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Essay

Are You Recording This?: Enforcement of Police Videotaping

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Increasing numbers of police departments equip officers with dashboard or body cameras. Advances in technology have made it easy for police to create and preserve videos of their citizen encounters. Videos can be important pieces of evidence; they may also serve to document police misconduct or protect officers from false allegations. Yet too often, videos are lost, destroyed, or never made, often depriving criminal defendants of the only objective evidence in a case. When this happens, there is not always a consequence to the prosecution. This Essay explores this problem of enforcement by examining how different states are compelling law enforcement to make and preserve videos through a combination of legislation and judicial intervention.

ESSAY CONTENTS

Are You Recording This?: Enforcement of Police Videotaping

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I. INTRODUCTION

In March 2014, a video showing Albuquerque police officers fatally shooting a mentally ill homeless man camping in Albuquerque's foothills went viral on the news and Internet. In the video, recorded by an officer's helmet camera, police officers shoot James Boyd three times after he was apparently about to surrender himself, then fire a beanbag gun and set loose a police dog as Boyd lies on the ground.[1] The shooting, which came in the wake of more than twenty fatal shootings committed by A.P.D. officers since 2010,[2] caused widespread criticism, outrage, and protests of the Albuquerque police force.[3]

It is difficult to imagine the same intense public reaction without the very graphic images contained on the widely circulated video. In fact, one might question whether the events surrounding James Boyd's shooting could ever have been reconstructed completely and accurately without video.

Another fatal shooting less than one month after Boyd's death illustrated this point, as 19-year-old Mary Hawkes was shot three times by an A.P.D. officer whose camera was not running.[4] The lack of video raised questions as to the circumstances of the shooting; questions that would not necessarily have been resolved against the officer, had a video existed that

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[1] Dan McKay, *Video: Camper Turning From Officers When Shot*, ALBUQUERQUE J. (Mar. 22, 2014, 12:05 AM), http://www.abqjournal.com/372844/news/video-camper-turning-away.html.

[2] *Albuquerque Journal Special Report: DOJ Investigation of APD*, ALBUQUERQUE J., http://www.abqjournal.com/apd-under-fire (last visited Sept. 18, 2014).

[3] Bill Chappell, *Albuquerque Protest of Fatal Police Shootings Turns Into Chaos*, NPR (Mar. 31, 2014, 11:50 AM), http://www.npr.org/blogs/thetwo-way/2014/03/31/297163938/albuquerque-protest-of-fatal-police-shootings-turns-into-chaos.

[4] Patrick Lohmann, *No Video of Mary Hawkes Shooting, APD Says*, ALBUQUERQUE J. (May 22, 2014, 12:05 AM), http://www.abqjournal.com/404223/news/apd-no-lapel-video-of-mary-hawkes-shooting-2.html.

showed Hawkes pointing a gun at the officer, as the officer alleged.

The lapel video of yet another recent A.P.D shooting in fact proved extremely helpful to the officer involved; when Officer Peter Romero shot Robert Garcia in November 2013, the officer's video showed Romero commanding Garcia a total of nine times to drop his weapon, circling around his police car as Garcia continued to approach him, and finally shooting him once.[5]

Due in part to the mounting accusations of excessive use of force, A.P.D. issued a standard operating procedure in May of 2012 requiring officers to record all citizen encounters on newly acquired lapel cameras.[6] Only a small amount of officers had previously carried video equipment on their persons or in their vehicles,[7] leaving it mostly to the their discretion if they chose to record an encounter. Overnight, video recordings of all A.P.D. investigations should have become the new norm.

But did they?

While officer-involved shootings generate the most attention, it is the thousands of run-of-the-mill investigations—like Albuquerque's many DUI and domestic violence cases—that provide a more complete picture of the level of police compliance with the new video policy. There have been countless properly collected and preserved videos, but cases without a video are frequent.[8] There are many possible reasons for an absence of case videos: equipment malfunction, limited storage capacity, viruses on A.P.D. computers, failure to turn the camera on or to tag a video into evidence, and inadvertent loss or destruction of the video.

When no video exists in a criminal case, what is the remedy? Should the trial court dismiss the case or suppress any testimony regarding the content of the video? Is there no sanction at all? How does the level of culpability (by the officer or another agent for the prosecution) affect the analysis, and what distinction exists between a video that was lost or destroyed as opposed to a video that was never made? This Essay

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[5] *See* Dan McKay, *APD Releases Video of Shooting by Officer*, ALBUQUERQUE J. (Jan. 16, 2014, 5:59 AM), http://www.abqjournal.com/337394/news/apd-releases-video-of-shooting-by-officer.html (reporting that Garcia lived; he had planned for an officer to shoot and kill him and carried a note in his pocket with the words "thank you, officer").

