 (analyzing the disconnect between policy goals and practice within the Albuquerque Police Department’s body-worn camera program).

20. 373 U.S. 83 (1963).

parallels between the debates surrounding the implementation of dashboard camera and body-worn camera programs. It then details the development of body-worn cameras for police officers and the technology's evolution in American police departments from a curiosity to a standard issue tool. To illustrate the nature of this development, this part analyzes *Floyd*, the debate surrounding its holding, and the influence of the case on body-worn camera video retention policies. The discussion ends with an evaluation of federal interest in body-worn cameras and how federal programs have provided significant resources for the development of local body-worn camera programs while remaining relatively silent on how the video retention policies of these programs should be shaped. The second half of this part begins with a brief synopsis of the law concerning the disclosure of exculpatory evidence established in *Brady*<sup>21</sup> before moving to a discussion about how the bad faith standard of *Youngblood* affects the retention of lost or destroyed evidence. This part concludes with a discussion on the law establishing sanctions for violations of *Brady* and *Youngblood*.

*A. Dashboard Cameras:  
The Precursor to Body-Worn Cameras*

The current body-worn camera discussion has its roots in the late 1980s and early 1990s, when filmed police encounters became increasingly available to the public through the concurrent implementation of dashboard cameras in police vehicles, and the 1989 debut of the Fox Network's long running *Cops* television program.<sup>22</sup> While vehicle-based camera technology was available in the 1960s, it was cumbersome, expensive, and rarely used.<sup>23</sup> Dashboard cameras became more popular with law enforcement during the 1980s, especially in DUI stops, as the technology became smaller and more affordable.<sup>24</sup> As penalties for drunk driving became more severe, and defendants became more willing to contest DUI charges, many police departments began filming the administration of breathalyzer tests and the conduct of drunk drivers prior to their arrests in order to corroborate their testimony.<sup>25</sup> During the late 1990s, the rise of police brutality allegations and assaults on officers lead the DOJ's Community Oriented Policing Service, an office responsible for advancing

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21. *Brady*, 373 U.S. at 87.

22. See Robinson Meyer, *Seen It All Before: 10 Predictions About Police Body Cameras*, ATLANTIC (Dec. 5, 2014), <http://www.theatlantic.com/technology/archive/2014/12/seen-it-all-before-10-predictions-about-police-body-cameras/383456/> [https://perma.cc/2UZJ-GADW].

23. See Rachael Conway, *Caught on Camera: Suburban Police Departments Realize Benefits of "Cruiser Cams,"* PITT. POST-GAZETTE (Apr. 15, 2010), <http://www.post-gazette.com/local/north/2010/04/15/Caught-on-camera-Suburban-police-departments-realize-benefits-of-cruiser-cams/stories/201004150267> [https://perma.cc/YXL6-Z943].

24. See *id.*; see also Andrew H. Malcolm, *Drunken Drivers Now Facing Themselves on Video Camera*, N.Y. TIMES (Apr. 21, 1990), <http://www.nytimes.com/1990/04/21/us/drunken-drivers-now-facing-themselves-on-video-camera.html> [https://perma.cc/T62S-XXNA].

25. See Malcolm, *supra* note 24.

community policing practices through grants and information, to begin providing funding for dashboard cameras.<sup>26</sup>

Mirroring the future debate on body-worn cameras in police departments, several departments encountered initial resistance to the implementation of dashboard cameras among officers, which soon diminished upon observation of the utility of video footage in corroborating police testimony and streamlining the government's case against drunk drivers.<sup>27</sup> American police departments would soon embrace this technology on a wide scale, with 67 percent of sheriffs' offices using dashboard cameras in patrol cars in 2007—a 62 percent increase in the number of dashboard cameras used by sheriffs' offices between 2003 and 2007.<sup>28</sup> A survey of police officers showed that while only 75 percent of officers welcomed dashboard cameras upon their initial implementation, 87 percent reported that they welcomed the technology at the time of the survey.<sup>29</sup>

### *B. The Implementation of Body-Worn Camera Programs*

By 2016, the DOJ had processed applications for body-worn camera funding from 492 police departments in two program years and had granted 179 awards to purchase cameras during this period.<sup>30</sup> However, the ubiquity and popularity of this technology is an extremely recent development. The early history of body-worn camera use by police departments was characterized by pilot programs operating with little precedent, a lack of federal guidance on implementation, and skepticism concerning the feasibility of the use of this technology in large American cities.

#### 1. The Rapid Rise of Body-Worn Cameras in Police Departments and the Public Consciousness

As camera technology became lighter and smaller over time, and dashboard cameras became commonly used in police work, it was perhaps inevitable that police departments would begin to affix camera systems to

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26. See Conway, *supra* note 23; see also Lonnie J. Westphal, *The In-Car Camera: Value and Impact*, POLICE CHIEF (Nov. 9, 2004), <https://www.policeone.com/police-products/police-technology/articles/93475-The-in-car-camera-Value-and-impact/> (reporting that the COPS incentive program purchased 4,500 dashboard camera systems by 2004, providing \$21 million in federal funds for state and local law enforcement) [<https://perma.cc/X59Q-P2RY>].

27. See Westphal, *supra* note 26; see also Malcolm, *supra* note 24 (quoting Chief Deputy Michael Creamer of the Franklin County Sheriff's Department in Texas as saying, "I was skeptical of the cameras at first . . . . But they've been fantastic for us . . . . Now I'd like a camera in all 45 cars").

28. See ANDREA M. BURCH, U.S. DEP'T OF JUSTICE, SHERIFFS' OFFICES, 2007—STATISTICAL TABLES 3 (2012), <http://www.bjs.gov/content/pub/pdf/so07st.pdf> [<https://perma.cc/52CQ-SR6P>].

29. See Conway, *supra* note 23.

30. BUREAU OF JUSTICE ASSISTANCE, U.S. DEP'T OF JUSTICE, UPDATE: FISCAL YEAR 2016 (2016), <https://www.bja.gov/bwc/pdfs/BWCPIP-Factsheet-2016-Update-Final.pdf> [<https://perma.cc/BKU4-XEUL>].



police officers themselves.<sup>31</sup> Body-worn camera use by police officers in Europe predated the technology's implementation in American police departments, with a pilot program first launched in Denmark followed by a series of small studies in Plymouth, England, between 2005 and 2006.<sup>32</sup> A study of the Plymouth program by the British Home Office found that implementation of body-worn cameras had increased the city police department's ability to accurately collect evidence, reduced the number of public order offenses, and resolved public order offenses faster.<sup>33</sup> The success of the program led the British Home Office to allocate \$6 million to purchase over 2,000 head-mounted cameras for forty-two police departments across Great Britain.<sup>34</sup>

By 2010, no large body-worn camera program had been implemented in the United States.<sup>35</sup> However, a small number of test programs had been initiated in Cincinnati, San Diego, San Jose, Rialto (California), and Aberdeen (South Dakota).<sup>36</sup> A study of the Rialto program found that during a twelve-month period in which fifty-four police officers were randomly assigned to use body-worn cameras during their twelve-hour shifts, use-of-force incidents decreased by 60 percent, from an average of sixty-five incidents over the previous three years to just twenty-five in 2012.<sup>37</sup> Furthermore, the study showed that public complaints against the police decreased by 88 percent in that year.<sup>38</sup>

In addition to the promising results of pilot programs in reducing complaints, the increasing exposure of body-worn cameras in the media publicized the ability of this technology to bolster the case of an officer

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31. See David A. Harris, *Picture This: Body-Worn Video Devices (Head Cams) as Tools for Ensuring Fourth Amendment Compliance by Police*, 43 TEX. TECH L. REV. 357, 360 (2010).

32. See *Britain Straps Video Cameras to Police Helmets*, NBC NEWS (July 13, 2007), [http://www.nbcnews.com/id/19750278/ns/world\\_news-europe/t/britain-straps-video-cameras-police-helmets/#.ViUuquGVSar](http://www.nbcnews.com/id/19750278/ns/world_news-europe/t/britain-straps-video-cameras-police-helmets/#.ViUuquGVSar) [<https://perma.cc/L9DB-HS9Q>].

33. See MARTIN GOODALL, POLICE & CRIME STANDARDS DIRECTORATE, GUIDANCE FOR THE POLICE USE OF BODY-WORN VIDEO DEVICES 7 (2007), <http://library.college.police.uk/docs/homeoffice/guidance-body-worn-devices.pdf> [<https://perma.cc/6KK9-ADB7>].

34. See *Britain Straps Video Cameras to Police Helmets*, *supra* note 32.

35. See Harris, *supra* note 31, at 362 (stating that by 2010, the technology had not been formally evaluated but that several tests programs were underway).

36. See *id.*; see also Russ Mitchell, *Police Head Cameras Capture Action, Evidence*, CBS NEWS (Apr. 4, 2010), <http://www.cbsnews.com/news/police-head-cameras-capture-action-evidence/> [<https://perma.cc/4ZYK-5Q6J>]; Corky Siemaszko, *Body Cameras Win Converts Among Police Officers on the Beat*, NBC NEWS (May 8, 2016), <http://www.nbcnews.com/news/crime-courts/body-cameras-win-converts-among-police-officers-beat-n566311> [<https://perma.cc/ADR2-NXT6>].

37. See Siemaszko, *supra* note 36; see also Barak Ariel, William A. Farrar & Alex Sutherland, *The Effect of Police Body-Worn Cameras on Use of Force and Citizens' Complaints Against the Police: A Randomized Controlled Trial*, 31 J. QUANTITATIVE CRIMINOLOGY 509, 523–24 (2015).

38. See Ariel, Farrar & Sutherland, *supra* note 37, at 524.

when his or her actions at a crime scene were scrutinized.<sup>39</sup> A high-profile, early example took place following the death of Eric Berry on November 11, 2009, in Fort Smith, Arkansas, which occurred while Brandon Davis and two other police officers were investigating a domestic disturbance at Berry's residence.<sup>40</sup> After finding Berry in his home holding a gun, officers asked Berry to put down his weapon ten times, which he refused to do.<sup>41</sup> Following this noncompliance, Officer Davis shot Berry twice, killing him.<sup>42</sup> Prosecutors declined to press charges against Officer Davis, in large part because of a review of footage taken from the body-worn camera he was wearing during the shooting.<sup>43</sup> Local prosecutor Daniel Shue explained, "Though there [were] several third-party witnesses, as well as the officers' own recollections of some of the events leading up to the weapons discharge, this technology enabled this office to observe what happened with complete objectivity."<sup>44</sup> After the decision not to prosecute was made, TASER International, the manufacturer of the camera that Officer Davis wore during the shooting, published a press release about the incident, extensively quoting Shue's statement concerning the efficacy of their new "AXON" body-worn camera system.<sup>45</sup> Tom Smith, the founder of TASER, stated that the use of video in Fort Smith "clearly demonstrates the power of the AXON on-officer camera and the ability to provide a centralized secure repository and software service to manage, access and view digital evidence."<sup>46</sup>

Wide-scale implementation of body-worn cameras became more feasible as the price of the technology rapidly fell: TASER sold its "Axon Flex" camera system for \$1,000 in 2012,<sup>47</sup> and, by 2013, the company retailed the system for \$399 per unit.<sup>48</sup> By 2013, implementation of body-worn camera programs in American police departments increased dramatically, and experts predicted that the technology would become standard issue in the

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39. See Mario Aguilar, *How Police Body Cameras Were Designed to Get Cops off the Hook*, GIZMODO (Mar. 16, 2015), [www.gizmodo.com/how-police-body-cameras-were-designed-to-get-cops-off-t-1691693677](http://www.gizmodo.com/how-police-body-cameras-were-designed-to-get-cops-off-t-1691693677) [https://perma.cc/2SGY-3TM7].

40. See *id.*; Larry Henry, *Jury Rules in Favor of Former Fort Smith Officer in Shooting Death*, KFSM NEWS 5 (May 8, 2015), <http://5news.com/2015/05/08/jury-rules-in-favor-of-fort-smith-officer-in-shooting-death/> [https://perma.cc/5YX4-LGHG].

41. See Henry, *supra* note 40.

42. See Aguilar, *supra* note 39.

43. See *id.*

44. *Id.*

45. Press Release, TASER International, TASER International's AXON and EVIDENCE.COM Assists in Officer Involved Shooting Investigation and Exoneration (Nov. 24, 2009), <http://investor.taser.com/releasedetail.cfm?ReleaseID=720000> [https://perma.cc/F7WA-WEW7].

46. *Id.*

47. See Quentin Hardy, *Taser's Latest Police Weapon: The Tiny Camera and the Cloud*, N.Y. TIMES (Feb. 21, 2012), <http://www.nytimes.com/2012/02/21/technology/tasers-latest-police-weapon-the-tiny-camera-and-the-cloud.html> [https://perma.cc/PSC7-V9K7].

48. See Doug Wylie, *New TASER AXON Body On-Officer Camera Hits the Streets*, POLICEONE (Aug. 1, 2013), <https://www.policeone.com/police-products/body-cameras/articles/6354361-New-TASER-AXON-Body-on-officer-camera-hits-the-streets/> [https://perma.cc/LN2Q-FXNM].

coming years.<sup>49</sup> Critics of body-worn camera integration, such as Raymond Kelly, then-commissioner of the NYPD, questioned the feasibility of wide-scale implementation of a body-worn camera program in a major American city.<sup>50</sup> As he stated on *Face the Nation*, “The body camera issue opens up certainly more questions than it answers . . . . The only place [a body-worn camera program] has been implemented are cities that are much, much smaller [than New York.]”<sup>51</sup> This would soon change, as New York City would become the home of two expansive body-worn camera pilot programs.

## 2. *Floyd v. City of New York*

On August 12, 2013, the U.S. District Court for the Southern District of New York initiated the implementation of body-worn cameras in the City of New York.<sup>52</sup> In *Floyd v. City of New York*,<sup>53</sup> the court ruled that the NYPD’s “stop-and-frisk” policy was unconstitutionally applied and appointed an independent monitor that would assist the NYPD in bringing stop-and-frisk in accordance with the law.<sup>54</sup> The court established a number of mandated police department reforms, including changes to supervision, monitoring, and discipline policies within the NYPD.<sup>55</sup> Judge Scheindlin noted, “The NYPD’s duty to monitor stop and frisk activity is . . . hamstrung by supervisors’ inability to review an objective representation of what occurred.”<sup>56</sup> She opined that body-worn cameras were “uniquely suited” to remedy the constitutional violations at issue in stop-and-frisk scenarios and would serve to fill the void of “contemporaneous, objective” evidence of police interactions necessary for effective performance review.<sup>57</sup> Because of these perceived benefits, Judge Scheindlin ordered the NYPD to establish a yearlong pilot program of body-worn cameras that would be implemented in the precincts with the highest number of stop-and-frisk encounters in each borough.<sup>58</sup> The independent monitor was held responsible for establishing effective procedures for the retention of this footage in the five precincts selected for the pilot program.<sup>59</sup>

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49. See Ian Lovett, *In California, a Champion for Police Cameras*, N.Y. TIMES (Aug. 21, 2013), <http://www.nytimes.com/2013/08/22/us/in-california-a-champion-for-police-cameras.html> [https://perma.cc/NK6B-54RB].

50. See *id.*

51. *Id.*

52. See Rocco Parascandola, *60 NYPD Cops Set to Begin Wearing Body Cameras in Pilot Program*, N.Y. DAILY NEWS (Sept. 5, 2014), <http://www.nydailynews.com/new-york/50-nypd-cops-set-wearing-body-cameras-pilot-program-article-1.1927876> [https://perma.cc/H7GT-JK3G].

53. 959 F. Supp. 2d 668 (S.D.N.Y. 2013).

54. See *id.* at 684–86.

55. See *id.* at 678, 683.

56. *Id.* at 685.

57. *Id.*

58. See *id.*

59. See *id.*

Public reaction to *Floyd* varied across the board.<sup>60</sup> The New York Civil Liberties Union was supportive of the pilot program, with the executive director of the organization calling it a “wonderful idea” and a “win-win” for the police and the people of New York.<sup>61</sup> Former New York City Police Chief William Bratton stated that if he was still chief, he would want to implement body-worn cameras in the NYPD.<sup>62</sup> He praised the benefits of the technology in verifying the generally “accurate” version of events of the police in a “he-said-she-said” situation.<sup>63</sup> Michael Bloomberg, the mayor of New York City at the time of the ruling, emphatically opposed the pilot program mandate, calling the idea a “nightmare”<sup>64</sup> and promising to appeal the *Floyd* decision to the Second Circuit as soon as possible.<sup>65</sup> The Second Circuit granted the city’s motion on October 31, 2013, to stay the remedial option and remanded the case back to the district court to be heard by a different judge.<sup>66</sup> This challenge to Judge Scheindlin’s reforms was short-lived, however, as newly elected New York City Mayor Bill de Blasio dropped the city’s appeal in January 2014 and agreed to work with the court appointed monitor to implement the reforms, including the body-worn camera pilot program.<sup>67</sup>

As of November 2016, the court-ordered program was still in development, and the NYPD announced that it would not begin implementation until the first quarter of 2017.<sup>68</sup> The NYPD proceeded independently of the judicial order, announcing its own plan for an internally implemented pilot program in September 2014 involving fifty-

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60. See Marc Santora, *Order That Police Wear Cameras Stirs Unexpected Reactions*, N.Y. TIMES (Aug. 13, 2013), <http://www.nytimes.com/2013/08/14/nyregion/order-that-police-wear-cameras-stirs-unexpected-reactions.html> [https://perma.cc/2YYW-J9DP].

61. *Id.*

62. See Lovett, *supra* note 49.

63. *Id.* Bratton returned to his former position in a matter of months with the election of Bill de Blasio as mayor. See J. David Goodman & Joseph Goldstein, *Bratton Takes Helm of Police Force He Pledged to Change*, N.Y. TIMES (Jan. 2, 2014), [https://www.nytimes.com/2014/01/03/nyregion/bratton-stands-before-police-force-with-a-mandate-for-change.html?\\_r=0](https://www.nytimes.com/2014/01/03/nyregion/bratton-stands-before-police-force-with-a-mandate-for-change.html?_r=0) [https://perma.cc/X65Q-3AKT].

64. Santora, *supra* note 60.

65. See Colby Hamilton & Nicole Bode, *Bloomberg and Kelly Fire Back on ‘Dangerous’ Stop-and-Frisk Ruling*, DNAINFO (Aug. 12, 2013), <http://www.dnainfo.com/new-york/20130812/civic-center/bloomberg-kelly-fire-back-on-dangerous-stop-and-frisk-ruling> [https://perma.cc/54A2-SPBX].

66. See *Floyd, et al. v. City of New York, et al.*, CTR. CONST. RTS. (Nov. 18, 2016), <https://ccrjustice.org/home/what-we-do/our-cases/floyd-et-al-v-city-new-york-et-al> [https://perma.cc/DY5J-U3RB].

67. See Press Release, Office of the Mayor, Mayor de Blasio Announces Agreement in Landmark Stop-And-Frisk Case (Jan. 30, 2014), <http://www1.nyc.gov/office-of-the-mayor/news/726-14/mayor-de-blasio-agreement-landmark-stop-and-frisk-case#/0> [https://perma.cc/3D86-GUTA].