[6] Jeff Proctor, *APD to Expand Use of Cameras*, ALBUQUERQUE J. (May 2, 2012, 8:48 AM), http://www.abqjournal.com/103280/news/apd-to-expand-use-of-cameras.html.

[7] *See* Memorandum from Acting Assistant Attorney Gen. Jocelyn Samuels, Office of the Assistant Attorney Gen., Civil Rights Div. & Acting U.S. Attorney Damon P. Martinez, Dist. of N.M., to Mayor Richard J. Berry, City of Albuquerque 25 n.37 (Apr. 10, 2014), *available at* http://www.justice.gov/crt/about/spl/documents/apd_findings_4-10-14.pdf ("Before using lapel cameras in 2012, APD officers used belt tapes to capture audio of incidents.").

[8] Of the fifty-nine DUI and domestic violence cases handled by my students in the spring semester of 2014, ten cases had an issue with video that was lost or destroyed, or where no video had been taken at all. Lost and destroyed evidence is the most frequently raised defense issue in my prosecution clinic.

examines how various states have approached this issue through a combination of legislation and judicial intervention.

II. THE HISTORY

A. Arizona v. Youngblood

1. *The Case*

The United States Supreme Court set the tone for modern jurisprudence on destroyed evidence in 1988 when it decided *Arizona v. Youngblood*.[9] The defendant, Larry Youngblood, was convicted in an Arizona trial court of child molestation, sexual assault, and kidnapping.[10] The victim, a ten-year-old boy, was abducted by a stranger for a period of about one and a half hours.[11] Nine days after his abduction, the boy picked out Larry Youngblood from a photographic lineup.[12] Semen samples had been collected on a swab from a rape kit, as well as on the child victim's clothing. The amount of semen collected through the rape kit was insufficient to make a valid comparison with the defendant's blood and saliva.[13] When, more than a year after the assault, a criminologist first examined the boy's clothing, which had not been refrigerated or frozen, he too was unsuccessful in establishing the assailant's identity.[14] The defendant's case at trial rested on a defense of mistaken identity.[15] Expert witnesses testified that the defendant might have been completely exonerated by the timely performance of tests on properly preserved semen samples.[16]

The Arizona Court of Appeals overturned the jury's conviction due to the State's failure to preserve potentially exculpatory evidence.[17] The U.S. Supreme Court reversed.[18] The majority opinion drew a distinguishing line between material exculpatory evidence, where the good or bad faith of the state is irrelevant, and potentially useful evidence, "of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant."[19]

With regards to the latter, Chief Justice Rehnquist expressed the

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[9] 488 U.S. 51 (1988).
[10] *Id.* at 52.
[11] *Id.*
[12] *Id.* at 52–53.
[13] *Id.* at 53–54.
[14] *Id.*
[15] *Id.*
[16] *Id.* at 54.
[17] State v. Youngblood, 734 P.2d 592, 596–97 (Ariz. Ct. App. 1986), *rev'd*, 488 U.S. 51 (1988).
[18] *Youngblood*, 488 U.S. at 59.
[19] *Id.* at 57.

Court's 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."[20]

Applying this standard to the facts at hand, the Supreme Court did not consider the semen samples material exculpatory evidence.[21] Under its test for potentially useful evidence, the Court found no bad faith and therefore no due process violation, describing the failure by police to refrigerate the clothing and to perform tests on the semen samples as negligent at worst.[22]

2. Youngblood *Repercussions*

Not surprisingly, *Youngblood* was met with significant criticism.[23] In his concurrence, Justice Stevens expressed one point of contention most succinctly when he stated that "there may well be cases in which the defendant is unable to prove that the State acted in bad faith but in which the loss or destruction of evidence is nonetheless so critical to the defense as to make a criminal trial fundamentally unfair."[24]

Youngblood's holding—that the loss of potentially exculpatory evidence does not violate due process absent a showing of bad faith—was destined to create controversy, especially in the context of lost DNA evidence. The Supreme Court's decision in *Youngblood* in 1988 came several years before the Innocence Project was founded and decades before the current count of over three hundred overturned convictions.[25] In a tragic twist, the case, which effectively barred defendants from fighting the destruction of potentially exculpatory DNA evidence, rests on the conviction of an innocent man.[26] In 2000, advanced DNA analysis allowed for retesting of the old samples, exonerating Larry Youngblood.[27] Charges against Mr. Youngblood were dismissed the same year, and the true perpetrator was identified the following year through a hit in the national convicted offender databases.[28]

Those hoping that the United States Supreme Court might change its

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[20] *Id.* at 58.

[21] *Id.* at 57–58.

[22] *Id.* at 58.

[23] *See, e.g.*, 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, 259 (2008) (criticizing the *Youngblood* decision for allowing instrumentalism to trump adjudicative fairness).

[24] *Youngblood*, 488 U.S. at 61 (Stevens, J., concurring).

[25] *See* INNOCENCE PROJECT, http://www.innocenceproject.org (last visited Sept. 18, 2014) (describing the basic mission of the Innocence Project and noting that over three hundred people have been exonerated as of September, 2014).

[26] *Know the Cases: Larry Youngblood*, INNOCENCE PROJECT, http://www.innocenceproject.org/Content/Larry_Youngblood.php (last visited Sept. 18, 2014).

[27] *Id.*

[28] *Id.*

stance following these developments were disappointed.[29] The Court revisited the issue once in 2004, in *Illinois v. Fisher*.[30] In *Fisher*, the Supreme Court chose a case with remarkably uncontroversial facts[31] to confirm that *Youngblood* and the bad faith standard are still the law of the land.[32]

3. *Lost Recordings in the Wake of* Youngblood

Youngblood triggered a wave of prosecution-friendly decisions in cases where police lost or destroyed video and audio recordings.[33] Courts that followed *Youngblood* found that various manners of mishandling police recordings did not violate due process under the bad faith standard.[34]

What constitutes bad faith? As used in cases involving destroyed evidence, a finding of bad faith generally requires the state to "deliberately destroy the evidence *with the intent to deprive the defense of information*; that is, that the evidence was destroyed by, or at the direction of, a state agent who *intended to thwart the defense*."[35]

Herein lies the crux of the *Youngblood* dilemma for defense attorneys

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[29] *See* Illinois v. Fisher, 540 U.S. 544, 549 (2004) (per curiam) (reaffirming *Youngblood*'s bad-faith requirement).

[30] *Id.* (holding that because the evidence was "potentially useful," the *Youngblood* bad-faith requirement is applicable).

[31] Authorities had tested the cocaine at issue four times in two different labs, confirming the substance to be cocaine; Chicago police destroyed the cocaine only after ten years according to normal police procedure; the defendant had absconded to another state and remained a fugitive for over ten years. *Id.* at 545–46.

[32] *Id.* at 545–46, 549 (deciding that even though the State intentionally destroyed evidence after the defendant had been a fugitive for over ten years, the *Youngblood* bad-faith requirement still applies in Illinois).

[33] *See, e.g.*, State v. Gerhardt, 778 P.2d 1306, 1306–07, 1309 (Ariz. Ct. App. 1989) (deciding that accidentally destroying a videotape of the defendant did not substantially prejudice the defendant's case and thus did not warrant dismissal); Spaulding v. State, 394 S.E.2d 111, 111–12 (Ga. Ct. App. 1990) (concluding that the evidence was sufficient to convict the defendant after a videotape of him was destroyed by police).

[34] *See, e.g.*, State v. Hulbert, 481 N.W.2d 329, 334–35 (Iowa 1992) (explaining that because the deputy did not hinder the investigation and since he was unfamiliar with the contents on the tape, he did not act in bad faith); State v. Steffes, 500 N.W.2d 608, 614 (N.D. 1993) (holding that there was no evidence of bad faith when a sergeant erased a videotape thinking it was of no further value to the investigation); People v. Jackson, 568 N.Y.S.2d 215, 216 (N.Y. App. Div. 1991) (holding that the defendant's rights were not violated when the videotape was accidentally erased because the defendant failed to show how it depicted anything different from the testimony of police officers); *Gerhardt*, 778 P.2d at 1309 (deciding that the dismissal of a case is not warranted when a defendant fails to show that the evidence was not preserved in bath faith); *Spaulding*, 394 S.E.2d at 111 (concluding that the police did not act in bad faith when a videotape showing the defendant's arrest was taped over after a certain period of time); State v. Morales, 844 S.W.2d 885, 892 (Tex. Ct. App. 1992) (deciding that the defendant's due process rights were not violated when the taped interview was not preserved); Barre v. State, 826 S.W.2d 722, 723, 725 (Tex. Ct. App. 1992) (holding that the defendant's request to preserve a tape recording of police communications during his arrest was properly overruled).