68. See Fourth Report of the Independent Monitor at 2, *Floyd v. City of New York*, 302 F.R.D. 69 (S.D.N.Y. 2014) (Nos. 08 Civ. 1034 (AT), 12 Civ. 2274 (AT)), ECF No. 536. Despite delays since the judicial order, Mayor de Blasio announced that all NYPD patrol officers would be equipped with body-worn cameras by 2019. See Laura Nahmias, *City Department of Investigation Probes Body-Camera Contract*, POLITICO (Feb. 6, 2017), [www.politico.com/states/new-york/city-hall/story/2017/02/body-camera-contract-under-investigation-by-doi-109378](http://www.politico.com/states/new-york/city-hall/story/2017/02/body-camera-contract-under-investigation-by-doi-109378) [https://perma.cc/8FYG-ETTJ].

four body-worn cameras and five precincts.<sup>69</sup> On December 2, 2014, the NYPD issued Operations Order 48, a set of guidelines concerning the use of body-worn cameras to be used during the NYPD's own pilot program,<sup>70</sup> and officially rolled out the program in December 2014.<sup>71</sup> The program wrapped up in March 2016, and footage acquired through the pilot program had been used in several criminal cases by that point.<sup>72</sup>

### 3. Federal Interest in Body-Worn Camera Programs

In an announcement referencing the death of Michael Brown in Ferguson, Missouri, earlier that year, Barack Obama made a statement on December 1, 2014, asking for \$263 million in funding for more than 50,000 body-worn cameras, planning to match state funding for the technology by 50 percent.<sup>73</sup> The following year, the Bureau of Justice Assistance, a division of the DOJ providing funding and policy information for law enforcement initiatives, debuted a companion "Body-Worn Camera Toolkit" manual on its website with a "focus on [body-worn camera] implementation requirements, retention issues, policy concerns, interests of prosecutors, victim and privacy advocates' concerns, along with community engagement and funding considerations."<sup>74</sup> Along with displaying research on the efficacy of body-worn cameras and instructions on applying for camera grants, the manual provides a checklist for police departments on how to implement a body-worn camera program.<sup>75</sup> However, while the DOJ's manual suggests that police departments establish policies for video footage retention, and the federal grant application process instructs that successful applicants for funding must display a thorough understanding of literature recommending implementation methods, it acknowledges that "current implementation methods vary widely and [body-worn camera]

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69. See OFF. OF INSPECTOR GEN. FOR NYPD, DEP'T OF INVESTIGATION, BODY-WORN CAMERAS IN NYC: AN ASSESSMENT OF NYPD'S PILOT PROGRAM AND RECOMMENDATIONS TO PROMOTE ACCOUNTABILITY, at i (2015) [hereinafter OIG-NYPD REPORT], <http://www.nyc.gov/html/oignypd/assets/downloads/pdf/nypd-body-camera-report.pdf> [https://perma.cc/5G44-R9UB]; see also J. David Goodman, *New York Police Officers to Start Using Body Cameras in a Pilot Program*, N.Y. TIMES (Sept. 4, 2014), <http://www.nytimes.com/2014/09/05/nyregion/new-york-police-officers-to-begin-wearing-body-cameras-in-pilot-program.html> [https://perma.cc/N8H7-BZAK].

70. See generally OIG-NYPD REPORT, *supra* note 69, at i-ii.

71. See *id.* at i.

72. See Pervaiz Shallwani, *NYPD Prepares to Expand Body Camera Use*, WALL ST. J. (Mar. 2, 2016), <https://www.wsj.com/articles/nypd-wrapping-up-body-camera-pilot-program-1456916402> [https://perma.cc/3P46-GVQJ].

73. See Dann & Rafferty, *supra* note 7.

74. Press Release, U.S. Dep't of Justice, Justice Department Announces \$20 Million in Funding to Support Body-Worn Camera Pilot Program (May, 1, 2015) [hereinafter Pilot Program Press Release], <http://www.justice.gov/opa/pr/justice-department-announces-20-million-funding-support-body-worn-camera-pilot-program> [https://perma.cc/8Y2A-JT65]; see also BODY-WORN CAMERA TOOLKIT, <https://www.bja.gov/bwc/> (last visited Feb. 16, 2017) [https://perma.cc/89LL-YD5M].

75. See BUREAU OF JUSTICE ASSISTANCE, BODY-WORN CAMERA TOOLKIT: LAW ENFORCEMENT IMPLEMENTATION CHECKLIST (2015), <https://www.bja.gov/bwc/pdfs/BWCImplementationChecklist.pdf> [https://perma.cc/656A-826F].

deployment is often a complex balance between the overarching public safety goals and the technological, logistical, and policy challenges.”<sup>76</sup> The grant application process does not mandate specific guidelines on the time periods in which body-worn camera footage should be preserved, granting police departments flexibility in how they craft their individual policies.<sup>77</sup>

*C. The Disclosure of Video Evidence and Issues  
Concerning Its Destruction or Unavailability*

This section discusses the duty of police and prosecutors to retain and disclose evidence to defendants in criminal cases, which has been primarily refined by two Supreme Court cases: *Brady* and *Youngblood*. First, Part I.B.1 provides a description of the foundational role of *Brady* in lost and destroyed evidence cases and the obligation of the government to retain and disclose exculpatory evidence to criminal defendants. Part I.B.2 discusses the high bar for criminal defendants that the *Youngblood* “bad faith” standard presents and the powerful influence of the case at the state level. Then, Part I.B.3 summarizes sanction options available to judges to redress a *Brady* or *Youngblood* violation.

1. *Brady v. Maryland*

In a criminal case, the duty of the government to disclose and retain evidence finds its origin in the Due Process Clause of the Fourteenth Amendment, which provides that no state shall “deprive any person of life, liberty, or property, without due process of law.”<sup>78</sup> In *Brady*, the Supreme Court held that failing to disclose evidence in a criminal case that is both favorable to the defendant and “material either to guilt or to punishment” is a violation of due process.<sup>79</sup> Under *Brady*, determining whether a due process violation has occurred requires a defendant to show that (1) evidence was withheld from the defendant, (2) the evidence was favorable to the defendant, and (3) prejudice resulted from the nondisclosure of evidence.<sup>80</sup> The materiality of exculpatory evidence is determined by “a reasonable probability that [a defendant’s] conviction or sentence would have been different had these materials been disclosed.”<sup>81</sup> The Court explained that its reason for establishing such a rule was not for the purpose of the “punishment of society for misdeeds of a prosecutor but avoidance of

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76. BUREAU OF JUSTICE ASSISTANCE, U.S. DEP’T OF JUSTICE, BODY-WORN CAMERA POLICY AND IMPLEMENTATION PROGRAM (MORE THAN 25 OFFICERS) FY 2016 COMPETITIVE GRANT ANNOUNCEMENT 6 (2016), <https://www.bja.gov/funding/BWCPIP16.pdf> [https://perma.cc/FWM6-YBUE].

77. *See id.*

78. U.S. CONST. amend. XIV.

79. *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

80. *See* Bennett L. Gershman, *Reflections on Brady v. Maryland*, 47 S. TEX. L. REV. 685, 694 (2006).

81. *Strickler v. Greene*, 527 U.S. 263, 296 (1999); *see also* *United States v. Bagley*, 473 U.S. 667, 682 (1985).

an unfair trial to the accused.”<sup>82</sup> As a result, a *Brady* violation does not require a showing of bad faith on the part of the prosecutor.<sup>83</sup>

## 2. *Arizona v. Youngblood*

The materiality approach of *Brady* is apt for dealing with evidence in the government’s possession that has not been disclosed, as a court may examine this evidence to see if it would have made an impact in a trial.<sup>84</sup> However, in a case involving lost or destroyed evidence, a court may only speculate on its relative import to a case, presenting a high bar to overcome the reasonable probability of favorability threshold.<sup>85</sup> The Supreme Court established the current rule on the impact of lost or destroyed evidence on a criminal defendant’s due process rights in *Youngblood*.<sup>86</sup> In a case concerning the rape of a child, the police did not refrigerate the child’s clothing containing his assailant’s semen, which prevented criminologists from testing it to help identify the perpetrator.<sup>87</sup> After the defendant was convicted, the Arizona Court of Appeals overruled the lower court’s decision, on the grounds that the state improperly disposed of potentially exculpatory evidence and violated the defendant’s due process rights.<sup>88</sup> In the U.S. Supreme Court’s 6–3 decision, the majority came to a different result, holding 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.”<sup>89</sup>

In *Youngblood*, the Court distinguished *Brady*, finding that the earlier case concerned evidence that was “materially exculpatory” to a defendant, whereas the evidence in *Youngblood* was only “potentially useful” to the defendant.<sup>90</sup> The Court had previously ruled in *California v. Trombetta*<sup>91</sup> that materially exculpatory 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.”<sup>92</sup> Concerned with the monetary and logistical burdens that police departments would bear if a broad constitutional duty to preserve evidence were established, the Court in *Youngblood* reasoned that the “fundamental fairness” requirement of the Due Process Clause should not be interpreted as “imposing on the police an undifferentiated and absolute duty to retain and to preserve all material that

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82. *Brady*, 373 U.S. at 87.

83. *See id.*

84. *See* Che H. Lee, *The Prosecution’s Duty to Preserve Evidence Before Trial*, 72 CALIF. L. REV. 1019, 1021 (1984).

85. *See id.* at 1025.

86. *Arizona v. Youngblood*, 488 U.S. 51, 58 (1988).

87. *See id.* at 53–54.

88. *See id.* at 54–55.

89. *Id.* at 58 (emphasis added).

90. *Id.* at 57–58.

91. 467 U.S. 479 (1984).

92. *Id.* at 489.

might be of conceivable evidentiary significance in a particular prosecution.”<sup>93</sup>

In the years following *Youngblood*, most courts grappling with the meaning of the bad faith standard in lost or destroyed evidence cases have found that either knowledge<sup>94</sup> or wrongful intent<sup>95</sup> on the part of the police is required to demonstrate a due process violation.<sup>96</sup> The majority of these cases indicate that the conditions that fulfill one of these standards will fulfill the other, meaning that *Youngblood* is generally interpreted to hold that the reckless or negligent destruction or mishandling of evidence by the police does not violate a defendant’s due process rights.<sup>97</sup> Generally, lower courts have also held that compliance with departmental policy regarding the destruction of evidence indicates a lack of bad faith on the part of law enforcement.<sup>98</sup> Some judges and legal commentators have noted that, as applied, it is very difficult for the government’s actions in a case involving the destruction of evidence to meet the threshold of bad faith.<sup>99</sup>

### 3. Sanctions Under *Brady* and *Youngblood*

When a court determines that material exculpatory evidence was withheld under *Brady*, or that potentially exculpatory evidence has been lost

93. *Youngblood*, 488 U.S. at 58.

94. See, e.g., *State v. O’Dell*, 46 P.3d 1074, 1078 (Ariz. Ct. App. 2002); *People v. Frye*, 959 P.2d 183, 205 (Cal. 1998); *State v. Finley*, 42 P.3d 723, 727 (Kan. 2002); *State v. Heath*, 685 N.W.2d 48, 56 (Minn. Ct. App. 2004); *State v. Smith*, 157 S.W.3d 687, 691 (Mo. Ct. App. 2004); *State v. Castor*, 599 N.W.2d 201, 214 (Neb. 1999); *State v. Werner*, 851 A.2d 1093, 1105 (R.I. 2004); *State v. Jackson*, 396 S.E.2d 101, 102 (S.C. 1990).

95. See, e.g., *Guzman v. State*, 868 So. 2d 498, 509 (Fla. 2003); *People v. Gentry*, 815 N.E.2d 27, 33 (Ill. App. Ct. 2004); *Collins v. Commonwealth*, 951 S.W.2d 569, 573 (Ky. 1997); *State v. Lindsey*, 543 So. 2d 886, 891 (La. 1989); *Murray v. State*, 849 So. 2d 1281, 1286 (Miss. 2003); *State v. Hunt*, 483 S.E.2d 417, 421 (N.C. 1997); *State v. Durnwald*, 837 N.E.2d 1234, 1241 (Ohio Ct. App. 2005); *State v. Bousum*, 663 N.W.2d 257, 263 (S.D. 2003).