[35] *Steffes*, 500 N.W.2d at 613 (emphasis added) (citing State v. Baldwin, 618 A.2d 513, 522 (Conn. 1993)).

in video cases. Not only must all accidental loss or destruction fail under this standard, but even cases where police deliberately destroy recordings cannot pass unless the defense can show that the destruction was motivated by an intent to thwart the defense. As a result, numerous decisions declined to find due process violations where officers deliberately destroyed or taped over recordings, oftentimes in accordance with internal police procedure.[36]

In *State v. Steffes*,[37] the defense filed a broad discovery request within ten days of Steffes's arrest.[38] About three to four months later, the arresting officer destroyed his audiotape by recording over it.[39] When asked why he erased the tape, the officer explained that he needed a fresh tape and that he had assumed that the case was resolved.[40] The North Dakota Supreme Court analogized the officer's failure to preserve the tape to the State's failure to preserve clothing and semen samples properly in *Youngblood*.[41] Declining to find bad faith, the Court stated,

> [w]hether [the officer's] action could be termed reckless, intentional, negligent, or merely that of following or failing to follow regular police procedure, is open to question. But . . . the evidentiary standard necessary to prove bad faith by the state with regard to the destruction or loss of evidence is quite high.[42]

Other cases deal specifically with the issue of destruction according to police procedure. In *Barre v. State*,[43] the Texas Court of Appeals noted that "[w]here evidence is destroyed in good faith and in accord with the normal practice of the police . . . there is no due process violation."[44] Later that year, the Texas Court of Appeals found no due process violation when an

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[36] *See, e.g.*, *Steffes*, 500 N.W.2d at 613–14 (N.D. 1993) (contending that while the sergeant could have been acting recklessly when erasing the tapes while following police procedure, he did not act in bad faith); *Spaulding*, 394 S.E.2d at 111–12 (showing that video tapes that are involved in criminal investigations are kept for a certain period of time and then are eventually taped over, so the defendant was not entitled to have the testimony of the officers dismissed); *Barre*, 826 S.W.2d 722, 723 (Tex. Ct. App. 1992) (noting that re-using video tapes of dispatch communications is part of an officer's normal course of business); *Morales*, 844 S.W.2d at 887, 890 (Tex. Ct. App. 1992) (contending that it is regular police practice to reuse video tapes if a case is thought to be dismissed).

[37] *Steffes*, 500 N.W.2d at 608.

[38] *Id.* at 610.

[39] *Id.*

[40] *Id.* at 613.

[41] *Id.* (citing Arizona v. Youngblood, 488 U.S. 51, 53–54 (1988)).

[42] *Id.* at 613–14.

[43] 826 S.W.2d 722 (Tex. Ct. App. 1992).

[44] *Id.* at 724 (citing *Youngblood*, 488 U.S. at 58); *see* California v. Trombetta, 467 U.S. 479, 488 (1984) (concluding that the police's failure to retain breath samples in a criminal investigation did not violate the Constitution).

officer destroyed the defendant's recorded statement by taping over it.[45] The officer incorrectly assumed (without consulting the District Attorney's Office) that the case would be dismissed after the victim's mother indicated that she wanted to drop charges, and that department policy called for the reuse of tapes not being held in evidence.[46] Similarly, the Georgia Court of Appeals found no bad faith where the videotape of a defendant's DUI investigation was destroyed prior to trial, because the officer testified that it was standard practice to keep videotapes for a certain period of time and then tape over them.[47]

These cases from the early 1990s share a near impossibility of establishing bad faith in states following *Youngblood*. So long as an agency maintained a policy of allowing for the destruction of recordings, through reuse or destruction after a certain period of time, such policies were given deference even when police showed little concern for the fact that the criminal case was pending. Questions concerning the predictability of these policies resulting in the destruction of evidence were apparently not considered.

4. *States Deviating from* Youngblood

Not all states chose to follow *Youngblood*.[48] States rejecting a strict bad faith standard instead adopted balancing tests to determine due process violations arising from the deprivation of evidence. Connecticut and New Mexico are two such states.

Several years before *Youngblood*, the New Mexico Supreme Court, in *State v. Chouinard*,[49] adopted a three-part test, asking: (1) whether the state breached a duty or intentionally deprived the defendant of evidence; (2) whether the evidence was material; and (3) whether the defendant suffered prejudice.[50] Proving bad faith is not required, and the defendant must show materiality and prejudice in cases where the state shows that it did not act in bad faith when it lost evidence.[51] Even if the three-part test is met, dismissal is not mandated. The trial court has a choice between two alternatives, depending on its assessment of materiality and prejudice: "[e]xclusion of all evidence which the lost evidence might have

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[45] State v. Morales, 844 S.W.2d 885, 892 (Tex. Ct. App. 1992).