96. See Norman C. Bay, *Old Blood, Bad Blood, and Youngblood: Due Process, Lost Evidence, and the Limits of Bad Faith*, 86 WASH. U. L. REV. 241, 290 (2008) (providing an in-depth discussion on the various definitions jurisdictions have applied to “bad faith” while interpreting *Youngblood*).

97. See *id.*

98. See *United States v. Vera*, 231 F. Supp. 2d 997, 1000 (D. Or. 2001); see also *United States v. Gomez*, 191 F.3d 1214, 1219 (10th Cir. 1999) (“[D]estruction of evidence in accordance with an established procedure precludes a finding of bad faith absent other compelling evidence.” (quoting *United States v. Deaner*, 1 F.3d 192, 202 (3d Cir. 1993))); *United States v. Barton*, 995 F.2d 931, 936 (9th Cir. 1993); *United States v. Heffington*, 952 F.2d 275, 280 (9th Cir. 1991); *United States v. Westerdahl*, 945 F.2d 1083, 1087 (9th Cir. 1991).

99. See *Arizona v. Youngblood*, 488 U.S. 51, 66 (1988) (Blackmun, J., dissenting) (stating that a defendant has an “inherent difficulty . . . in obtaining evidence to show a lack of good faith”); JAMIE S. GORELICK ET AL., *DESTRUCTION OF EVIDENCE* § 6.8, at 497 (Supp. 2016) (“[O]nly a handful of decisions have found that the bad faith standard is met”); Elizabeth A. Bawden, *Here Today, Gone Tomorrow—Three Common Mistakes Courts Make When Police Lose or Destroy Evidence with Apparent Exculpatory Value*, 48 CLEV. ST. L. REV. 335, 350 (2000); Bay, *supra* note 96, at 291; Cynthia E. Jones, *The Right Remedy for the Wrongly Convicted: Judicial Sanction for Destruction of DNA Evidence*, 77 FORDHAM L. REV. 2893, 2903–04 (2009).



or destroyed in bad faith, it has broad discretion in the imposition of sanctions to redress the infraction.<sup>100</sup> The Supreme Court has ruled that trial courts should weigh three factors when deciding whether to impose a sanction: (1) “the degree of negligence or bad faith involved,” (2) “the importance of the evidence lost,” and (3) “the evidence of guilt adduced at trial in order to come to a determination that will serve the ends of justice.”<sup>101</sup> The imposition of a sanction under these circumstance is not automatic, and the type of sanction imposed “may vary with the degree of culpability found.”<sup>102</sup> Some courts addressing lost or destroyed evidence in the absence of bad faith have imposed sanctions short of dismissal where “a defendant, using reasonable diligence, has requested [the lost or destroyed evidence] reasonably likely to be material.”<sup>103</sup>

## II. BODY-WORN CAMERAS AND THE DESTRUCTION OF EVIDENCE

How should courts address the issue of lost or destroyed video footage in criminal cases, and what role can the government play in preventing the destruction of body-worn camera footage? To arrive at a suitable answer to this question, this part addresses the conflicting judicial responses to the issue of lost or destroyed police video footage, as well as the divergent approaches taken by police departments and state legislatures in creating video retention policies. Part II.A begins by discussing the expansive body-worn camera program in Albuquerque, New Mexico, and how a lack of strict video retention policies gave officers wide discretion to destroy footage. It then assesses the myriad challenges related to the storage and classification of video footage that police departments may face while implementing a body-worn camera program. Part II.B discusses how strict adherence to the bad faith standard of *Youngblood* compels most jurisdictions to find that the destruction of police video footage, barring bad faith conduct by law enforcement, does not violate a defendant’s due process rights and that adherence to general practices concerning the retention of evidence indicates a lack of bad faith in these jurisdictions. It then analyzes the judicial remedies available to address police destruction of video footage in various jurisdictions, discussing sanctions used in states strictly adhering to the bad faith standard of *Youngblood*, as well as sanctions used in states that have deviated from the bad faith standard of *Youngblood* in their state constitutions. Part II.C then surveys the increasing role of state legislatures in regulating the storage of body-worn camera footage through the rise of state statutes prescribing rules on police video retention.

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100. See Jones, *supra* note 99, at 2915; see also WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 15.6(a) (6th ed. 2017).

101. Cotton v. United States, 388 A.2d 865, 869 (D.C. 1978).

102. *Id.* at 870.

103. People v. Handy, 988 N.E.2d 879 (N.Y. 2013); accord Cost v. State, 10 A.3d 184, 197–98 (Md. 2010).

A. *The Current Landscape  
of Body-Worn Camera Video Retention Policies*

As the technology becomes more popular, vigorous policy debates on the best use of body-worn cameras continue to develop in the media, government, and legal scholarship.<sup>104</sup> The discussion centers on questions of public availability of footage, privacy considerations, and the appropriate time for officers to begin and end filming. The issues surrounding the retention of body-worn camera footage are less well charted but are critically important in their influence over access to this important source of evidence.

1. The Albuquerque Body-Worn Camera Program

The Albuquerque Police Department (APD) was one of the first large police forces in the United States to implement a department-wide body-worn camera program, installing systems on every APD officer in the beginning of 2011.<sup>105</sup> By 2016, the APD also had one of the most comprehensive video retention policies in the nation.<sup>106</sup> However, for nearly three years after the creation of the program, officers were given the ability to delete footage from their cameras at the end of a shift.<sup>107</sup> It also allowed officers to make the choice whether to set their cameras to “online” mode, which would automatically download all footage to a remote database, or “offline” mode, which allowed officers the discretion to pick and choose which footage they could erase.<sup>108</sup> In 2014, Martina Kitzmueller’s<sup>109</sup> prosecution clinic at the University of New Mexico School of Law analyzed fifty-nine DUI and domestic abuse cases in Albuquerque

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104. See, e.g., *Developments in the Law—Policing*, 128 HARV. L. REV. 1794 (2015); Kelly Freund, *When Cameras Are Rolling: Privacy Implications of Body-Mounted Cameras on Police*, 49 COLUM. J.L. & SOC. PROBS. 91, 98–115 (2015); Peter Hermann & Aaron C. Davis, *As Police Body Cameras Catch On, a Debate Surfaces: Who Gets to Watch?*, WASH. POST (Apr. 7, 2015), [https://www.washingtonpost.com/local/crime/as-police-body-cameras-catch-on-a-debate-surfaces-who-gets-to-watch/2015/04/17/c4ef64f8-e360-11e4-81ea-0649268f729e\\_story.html?utm\\_term=.23e8264a0343](https://www.washingtonpost.com/local/crime/as-police-body-cameras-catch-on-a-debate-surfaces-who-gets-to-watch/2015/04/17/c4ef64f8-e360-11e4-81ea-0649268f729e_story.html?utm_term=.23e8264a0343) [<https://perma.cc/7JGT-J3D5>].

105. See Jeff Proctor & Matt Grubs, *For Years at Albuquerque Police, Option to Delete Body-Cam Video Was Widespread*, KRQE NEWS 13 (Dec. 22, 2015), <http://krqe.com/2015/12/22/for-years-at-albuquerque-police-option-to-delete-body-cam-video-was-widespread/> [<https://perma.cc/QB5M-HKVH>].

106. See, e.g., POLICE EXEC. RESEARCH FORUM, *supra* note 14, at 17 (nonevidentiary footage collected by the Albuquerque Police Department is retained for a full year).

107. See Proctor & Grubs, *supra* note 105.

108. See *id.* A former APD record keeper would later accuse his former employer of systematically and deliberately destroying body-worn camera footage. See Kelly Weill, *Did Albuquerque Police Delete Damning Body Camera Evidence?*, DAILY BEAST (Nov. 20, 2016), <http://www.thedailybeast.com/articles/2016/11/20/did-albuquerque-police-delete-damning-body-camera-evidence.html> [<https://perma.cc/MCT6-G4T6>]. These claims were made through an affidavit in a wrongful death lawsuit against the APD filed by the family of Mary Hawkes, who was killed in a police encounter in which the officer’s body-worn camera was turned off. See *id.*

109. Martina Kitzmueller is a Special Assistant District Attorney in the Bernalillo County District Attorney’s Office in Albuquerque and a research professor at the University of New Mexico School of Law. See Kitzmueller, *supra* note 13, at 169 n.\*.

where video had been produced by an officer, finding that footage had been lost or destroyed in ten of the cases.<sup>110</sup>

The American Civil Liberties Union (ACLU) criticized officers of the APD for repeatedly failing to turn in body-worn camera footage for review, noting that “the Albuquerque experience shows just how badly body-camera oversight is needed.”<sup>111</sup> Organizations such as the ACLU and the Police Executive Research Forum (PERF), an independent research and policy organization focusing on issues in policing, have advocated that police departments create and enforce clear data retention policies for preserving footage.<sup>112</sup> However, police departments face several challenges in crafting policies that balance substantial retention of footage, while addressing the significant logistical problems arising from the storage of huge quantities of data.<sup>113</sup>

## 2. The Unique Challenges of Body-Worn Camera Video Retention

High-volume storage of police video footage has become a profitable and rapidly growing industry.<sup>114</sup> TASER, which made \$5.9 million in sales during the first quarter of 2014 for their cloud-based body-worn camera footage storage server, saw their profits grow to \$36.9 million in the third quarter of 2015.<sup>115</sup> Mary Fan, a professor at the University of Washington School of Law, estimates that large police departments will be producing and processing more than 10,000 hours of footage a week from body-worn cameras.<sup>116</sup> Moreover, total storage costs for police departments for the first few years of operation are often comparable to the initial investment of purchasing the cameras. During the New Orleans Police Department’s two-

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110. *See id.* at 170. Professor Kitmueller also notes that “[l]ost and destroyed evidence is the most frequently raised defense issue in my prosecution clinic.” *Id.* at 170 n.8.

111. Jay Stanley, *Police Body Cameras: The Lessons of Albuquerque*, ACLU: FREE FUTURE (Mar. 24, 2015), <https://www.aclu.org/blog/police-body-cameras-lessons-albuquerque> [<https://perma.cc/NM75-WDA5>].

112. *See* ACLU, A MODEL ACT FOR REGULATING THE USE OF WEARABLE BODY CAMERAS BY LAW ENFORCEMENT 2–4 (2017), [https://www.aclu.org/sites/default/files/field\\_document/aclu\\_police\\_body\\_cameras\\_model\\_legislation\\_jan\\_2017.pdf](https://www.aclu.org/sites/default/files/field_document/aclu_police_body_cameras_model_legislation_jan_2017.pdf) [<https://perma.cc/RF8W-GYFS>]; POLICE EXEC. RESEARCH FORUM, *supra* note 14, at 15–16.

113. *See infra* Part II.A.2.

114. *See* Lucas Mearian, *As Police Move to Adopt Body Cams, Storage Costs Set to Skyrocket*, COMPUTERWORLD (Sept. 3, 2015), <http://www.computerworld.com/article/2979627/cloud-storage/as-police-move-to-adopt-body-cams-storage-costs-set-to-skyrocket.html> (“[In 2014], Taser’s gross profit margins on hardware were 15.6%; the gross margins for video storage were 51%”) [<https://perma.cc/D3YC-UCTT>]; Josh Sanburn, *Storing Body Cam Data Is the Next Big Challenge for Police*, TIME (Jan. 25, 2016), <http://time.com/4180889/police-body-cameras-viewu-taser/> [<https://perma.cc/6SHD-2LHY>].

115. *See* Sanburn, *supra* note 114.

116. *See id.* The Chula Vista Police Department in California has estimated that if the 200 sworn officers of the department were to be equipped with body-worn cameras, potentially thirty-three terabytes of data would be generated. *See* Tod Newcombe, *Body Worn Camera Data Storage: The Gorilla in the Room*, GOVTECH (Sept. 9, 2015), <http://www.govtech.com/dc/articles/Body-Worn-Camera-Data-Storage-The-Gorilla-in-the-Room.html> [<https://perma.cc/DDT3-TATT>].

year plan to purchase and operate 350 body-worn cameras for \$1.2 million, most of the funds were earmarked toward storage costs.<sup>117</sup> As Chief Hassan Aden of the Greenville Police Department in North Carolina told PERF in their report on body-worn camera implementation, “Data storage costs can be crippling [for police departments].”<sup>118</sup>

The process of reviewing and categorizing body-worn camera footage also presents logistical challenges for police forces.<sup>119</sup> Videos are typically labeled, or “tagged,” as “evidentiary” or “non-evidentiary” at the end of each officer’s shift.<sup>120</sup> Video is further categorized by the specific incident it documents, which may be subject to state evidentiary rules for footage of a certain type.<sup>121</sup> These tags are important, as video retention policies of police departments typically require different storage time periods for evidentiary and nonevidentiary footage.<sup>122</sup> Due to the many hours of video footage generated from a large body-worn camera program, this process imposes significant administrative costs and is time consuming for officers.<sup>123</sup>

Because of the rapid growth of body-worn camera use in the United States, it is not surprising that many police departments implementing a camera program do not yet have official policies regarding time periods for footage retention.<sup>124</sup> Out of twenty-four body-worn camera programs reviewed by the Brennan Center for Justice in 2016, ten of them did not have explicit policies regarding the length of time nonevidentiary footage was kept.<sup>125</sup> Furthermore, several external organizations influencing the creation of body-worn camera policies do not provide firm guidance on this issue.<sup>126</sup> The model policy of the International Association of Chiefs of Police for body-worn cameras does not provide any recommendations on specific time periods that evidentiary or nonevidentiary footage should be stored.<sup>127</sup> Additionally, none of the guidelines provided by the DOJ related

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117. See Henrick Karoliszyn, *NOPD Wearable Cameras Expected to Cost \$1.2 Million*, TIMES PICAYUNE (Sept. 30, 2013), [http://www.nola.com/crime/index.ssf/2013/09/post\\_346.html](http://www.nola.com/crime/index.ssf/2013/09/post_346.html) [<https://perma.cc/DR22-CDZL>]; see also POLICE EXEC. RESEARCH FORUM, *supra* note 14, at 32 (quoting Captain Thomas Roberts of the Las Vegas Police Department saying, “Storing videos over the long term is an ongoing, extreme cost that agencies have to anticipate”).

118. POLICE EXEC. RESEARCH FORUM, *supra* note 14, at 32.

119. See *id.*

120. *Id.* at 43.

121. See *id.* at 16–17 (explaining that several states require the indefinite storage of police video involving a homicide).

122. See *id.*; see also *Police Body-Worn Camera Policies*, BRENNAN CTR. JUST. (Aug. 3, 2016), <https://www.brennancenter.org/analysis/police-body-camera-policies-retention-and-release> [<https://perma.cc/FL7D-Z9J9>].

123. See POLICE EXEC. RESEARCH FORUM, *supra* note 14, at 32–33.

124. See Balko, *supra* note 3.

125. See *Police Body-Worn Camera Policies*, *supra* note 122; see also Balko, *supra* note 3.

126. See *Police Body-Worn Camera Policies*, *supra* note 122.

127. See INT’L ASS’N OF CHIEFS OF POLICE, *BODY-WORN CAMERAS: MODEL POLICY* (2014), <http://www.aele.org/iacp-bwc-mp.pdf> [<https://perma.cc/S3DC-2VWH>]. The DOJ’s Bureau of Justice Assistance cited this model policy as a helpful guideline for the creation of a body-worn camera policy in their grant application guide. See BUREAU OF JUSTICE

to the grant application process explicitly require police departments to adopt a retention policy.<sup>128</sup>

B. Arizona v. Youngblood  
and the Destruction of Video Footage

*Youngblood* remains a strong influence on cases involving lost or destroyed evidence, and the Supreme Court reaffirmed its holding in 2004.<sup>129</sup> Thirty-six states and the District of Columbia have adopted the *Youngblood* bad faith rule in their own constitutions.<sup>130</sup> Courts applying *Youngblood* to cases involving the destruction of video footage generally find that this footage is only potentially exculpatory at best because defendants cannot show that a video is materially exculpatory if the video no longer exists.<sup>131</sup> Under this interpretation, these courts rule that police actions leading to the destruction of evidence were not taken in bad faith and, as such, do not violate the due process rights of defendants.<sup>132</sup>

The demanding bad faith standard as applied in destroyed video contexts can be observed in the Court of Appeals of Mississippi case of *Ellis v. State*.<sup>133</sup> Nineteen days after a defendant was pulled over and arrested for driving under the influence, his attorney sent a letter to the police requesting video footage of the stop, which he did not receive.<sup>134</sup> During the trial, the arresting officer testified that the memory card of the camera was erased but that the department did not require officers to preserve the footage of each stop and that the footage was erased through the normal department process of clearing memory cards to record new footage.<sup>135</sup> The court found that

ASSISTANCE, U.S. DEP'T OF JUSTICE, BODY-WORN CAMERA PILOT IMPLEMENTATION PROGRAM FY 2015 COMPETITIVE GRANT ANNOUNCEMENT (2015), <https://www.bja.gov/Funding/15BWCsol.pdf>, [<https://perma.cc/4HX9-EUW4>].

128. See BUREAU OF JUSTICE ASSISTANCE, *supra* note 127; Pilot Program Press Release, *supra* note 74; see also *supra* Part I.B.3.

129. See *Illinois v. Fisher*, 540 U.S. 544 (2004) (per curiam); see also Bay, *supra* note 96, at 297 (describing the impact that *Youngblood* had on state court decisions).

130. See GREG HURLEY, NAT'L CTR. FOR STATE COURTS, BODY-WORN CAMERAS AND THE COURTS (2016), <http://www.ncsc-jurystudies.org/~media/files/pdf/jury/final%20bwc%20report.ashx> (listing state court decisions that adhere to *Youngblood*) [<https://perma.cc/CS6G-RZA3>].

131. See, e.g., *Snyder v. State*, 893 So. 2d 488, 530 (Ala. Crim. App. 2003); *People v. Alvarez*, 176 Cal. Rptr. 3d 890, 904 (Ct. App. 2014); *State v. Geeslin*, 878 N.E.2d 1, 4 (Ohio 2007); *State v. Durnwald*, 837 N.E.2d 1234, 1241 (Ohio Ct. App. 2005) (finding the footage to be only potentially exculpatory even if it was seen by police officers before being erased). But see *State v. Zinsli*, 966 P.2d 1200, 1205 (Or. Ct. App. 1998) (holding that a missing video of a sobriety test in a DUI arrest was materially exculpatory, despite the arresting officer writing his report based on watching the footage).

132. See, e.g., *State v. Gerhardt*, 778 P.2d 1306, 1309 (Ariz. Ct. App. 1989) (holding that a blank space in police video containing defendant's entire interview with police did not cause a violation of his rights, because defendant failed to show that the evidence was destroyed in bad faith); *Spaulding v. State*, 394 S.E.2d 111, 111–12 (Ga. Ct. App. 1990) (holding that an officer who taped over arrest footage was not acting in bad faith); see also *Kitzmueller*, *supra* note 13, at 173–74.

133. 77 So. 3d 1119 (Miss. Ct. App. 2011).

134. See *id.* at 1123.

135. See *id.* at 1123–24.

because the officer was acting in accordance with departmental practices and displayed no animus toward the defendant, the destruction of the video footage was not committed in bad faith, and it did not violate the defendant's due process rights.<sup>136</sup>

Another case involving destruction of video footage typical of states strictly adhering to the bad faith standard is *Burdick v. State*.<sup>137</sup> Subsequent to filming the booking and intake of a defendant charged with a DUI, the footage of the arrest was taped over after seventeen days in storage.<sup>138</sup> The defendant argued that this prevented him from verifying his claim that he walked into the police station normally and without assistance after his arrest.<sup>139</sup> After the court of appeals determined that the video footage was not materially exculpatory, the court found that the footage was not destroyed in bad faith and that the defendant's due process rights were not violated by the destruction of video evidence.<sup>140</sup> This determination was made in spite of the absence of a departmental policy regarding the handling of tapes and the fact that the defendant made a discovery request for the footage shortly after his arrest.<sup>141</sup> While most courts have made similar rulings to *Burdick* when addressing the issue of destroyed video evidence, it is not a uniform trend.<sup>142</sup> Several courts in jurisdictions adhering closely to the bad faith standard of *Youngblood*, as well as those deviating significantly from this standard, have been willing to impose judicial remedies in response to destroyed video footage under certain circumstances.<sup>143</sup>

#### 1. The Imposition of Sanctions for Lost or Destroyed Evidence in Jurisdictions Strictly Adhering to *Youngblood*

A "missing-evidence instruction," also known as an "adverse-inference charge," is a sanction which serves to mitigate the damage of lost or destroyed evidence to a defendant.<sup>144</sup> Missing-evidence instructions can direct the jury to assume adverse facts based on the government's destruction of evidence<sup>145</sup> or simply inform the jury that evidence has been lost or destroyed.<sup>146</sup> This can aid the jury in "clearly understanding the case, to provide guidance for the jury's deliberations, and to help the jury

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136. *Id.*

137. 474 S.W.3d 17 (Tex. App. 2015).