[46] *Id.* at 887.

[47] Spaulding v. State, 394 S.E.2d 111, 111 (Ga. Ct. App. 1990).

[48] For lists of states following and rejecting *Youngblood* and a comparison of state approaches, see Daniel R. Dinger, Note, *Should Lost Evidence Mean a Lost Chance to Prosecute?: State Rejections of the United States Supreme Court Decision in* Arizona v. Youngblood, 27 AM. J. CRIM. L. 329, 343–53 (2000) (discussing a variety of approaches to the bad-faith requirement in different states).

[49] 634 P.2d 680, 680–81 (N.M. 1981).

[50] *Id.* at 683; *see* State v. Redd, 308 P.3d 1000, 1005 (N.M. Ct. App. 2013) (noting that New Mexico courts generally follow *Chouinard*'s three-part test for deciding the outcome of cases involving violation of discovery orders).

[51] *Chouinard*, 634 P.2d at 684–85.

impeached, or admission with full disclosure of the loss and its relevance and import."[52]

Connecticut's balancing test will be discussed later in this Essay.

III. THE ROLE OF VIDEO IN LOST EVIDENCE CASES

Lost video recordings generally do not hold the crucial power of DNA evidence. Videos are rarely capable of sending a person to prison or saving an innocent man from death row. While videos such as the one recording the shooting of James Boyd attract media attention, the average police video shows a person counting incorrectly or failing the heel-to-toe component of a DUI field sobriety test.[53] Perhaps this explains the almost casual attitude that courts have long taken towards recordings destroyed by police. However, recent years have brought signs of change. The following are factors that likely contributed to the change in attitudes.

A. *The Evolving Role of DUI*

A significant portion of videotaping case law and legislation applies specifically to DUI.[54] The criminal offense of driving under the influence of alcohol or drugs has undergone great changes in punishment, social stigma, and related consequences, such as employment. Where a few decades ago many jurisdictions treated DUI no worse than a traffic ticket, DUI offenders today, depending on their state, face stiff fines, DUI school,[55] suspension of their driving privileges,[56] supervised probation, an ignition interlock in their vehicle,[57] potential incarceration, sometimes even

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[52] *Id.* at 684. The New Mexico courts confirmed the continued application of *Chouinard* and the three-part test shortly after *Youngblood* in *State v. Bartlett*, 789 P.2d 627, 628 (N.M. Ct. App. 1990) and *State v. Riggs*, 838 P.2d 975, 978 (N.M. 1992), and most recently in *State v. Redd*, 308 P.3d 1000, 1005 (N.M. Ct. App. 2013).

[53] According to a survey of prosecutors, one of "the most common and effective uses of video evidence ha[s] been in the prosecution of: driving under the influence (DUIs) . . . ." INT'L ASS'N OF CHIEFS OF POLICE, THE IMPACT OF VIDEO EVIDENCE ON MODERN POLICING app. ii–1, *available at* http://www.cops.usdoj.gov/files/ric/Publications/video_evidence.pdf (last visited Sept. 26, 2014).

[54] *E.g.*, S.C. CODE ANN. § 56-5-2953(A) (West 2013) (requiring that a violator's conduct and breath test be video recorded); City of Greer v. Humble, 742 S.E.2d 15, 16 (S.C. Ct. App. 2013) (attempting to dismiss a DUI charge based on an officer's failure to use video recording).

[55] *See* Robert Scott, *Using Critical Pedagogy to Connect Prison Education and Prison Abolitionism*, 33 ST. LOUIS U. PUB. L. REV. 401, 403 n.8 (2014) ("[M]any states have DUI School and other 'courses' that result in a reduced or waived prison sentence . . . ."); *see, e.g.*, S.C. CODE ANN. § 56-5-2953(H) (West 2013) ("A person convicted of [driving under the influence] . . . must enroll in and successfully complete an Alcohol and Drug Safety Action Program . . . .").

[56] *See Drunk Driving Laws*, GOVERNORS HIGHWAY SAFETY ASS'N, http://www.ghsa.org/html/stateinfo/laws/impaired_laws.html (last visited Sept. 30, 2014) ("42 states . . . have administrative license suspension (ALS) on the first offense.").