138. *See id.*

139. *See id.*

140. *See id.*

141. *See id.*

142. *See infra* Part II.B.1–2.

143. *See infra* Part II.B.1–2.

144. *See Cost v. State*, 10 A.3d 184, 190–91 (Md. 2010); Bay, *supra* note 96, at 293.

145. *See, e.g., People v. Zamora*, 615 P.2d 1361, 1370 (Cal. 1980) (mandating an adverse inference instruction in response to intentionally destroyed complaints concerning abuse by police officers, which informed the jury that the documents containing evidence of misconduct were destroyed by the government, and that the jury could infer that the police officers were "prone to use excessive or unnecessary force").

146. *See People v. Handy*, 988 N.E.2d 879, 882–83 (N.Y. 2013).

arrive at a correct verdict.”<sup>147</sup> However, missing-evidence instructions also create the risk that the jury will give undue weight to a particular inference, or “overemphasiz[e] just one of the many proper inferences that a jury may draw.”<sup>148</sup> There is significant variation in how courts approach the imposition of a missing-evidence instruction for lost or destroyed evidence.<sup>149</sup>

The imposition of sanctions for the destruction of evidence, short of dismissal, is not in conflict with *Youngblood*.<sup>150</sup> Despite the Court’s finding that the defendant’s due process rights were not violated by the destruction of evidence, a missing-evidence instruction was still imposed.<sup>151</sup> However, a significant number of jurisdictions require a showing of bad faith in a lost or destroyed evidence case before any sanctions can be granted.<sup>152</sup> But even if the bad faith threshold cannot be met in a state closely adhering to *Youngblood*, several jurisdictions have imposed missing-evidence instructions as a result of the destruction or unavailability of evidence under certain circumstances.<sup>153</sup> These cases reflect Justice John Paul Stevens’s belief that circumstances exist “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.”<sup>154</sup> A case that illustrates this concept is *Koonce v. District of Columbia*.<sup>155</sup> In *Koonce*, the appellant requested video footage of the defendant’s conduct in a police station following a DUI arrest, with the request reaching the government thirty-four days after the arrest.<sup>156</sup> The government argued there was no due process violation, as the officer acted in accordance with a departmental policy of deleting video footage after thirty days and, as such, did not act in bad faith.<sup>157</sup> The court agreed with the government that by adhering to the policy of the Metropolitan Police Department, the officers in *Koonce* had not acted in bad faith, and found that the evidence was only potentially

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147. *Cost*, 10 A.3d at 197 (quoting *Chambers v. State*, 650 A.2d 727, 729 (Md. 1994)); see also *Davis v. State*, 633 A.2d 867, 879 (Md. 1993).

148. *Cost*, 10 A.3d at 197 (quoting *Davis*, 633 A.2d at 879).

149. See Bay, *supra* note 96, at 294.

150. See *Arizona v. Youngblood*, 488 U.S. 51, 61 (1988) (Stevens, J., concurring).

151. See *id.*

152. See Bay, *supra* note 96, at 293 n.396 (providing a list of jurisdictions requiring the bad faith threshold to be met before sanctions can be imposed). Professor Bay implies that this could be the majority view among jurisdictions. *Id.*

153. See *Cost*, 10 A.3d at 194–95 (“Even some states that adhere to *Youngblood*’s bad faith requirement allow or encourage missing evidence instructions.”); see also *State v. Youngblood*, 844 P.2d 1152, 1157 (Ariz. 1993) (asserting that the bad faith standard on remand from the U.S. Supreme Court, but finding that “an instruction is adequate where the state destroys, loses or fails to preserve evidence”); *Collins v. Commonwealth*, 951 S.W.2d 569, 573 (Ky. 1997) (adhering strictly to *Youngblood*, but finding that a “factor of critical importance to this case is the missing evidence instruction that was provided . . . [through which] any uncertainty as to what the [missing evidence] might have proved was turned to [the defendant’s] advantage”).

154. *Youngblood*, 488 U.S. at 61 (Stevens, J., concurring).

155. 111 A.3d 1009 (D.C. 2015).

156. See *id.* at 1016–17.

157. *Id.* at 1017–19.

exculpatory.<sup>158</sup> In most jurisdictions interpreting *Youngblood*, the analysis of the destruction of evidence would end at this point.<sup>159</sup> However, while the court held that the charges should not be dismissed because the footage was not destroyed in bad faith, the court found that the government's destruction did "not align with the government's obligation to preserve evidence to which appellant was entitled."<sup>160</sup> The court cited a D.C. statute stating that evidence of a properly informed arrestee's refusal to take tests evaluating intoxication may be presented to the jury and that it is customary in DUI cases for the government to present testimony concerning the behavior and appearance after an arrest to infer intoxication.<sup>161</sup> As a result, the court found that it was not a logical leap to conclude that the video destroyed by the police could have been material to the defendant and should have been preserved.<sup>162</sup> Judge Vanessa Ruiz outlined the importance of evidence retention reform in the face of evolving technology in her majority opinion, writing that "[i]t is for the government to establish procedures and practices to preserve such [video] evidence. . . . However, a reasonable amount of time has to be allowed for the defense to make a discovery request, and for the government to respond to those requests."<sup>163</sup> As a result, the D.C. Court of Appeals upheld the lower court's jury instruction, stating that a "request for video from the station was made, but the video had been destroyed in accordance with MPD practice to record over video after thirty days, leaving it to the jury to draw its own conclusions" as an appropriate sanction.<sup>164</sup>

In the rare cases where courts applying *Youngblood* have found a due process violation as a result of evidence lost or destroyed in bad faith, most jurisdictions have found that the dismissal of charges is acceptable if less drastic alternatives are not available.<sup>165</sup> In *People v. Alvarez*,<sup>166</sup> the California Court of Appeals reviewed a robbery case where officers failed to preserve the video footage of at least two cameras that filmed the area where the incident took place.<sup>167</sup> The defendant claimed that the actions of the police violated his right to due process, as he maintained that the footage would have exonerated him.<sup>168</sup> After the court found that the footage was at least potentially exculpatory under *Youngblood*, it turned to the issue of bad faith.<sup>169</sup> The court noted that on the night of the incident,

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158. *See id.* at 1016–17.

159. *See supra* Part II.B.

160. *Koonce*, 111 A.3d at 1017.

161. *See id.* (citing D.C. CODE § 50–1905(c) (2012)).

162. *See id.* at 1017–18.

163. *Id.* at 1018.

164. *Id.* at 1019.

165. *See People v. Alvarez*, 176 Cal. Rptr. 3d 890, 904 (Ct. App. 2014) ("There are few cases after *Youngblood*, however, where the bad faith destruction of material exculpatory evidence warranted anything less than dismissal."); *see also* *United States v. Bohl* 25 F.3d 904, 914 (10th Cir. 1994).

166. 176 Cal. Rptr. 3d 890 (Ct. App. 2014).

167. *See Alvarez*, 176 Cal. Rptr. 3d at 894.

168. *See id.*

169. *See id.* at 903.



the defendant had asked an officer for the video footage, and the officer told him that it was his department's responsibility to furnish the video.<sup>170</sup> The court also found that the prosecution was on notice that the footage was important, relying on statements made by the prosecutor in the initial hearing.<sup>171</sup> Considering these factors, the court found that the video footage was destroyed in bad faith and that dismissal of charges was the appropriate sanction.<sup>172</sup>

## 2. The Imposition of Sanctions for Lost or Destroyed Evidence in Jurisdictions Deviating from *Youngblood*

While the majority of states adhere to the bad faith standard of *Youngblood*, ten states have rejected it as a controlling matter in their state's constitutional law.<sup>173</sup> At least one court has observed that there is "an emerging consensus that a universal 'bad faith' standard does not go far enough to adequately protect the rights of a person charged with a crime."<sup>174</sup> Courts have been willing to stray from strict adherence to the bad faith standard when the eventual remedy is not the dismissal of charges (the issue in *Youngblood*) but a missing-evidence instruction.<sup>175</sup>

An example of this trend can be found in the New York Court of Appeals's decision in *People v. Handy*.<sup>176</sup> In *Handy*, the defendant and a police officer engaged in a physical confrontation in a cell block, which the government alleged was initiated by the defendant.<sup>177</sup> The defendant provided a different narrative in which the officer swung first, and he argued that he was entitled to the jail's video footage that had captured a "very small part of the . . . incident" and had been destroyed.<sup>178</sup> As the video had been erased in accordance with the jail's policy of recording over footage after thirty days, the government did not act in bad faith as defined by *Youngblood*.<sup>179</sup> However, the New York Court of Appeals sidestepped the bad faith standard of *Youngblood*, declining to agree or disagree with its

170. *See id.*

171. *See id.*

172. *See id.* at 904.

173. *See Ex parte Gingo*, 605 So. 2d 1237, 1241 (Ala. 1992); *Thorne v. Dep't Pub. Safety*, 774 P.2d 1326, 1330–31 (Alaska 1989); *State v. Morales*, 657 A.2d 585, 592–94 (Conn. 1995); *Lolly v. State*, 611 A.2d 956, 959–60 (Del. 1992); *Hammond v. State*, 569 A.2d 81, 85–89 (Del. 1989); *State v. Okumura*, 894 P.2d 80, 98–99 (Haw. 1995); *Commonwealth v. Henderson*, 582 N.E.2d 496, 496–97 (Mass. 1991); *State v. Ferguson*, 2 S.W.3d 912, 915–18 (Tenn. 1999); *State v. Tiedemann*, 162 P.3d 1106, 1115–17 (Utah 2007); *State v. Delisle*, 648 A.2d 632, 642–43 (Vt. 1994); *State v. Osakalumi*, 461 S.E.2d 504, 508–11 (W. Va. 1995); *see also HURLEY*, *supra* note 130, at 38–47; *Bay*, *supra* note 96, at 246–47.