[57] *See Status of State Ignition Interlock Laws*, MADD, http://www.madd.org/drunk-driving/ignition-interlocks/status-of-state-ignition.html (last visited Sept. 14, 2014) (showing that a total of thirty-nine states mandate an ignition interlock for first time offenders if BAC exceeds .18).

public shaming[58] and, depending on their employment, loss of their careers. Unlike other types of criminal charges brought predominantly against the economically disadvantaged, DUI arrests are spread across the population,[59] including individuals willing and able to pour significant resources into his or her defense. Consequently, fighting a charge of DUI is now of great importance to many defendants.

Up until a possible breath or blood alcohol test, the standard DUI investigation is based entirely on the officer's observations of the suspect's driving, statements, speech, balance, demeanor, and ability to perform field sobriety tests. In view of this fact, the existence of a video documenting the investigation can be crucial to a defense attorney intent on impeaching the officer.

B. *The Advance in Technology*

Twenty years ago, making a recording meant creating a bulky tape. Several cases discussed previously featured tapes that were reused by taping over old recordings. This must indeed have appeared to be the best solution short of every decent-sized police department housing thousands of tapes, a problem of both cost and storage. Digital recorders are now a fraction of the cost they used to be and exist in all types and variations: dash cameras, lapel cameras, helmet cameras, digital audio recorders, et cetera. Digital files can be easily stored and duplicated on compact discs, flash drives, hard drives, and now even in a "cloud."[60]

See also Michael L. Rich, *Limits on the Perfect Preventive State*, 46 CONN. L. REV. 883, 890–92 (2014) (discussing technologies that prevent drunk driving).

[58] *See* Dan McKay, *Will Shame Stop DWI Offenders?*, ALBUQUERQUE J. (Feb. 22, 2006), http://abqjournal.com/news/metro/435614metro02-22-06.htm (discussing the potential for the legislature to "publish the names and photographs of people who are convicted of drunken driving"). Pursuant to the City of Albuquerque Code of Ordinances, Chapter 11, Article 13, titled "Publication of Persons Convicted of Driving Under the Influence," the names and photographs of all persons convicted of DUI in Bernalillo County are published "in print form in a newspaper of general circulation in the City of Albuquerque." ALBUQUERQUE, N.M., CODE § 11–13–1(A) (2013).

[59] *See* MICHAEL C. TILLOTSON & JEFF MARTIN, VA. PRAC., VA. DUI LAW § 9:1 (2013) ("DUI is neither a poor man's crime nor a rich man's crime. The offense does not favor one gender over the other, nor is one race more likely than any other to commit this offense. DUI is truly an equal opportunity offense."). In addition, courts apply a special causation requirement in some DUI cases. *See* Eric A. Johnson, *Wrongful-Aspect Overdetermination: The Scope-of-the-Risk Requirement in Drunk-Driving Homicide*, 46 CONN. L. REV. 601, 607–08 (2013).

[60] *See* Neal Ungerleider, *Taser's New Police Glasses-Cam Lets Citizens See What Cops See*, FAST CO. (Feb. 21, 2012, 12:50 AM), http://www.fastcompany.com/1817960/tasers-new-police-glasses-cam-lets-citizens-see-what-cops-see (discussing a product sold to police departments that includes the ability of cloud storage of files). The Albuquerque Police Department began using evidence in the cloud in April 2013. Press Release, TASER, Albuquerque Police Department Deploys 75 AXON Flex Systems (Mar. 28, 2013), *available at* http://investor.taser.com/releasedetail .cfm?ReleaseID=751864.

C. *A Greater Demand for Police Accountability – Lessons from Ferguson*

The recent events in Ferguson, Missouri showcased the need for police video regulations better than any other event. Without a doubt, the vastly differing accounts of the circumstances surrounding Michael Brown's death, combined with what many perceived as an unconditional willingness by the St. Louis Chief of Police to believe the officer over other witnesses, fueled the fire of the protests that followed.[61] For days, the streets of Ferguson were filled with people demanding the name of the shooter and a better investigation into Michael Brown's killing.[62] They demanded transparency and accountability; each day their rage grew as they found neither.

The vastly differing versions of the story of the shooting did something else: they propelled the topic of body cameras into the national spotlight.[63] Four days after the shooting, an online activist from Georgia created a petition on the White House's "We the People" page, calling for all police to wear cameras, which easily surpassed the 100,000-signature mark in less than one week.[64] How differently would the events in Ferguson have played out, had the officer worn a camera? One cannot speculate in which direction a video recording would have swayed the judgment that Ferguson residents passed on Michael Brown's shooter. However, it is a safe assumption that a police department that makes its officers record all encounters and that uses videos to hold officers accountable would likely not have incited the same public rage as the Ferguson Police Department did in the wake of Michael Brown's shooting.