174. *Cost v. State*, 10 A.3d 184, 195 (Md. 2010).

175. *See id.*; *see also Fletcher v. Anchorage*, 650 P.2d 417, 418 (Alaska Ct. App. 1982) (holding that a court may "instruct the jury to assume that the [missing] evidence would be favorable to the defendant" even if evidence is lost or destroyed in good faith); *Hammond*, 569 A.2d at 90 (mandating a missing evidence instruction in the absence of bad faith).

176. 988 N.E.2d 879 (N.Y. 2013).

177. *See id.* at 880.

178. *Id.*

179. *See id.* at 880–81.

rule.<sup>180</sup> Instead, the court decided to hold that under New York’s rules of evidence, “a permissive adverse inference charge should be given where a defendant, using reasonable diligence, has requested evidence reasonably likely to be material, and where that evidence has been destroyed by agents of the State.”<sup>181</sup> The court held that when video is taken of something that will foreseeably lead to criminal prosecution, “authorities in charge should . . . take whatever steps are necessary to insure that the video will not be erased—whether by simply taking a tape or disc out of a machine, or by instructing a computer not to delete the material.”<sup>182</sup> The court stated that its decision would improve the chance that the government would take more affirmative steps to preserve evidentiary video footage.<sup>183</sup>

### C. State Statutes Regulating Police Video Retention

As body-worn camera programs in police departments across the United States continue to expand, it is becoming more common for state legislatures to introduce statutes prescribing time periods in which police must store video footage.<sup>184</sup> By January 2017, seventeen states and the District of Columbia had established some control over the storage time of police video, through statute, agency directive, or model policy.<sup>185</sup> While there are significant differences between each of these states, several mandate significantly longer storage periods for evidentiary footage than nonevidentiary footage, reflecting the recommendations of several model body-worn camera policies.<sup>186</sup> This section analyzes statutes enacted in Illinois, the District of Columbia, Washington, and Nevada to provide a brief survey of some of the commonalities of these laws, as well as how they diverge from each other in mandating retention times for different classes of body-worn camera footage.

#### 1. Illinois

In 2008, Illinois passed section 30(b) of the State Police Act, titled “Patrol Vehicles with In-Car Video Recording Cameras.”<sup>187</sup> It mandated that all footage must be retained for a minimum of ninety days but may not be deleted after this period if the video is designated as evidentiary.<sup>188</sup> Illinois also passed a law stating that all footage taken as part of an “enforcement stop” (a designation including traffic stops, pedestrian stops, and requests for information) considered to be part of evidence in a

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180. *See id.* at 881–82.

181. *Id.* at 882.

182. *Id.*

183. *See id.*

184. *See Police Body-Worn Cameras Legislation Tracker*, URB. INST., <http://apps-staging.urban.org/features/body-camera-update/> (last updated Jan. 1, 2017) [<https://perma.cc/6AH4-S8ZQ>]; *see also* Kitzmueller, *supra* note 13, at 181.

185. *See Police Body-Worn Cameras Legislation Tracker*, *supra* note 184.

186. *See id.*; *see also* ACLU, *supra* note 112; POLICE EXEC. RESEARCH FORUM, *supra* note 14, at 44.

187. 20 ILL. COMP. STAT. ANN. 2610/30 (West 2013); Kitzmueller, *supra* note 13, at 185.

188. *See* 20 ILL. COMP. STAT. ANN. 2610/30(f).

criminal, civil, or administrative proceeding, is to be tagged as evidentiary footage and is prohibited from destruction until a final disposition of the case and a court order.<sup>189</sup> While only referring to in-car camera footage, concepts such as requiring the retention of all footage for a set period of time, as well as higher retention periods for certain types of video would be seen in subsequent body-worn camera statutes passed in other states.<sup>190</sup>

## 2. Washington, D.C.

Washington, D.C., initiated one of the largest body-worn camera programs in the country when the Council of the District of Columbia announced plans to equip officers of the Metropolitan Police Department (MPD) with 2,400 cameras, promising to make the majority of footage created from these cameras available for public viewing.<sup>191</sup> To accompany this program, the council also passed the Body-Worn Camera Program Amendment Act of 2015, which contains retention standards similar to the Illinois statute.<sup>192</sup> The statute mandates that all body-worn camera footage be retained for ninety days by the MPD.<sup>193</sup> However, for footage related to a criminal investigation, a civilian complaint against a police officer, a death investigation, a civil litigation hold, a Freedom of Information Act request, or departmental training, the statute requires the MPD establish a retention schedule available online.<sup>194</sup> The MPD has since established a detailed retention policy on its website, listing twenty-four categories of footage and the period of time each type will be retained.<sup>195</sup> Washington, D.C.'s body-worn camera video retention policy is one of the most expansive in the nation,<sup>196</sup> yet several states have passed video retention statutes significantly more limited in scope.<sup>197</sup>

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189. *See id.* 5/14-3(h-15).

190. *See infra* Part II.C.2-4.

191. *See* Abigail Hauslohner, *Bulk of D.C. Body Camera Footage Will Be Available to the Public*, WASH. POST (Dec. 1, 2015), [https://www.washingtonpost.com/local/dc-politics/bulk-of-dc-body-camera-footage-will-be-available-to-the-public/2015/12/01/c9fef7d0-9858-11e5-94f0-9eeaff906ef3\\_story.html](https://www.washingtonpost.com/local/dc-politics/bulk-of-dc-body-camera-footage-will-be-available-to-the-public/2015/12/01/c9fef7d0-9858-11e5-94f0-9eeaff906ef3_story.html) [<https://perma.cc/CK4A-8P9G>]; Robinson Meyer, *Should Everyone Get to See Body-Camera Video?*, ATLANTIC (Aug. 17, 2015), <http://www.theatlantic.com/technology/archive/2015/08/police-worn-body-camera-footage-video-washington-dc-new-policy/401468/> [<https://perma.cc/DCL3-ULY6>].

192. *See* D.C. CODE § 21-265 (2016).

193. *See id.*

194. *See id.*

195. *See* Washington, D.C., Metropolitan Police Body-Worn Camera Program GO-SPT-302-13 pt. V.H.1 (2016), [https://go.mpdconline.com/GO/GO\\_302\\_13.pdf](https://go.mpdconline.com/GO/GO_302_13.pdf) [<https://perma.cc/8VEA-4Q7R>]. The MPD will retain footage related to a murder or manslaughter case for sixty-five years, while most footage related to misdemeanors will only be stored for three years. *See id.*

196. This was determined through a comparison of statutes listed in the Urban Institute database. *See Police Body-Worn Cameras Legislation Tracker*, *supra* note 184.

197. *See infra* Part II.C.3-4.

### 3. Washington

In 2014, Seattle unveiled a plan to equip 680 officers with body-worn cameras following the completion of a small pilot program, and in 2015, Mayor Ed Murray announced that the city would spend \$1.8 million to purchase these cameras.<sup>198</sup> To provide rules for Washington's burgeoning body-worn camera programs, Governor Jay Inslee signed into law House Bill 2362, which required police departments using body-worn cameras to establish policies governing the use of cameras, and created a task force to study best practices for camera use.<sup>199</sup> Regarding retention of footage, House Bill 2362 states that law enforcement agencies "must retain body worn camera recordings for at least sixty days and thereafter may destroy the records."<sup>200</sup> Unlike the Illinois statute, the Washington body-worn camera statute does not distinguish between evidentiary and nonevidentiary footage in defining retention time periods.<sup>201</sup>

### 4. Nevada

On June 12, 2015, Nevada Governor Brian Sandoval signed Senate Bill 111 into law, mandating that all Nevada Highway Patrol officers wear body-worn cameras by 2016.<sup>202</sup> Nevada also established rules for the creation and retention of body-worn camera footage in 2015 through the passage of Assembly Bill 162, which required police departments to set disciplinary rules addressing the manipulation and premature destruction of stored video footage.<sup>203</sup> However, the statute was limited in scope compared to the retention period requirements of Illinois or Washington, D.C., mandating that the Nevada Highway Patrol preserve footage taken from body-worn cameras "not less than 15 days" and requiring police to limit "the period for which a video recorded by a [body-worn camera] must be retained."<sup>204</sup>

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198. See Jennifer Sullivan, *SPD to Test Body Cameras on a Dozen Officers*, SEATTLE TIMES (Sept. 24, 2014), [www.seattletimes.com/seattle-news/spd-to-test-body-cameras-on-a-dozen-officers/](http://www.seattletimes.com/seattle-news/spd-to-test-body-cameras-on-a-dozen-officers/) [https://perma.cc/2BS2-WQQX]; see also Daniel Beekman, *Murray: City Needs Bikes, Body Cameras, New Planning Department in 2016*, SEATTLE TIMES (Sept. 28, 2015), <http://www.seattletimes.com/seattle-news/politics/seattle-mayors-proposed-51b-budget-boosts-body-cameras-bike-share-system/> [https://perma.cc/ZYZ7-T2LF]. In 2015, Seattle received a \$600,000 federal grant to equip the city's police with body-worn cameras. See Siemaszko, *supra* note 36.

199. See 2016 WASH. SESS. LAWS 780–88.

200. *Id.* at 784.

201. See *id.* at 780–88.

202. See Press Release, Brian Sandoval, Governor, Nev., Sandoval Joins Educators and Legislators to Sign Historic Education Reform Bills (June 12, 2015), <http://gov.nv.gov/News-and-Media/Press/2015/Sandoval-Joins-Educators-and-Legislators-to-Sign-Historic-Education-Reform-Bills/> [https://perma.cc/57WV-GNLN]; *Nevada Troopers Will Wear Body Cameras*, RENO GAZETTE-J. (June 2, 2015), <http://www.rgj.com/story/news/politics/2015/06/02/nevada-troopers-will-wear-body-cameras/28344061/> [https://perma.cc/994E-R2BN].

203. See A.B. 162, 2015 Leg., 78th Reg. Sess. (Nev. 2015).

204. *Id.*; see also Rebecca Brown, *Nearly All States Considered Police Body Cameras in 2015, Few Enacted Laws*, FISCALNOTE (Aug. 6, 2015), <https://>

### III. EXPANDING ACCESS TO BODY-WORN CAMERA FOOTAGE THROUGH IMPROVED RETENTION POLICIES

While the risk of destroyed body-worn camera footage is significant, it can be mitigated through judicial and statutory means focused on protecting critical evidentiary footage. This part addresses these solutions by recommending (1) the passage of state statutes regulating the time periods in which body-worn camera footage must be stored to prevent the likelihood that evidentiary footage will be destroyed, (2) time limits that balance the need for access with the administrative burdens carried by police departments implementing a large-scale body-worn camera program, and (3) an interpretation of the current case law of lost and destroyed evidence allowing for the imposition of missing-evidence instructions in situations described by Justice Stevens in his *Youngblood* concurrence: where “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.”<sup>205</sup>

#### *A. States Should Establish Clear Standards on Body-Worn Camera Video Retention That Balance Access with Logistical Concerns*

As a result of the demanding bad faith standard of *Youngblood* and the widespread adoption of *Youngblood* at the state level, the destruction of video footage by police in accordance with departmental policy, no matter how short, is permissible under the law of most of the United States.<sup>206</sup> Because of the current flexibility that police departments possess in storing and destroying footage, it is essential that clear and powerful standards for the retention of body-worn camera footage be established at the state and federal level. However, these standards should take into consideration the logistical burdens on police related to the expansive retention of video footage.<sup>207</sup>

Most model body-worn camera policies and many implemented body-worn camera programs with written retention standards require evidentiary footage to be stored for longer periods than nonevidentiary footage.<sup>208</sup> States should follow the lead of Illinois and preserve all footage of an arrest or footage that provides evidence in a criminal, civil, or administrative proceeding until disposition.<sup>209</sup> Such a statutory requirement would do much to limit the destruction of evidentiary video seen in *Handy*, where

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[www.fiscalnote.com/2015/08/06/nearly-all-states-considered-police-body-cameras-in-2015-few-enacted-laws/](http://www.fiscalnote.com/2015/08/06/nearly-all-states-considered-police-body-cameras-in-2015-few-enacted-laws/) [<https://perma.cc/3MJX-QS3P>].

205. *Arizona v. Youngblood*, 488 U.S. 51, 61 (1988) (Stevens, J., concurring).

206. *See supra* Part II.B.

207. *See supra* Part II.A.2.

208. *See supra* Part II.C.1–2; *see also* POLICE EXEC. RESEARCH FORUM, *supra* note 14, at 17; Raj Rana, *Arresting the Storage Challenges of Body Cameras*, GCN (Feb. 25, 2015), <https://gcn.com/articles/2015/02/25/body-cam-video-storage.aspx> [<https://perma.cc/8QGB-E9V5>].

209. 20 ILL. COMP. STAT. ANN. 5/14-3(h-15) (West 2012).

footage of a defendant and a police officer in a physical confrontation was treated the same as nonevidentiary footage and was automatically deleted after thirty days.<sup>210</sup> States should also adhere to the federal policy goal of transparency in policing by following the Washington, D.C., model of mandating that police departments clearly state the nature of their video retention policies on their website, whether that jurisdiction allows for broad public access to footage or not.<sup>211</sup>

In recognition of the high cost of storing and organizing vast amounts of body-worn camera footage, police departments should be given more flexibility in how they treat nonevidentiary footage.<sup>212</sup> PERF finds that the average time that police departments maintain nonevidentiary footage is between sixty and ninety days, which is also the amount of time they recommend that police departments store nonevidentiary footage.<sup>213</sup> However, such a short retention period could limit the use of nonarrest footage in certain circumstances. For example, in the New York Department of Investigation and the NYPD Office of the Inspector General substantial assessment of the NYPD's body-worn camera pilot program, the storage period of one year for nonevidentiary footage was criticized, as the limit would fail to cover the eighteen month statute of limitations for filing an administrative misconduct complaint.<sup>214</sup> In light of these factors, states should tailor their policies regarding the retention of nonarrest footage documenting police interaction with the public to their state's statute of limitations for misconduct claims.

As proper statutory video retention periods for body-worn camera programs are assessed, states and the federal government should be prepared to provide additional resources to police departments to cover the logistical burden of storing large volumes of data.<sup>215</sup> While the cost of body-worn cameras has decreased over the years,<sup>216</sup> the cost of effective management of data is substantial and presents a significant hurdle for small or resource-strapped police departments.<sup>217</sup> There is evidence that expansive body-worn camera programs have the ability to drastically reduce the amount of civilian complaints against police,<sup>218</sup> which constitute

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210. *See supra* Part II.B.2.

211. *See supra* Part II.C.2.

212. *See supra* Part II.A.2.

213. *See* POLICE EXEC. RESEARCH FORUM, *supra* note 14, at 28. The ACLU recommends that nonevidentiary footage be stored for six months. *See* ACLU, *supra* note 112, at 2–3.

214. *See* OIG-NYPD REPORT, *supra* note 69, at 35–36. This assessment was supported by all five District Attorney's Offices in New York City. *See id.*

215. *See supra* Part II.A.2.

216. *See supra* Part I.B.1.

217. *See* POLICE EXEC. RESEARCH FORUM, *supra* note 14, at 32.

218. *See supra* Part I.B.1.; *see also* POLICE EXEC. RESEARCH FORUM, *supra* note 14, at 6 (stating that police executives interviewed by PERF “overwhelmingly report that their agencies experienced a noticeable drop in complaints against officers after deploying body-worn cameras”); Ariel, Farrar & Sutherland, *supra* note 37. The PERF report also describes a study conducted by the Mesa Police Department and Arizona State University finding that Mesa police officers wearing body-worn cameras for a year-long period had “40 percent fewer total complaints and 75 percent fewer use of force complaints” than they did in the

an enormous expense for local governments.<sup>219</sup> While the cost-saving impact of body-worn cameras has yet to be studied, legislators should consider the potential long-term reduction in expenses that an effective body-worn camera program could provide when grappling with the logistical challenges of paying for video storage.

*B. Courts Should Strengthen Protections Against  
the Destruction of Video Evidence in the Shadow of Youngblood*

Whether *Youngblood* should be overruled and what standard for lost or destroyed evidence should take its place is beyond the scope of this Note. However, in light of the increasing scale of body-worn camera footage collected by police departments and the enhanced risk of video destruction as a result of unclear storage regulations at the state and departmental level, courts should follow the lead of jurisdictions that have imposed missing-evidence instructions in cases where bad faith cannot be established<sup>220</sup> but when the effect of the destruction of evidence is significant enough to fundamentally influence the fairness of a trial.<sup>221</sup> Whether a state applies the bad faith standard of *Youngblood* to its state constitution or relies on a separate test, courts should more readily consider sanctions short of dismissal in cases where a defendant has been unusually burdened by the destruction or unavailability of police video footage, such as the former practice of video destruction of the Albuquerque Police Department described in Part II.A.1. Courts should provide some degree of remedy in cases like Albuquerque, where officers technically follow standard practices of a department but where those practices are obviously inadequate in their ability to preserve video footage in any meaningful way.

In the absence of clear state statutes regulating the retention of body-worn camera footage, the imposition of sanctions for the most egregious cases of destruction of video footage is one of the strongest bulwarks against the destruction of police video available.<sup>222</sup> Courts should recognize that while the bad faith standard of *Youngblood* has been widely implemented at the state level and is difficult to overcome,<sup>223</sup> an “emerging consensus” is building against strict adherence to the standard.<sup>224</sup> Courts should be sure to carefully weigh the degree of government negligence with

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year prior when they were not using cameras. POLICE EXEC. RESEARCH FORUM, *supra* note 14, at 6.

219. See Ali Winston, *Police-Related Legal Costs Spike in Oakland*, E. BAY EXPRESS (June 27, 2012), <http://www.eastbayexpress.com/oakland/police-related-legal-costs-spike-in-oakland/Content?oid=3260236> (reporting that the Oakland Police Department spent \$13,149,000 in 2010 on officer misconduct cases) [<https://perma.cc/KX6V-X4T6>].

220. See, e.g., *Fletcher v. Anchorage*, 650 P.2d 417, 418 (Alaska Ct. App. 1982); *Hammond v. State*, 569 A.2d 81, 90 (Del. 1989); *People v. Handy*, 988 N.E.2d 879 (N.Y. 2013).

221. See *Arizona v. Youngblood*, 488 U.S. 51, 61 (Stevens, J., concurring).

222. See *supra* Part II.B.1–2; see also *Kitzmueller*, *supra* note 13, at 190 (“[S]tate courts can be powerful enforcers of video preservation if they choose.”).

223. See *supra* Part I.B.2.

224. See *Cost v. State*, 10 A.3d 184, 195 (Md. 2010).

the importance of the video evidence lost before imposing a sanction.<sup>225</sup> They should also recognize that even a sanction such as a missing-evidence instruction can significantly influence the attention of a jury and should thus be reserved for the category of cases which do not meet bad faith but are acute in their negative impact on a defendant.<sup>226</sup> In determining whether the destruction of video evidence meets the threshold for a missing-evidence instruction, courts should weigh the likelihood that the video documents an incident that will lead to a prosecution, the length of time the video was stored before being destroyed, whether the footage was destroyed in accordance with departmental policy, the time at which the defendant requested the footage, and the state law regarding the role that evidence of the particular incident documented plays in a criminal trial.<sup>227</sup>

#### CONCLUSION

The widespread use of body-worn cameras in police departments is a significant development in criminal justice, promising to expand access to quality evidence in criminal proceedings and to promote police transparency at a critical juncture in the history of American criminal law. The expansion of funding and implementation of body-worn cameras is a positive step toward these goals, but it is limited by the risk of video destruction due to logistical challenges, a lack of retention standards, and the strict and widespread adherence at the state level to the bad faith standard of *Youngblood*. Courts should expand protections against the destruction of evidence in their state constitutions or should interpret *Youngblood* to allow for missing-evidence instructions in cases where there is an absence of bad faith but in which the effect of the destruction of evidence is significant enough to fundamentally influence the fairness of a trial. States should also establish statutes regulating the time periods in which body-worn camera footage is stored to prevent the likelihood that evidentiary footage will be destroyed before the video can be utilized in criminal trials.

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225. See *Cotton v. United States*, 388 A.2d 865, 869 (D.C. 1978).

226. See *Koonce v. District of Columbia*, 111 A.3d 1009 (D.C. 2015); *People v. Handy*, 988 N.E.2d 879, 882 (N.Y. 2013).

227. See *People v. Alvarez*, 176 Cal. Rptr. 3d 890 (Ct. App. 2014); *Koonce*, 111 A.3d at 1017; *Handy*, 988 N.E.2d at 882–83.