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[61] *See* Frances Robles & Julie Bosman, *Missouri Shooting Victim Was Hit at Least 6 Times*, N.Y. TIMES, Aug. 18, 2014, at A1 (contrasting the police department's account characterizing the shooting as a "physical struggle" between Brown and the officer with an eye-witness's account characterizing the shooting as "racial profiling and police aggression").

[62] *See* Julie Bosman & Erik Eckholm, *Anonymity in Police Shooting Fuels Frustration*, N.Y. TIMES, Aug. 14, 2014, at A1 (discussing nightly civilian protests requesting the release of details of the investigation including the name of the police officer who shot Brown). *Cf.* Nicolas J. Johnson, *Firearms Policy and the Black Community: An Assessment of the Modern Orthodoxy*, 45 CONN. L. REV. 1492, 1497–1532 (2013) (describing the historical experience of African-Americans and firearms, and noting that like "any racist terrorist the state was simply a menace.").

[63] *See* Barbara Ortutay, *After Ferguson: Calls for Police 'Body Cameras'*, AP (Aug. 23, 2014, 3:02 AM), http://www.apnewsarchive.com/2014/In-Ferguson-fallout,-calls-grow-for-police-to-wear-'body-cameras'-_-but-with-caveats/id-b84d0fabf6fa472cb3a6641a52655a7b (discussing a petition submitted to President Obama seeking the creation of a bill that would require police officers to wear body cameras).

[64] *See Mike Brown Law. Requires All State, County, and Local Police to Wear a Camera*, THE WHITE HOUSE (Aug. 13, 2014), https://petitions.whitehouse.gov/petition/mike-brown-law-requires-all-state-county-and-local-police-wear-camera/8tlS5czf ("Create a bill, sign into law, and set aside funds to require all state, county, and local police, to wear a camera."); *see also* Colby Itkowitz, *Michael Brown Petition Has 100,000 Signatures; the White House Must Respond*, WASH. POST (Aug. 20, 2014), http://www.washingtonpost.com/blogs/in-the-loop/wp/2014/08/20/michael-brown-petition-has-100000-signatures-the-white-house-must-respond/ (discussing the petition).

There is another painful point for speculation. Introducing mandatory recording procedures in a police force leads to an immediate decrease in excessive force claims.[65] Would Officer Darren Wilson have shot Michael Brown at least six times if he had known he was being recorded? It is impossible to answer that question. The mere fact that it poses itself speaks volumes.

Concern over police misconduct is neither new nor unique. Whether it is fear of a Rodney King style beating, garden variety neglect, or incompetence, the public appreciates knowing that law enforcement officers are held responsible for being the professional servants of the community for which they took an oath. This factor ties closely into the technological advances discussed immediately above. Not only has technology evolved for law enforcement, it has evolved for everyone. A society where almost anyone can make a video at a moment's notice with the tap of a cell phone button is less willing to indulge its police officers in claiming an inability to do the same.

D. *Protection of Police Officers from False Allegations*

On the other hand, the many conscientious police officers in our communities have an interest in recording their citizen encounters to combat frivolous claims of misconduct.[66] For example, the video that showed Albuquerque Police Officer Romero backing away and directing a total of nine commands at the man advancing at him with a raised gun, nipped in the bud any allegation of misconduct in a more powerful manner than any verbal explanation could have.[67]

IV. THE PROBLEM OF ENFORCEMENT IN VIDEO CASES

This Section examines the obstacles to the efficient enforcement of recording requirements and the approaches different states have taken to overcome them. These include statutes governing the videotaping of police investigations and court sanctions for mishandled recordings. Internal police regulations may also play a role.

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[65] *See* Randall Stross, *Wearing a Badge, and a Video Camera*, N.Y. TIMES, Apr. 7, 2013, at BU4 (noting that a study by Cambridge University, in cooperation with the Rialto, California Police Department, found that complaints filed against officers declined by eighty-eight percent within the first year of introducing body cameras).

[66] *See* AS MORE POLICE WEAR CAMERAS, POLICY QUESTIONS ARISE (Nat'l Pub. Radio broadcast Nov. 7, 2011) (transcript on file with LEXIS) (discussing the use of cameras to assure both officer accountability and protection from false accusations).

[67] Dan McKay, *ADP Releases Video of Shooting by Officer*, ALBUQUERQUE J. (Jan. 16, 2014 12:05 AM), http://www.abqjournal.com/337394/news/apd-releases-video-of-shooting-by-officer.html.

A. *Introduction: Failure to Preserve vs. Failure to Collect*

Every problem with lost, destroyed, or uncollected evidence falls into one of two categories: failure to preserve or failure to collect. The distinction plays a crucial role in determining what law applies and if a court may sanction the prosecution.

Regardless of whether state courts followed *Youngblood* or developed their own balancing test, every state in the nation follows *Brady v. Maryland*,[68] insofar as the prosecution in every state possesses the duty to preserve and disclose material evidence collected by its agents. However, a less stringent duty exists to collect evidence not yet in the state's possession.[69]

New Mexico, again, serves as an example here: "Usually, the failure to gather evidence is not the same as the failure to preserve evidence, and that the State generally has no duty to collect particular evidence at the crime scene."[70] The New Mexico Supreme Court in *State v. Ware*[71] noted that this rule is not absolute: "We do not condone shoddy and inadequate police investigation procedures at the expense of a criminal defendant's right to a fair trial. In some cases, the State's failure to gather evidence may amount to suppression of material evidence."[72] The Court then adopted a two-part test for deciding whether to sanction the State for police failure to gather: the evidence must be material to the defendant's defense, and there must be bad faith. "If the trial court determines that the failure to collect the evidence was done in bad faith, in an attempt to prejudice the defendant's case, then the trial court may order the evidence suppressed."[73] It is thus here, in the context of failure to gather rather than failure to preserve, that we encounter *Youngblood*'s notoriously difficult bad faith standard in New Mexico.

When a student in my prosecution clinic notices the absence of a video in a case file and all attempts to procure the video turn out to be unfruitful, the next step for that student is to contact the officer and inquire why there is no video: did he or she not make one at all, or was a video made and subsequently lost or destroyed? The first scenario falls under the failure to collect and is governed by *Ware*; the latter would be failure to preserve under *Chouinard*. Because of the different standards, the prosecution finds itself in a more promising situation if the officer did not attempt to make a video at all, rather than if a video was made but accidentally lost or destroyed.

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[68] 373 U.S. 83, 87 (1963).
[69] *E.g.*, State v. Ware, 881 P.2d 679, 683 (N.M. 1994) (citations omitted).
[70] *Id.*
[71] 881 P.2d 679 (N.M. 1994).
[72] *Id.* at 684 (citations omitted).
[73] *Id.* at 685.

As a matter of public policy, this result is problematic. If a video lost to one of many possible technical or human errors means a greater risk of dismissal than not making a recording at all, this sends a questionable message to law enforcement. Example A: an officer makes a recording that becomes lost when it is accidentally tagged into evidence under an incorrect case number. Example B: an officer has a camera attached to his uniform but makes no attempt to use it. We intuitively suspect that the first officer acted in better faith than the second. Yet the State has little to fear in Example B, unless the defense can prove that the failure to collect was done in an attempt to prejudice the defendant's case; a standard that is impossible to meet.[74]

B. *Video Recording Statutes*

Few states have statutes requiring police to acquire and use video cameras. This Section takes a closer look at two such states—South Carolina and Illinois—for a comparison of the different outcomes depending on the statutory provisions and the courts that interpret them.

1. *South Carolina's DUI Videotaping Statute*

The South Carolina Legislature solved the problem of video enforcement through its enactment of section 56-5-2953, titled *Incident Site and Breath Test Site Video Recording*.[75] Section 56-5-2953 controls the videotaping of all persons investigated for driving under the influence of alcohol or drugs. The statute gives detailed directions of what must be recorded and when a recording must commence.[76]

Subsection (A)(1)(a) governs video recording at the incident site: recordings must begin no later than the activation of the officer's blue lights and must include field sobriety tests, arrests, and *Miranda* warnings.[77]

Subsection (A)(2) governs video recording at the breath test site: recordings must include the entire breath test procedure and an advisement to the person arrested that he is being video recorded and that he has the right to refuse the test.[78] It must show the person taking or refusing the test

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[74] In Albuquerque, one resourceful defense attorney has been successful in establishing bad faith by showing a pattern of consistent failure to use the camera by an individual officer. She would do so through review of all reports by that officer over a certain time period, revealing an unusually high occurrence of claims of camera malfunction, camera loss, etc.

[75] S.C. CODE ANN. § 56-5-2953 (2006 & Supp. 2013).

[76] *Id.*

[77] S.C. CODE ANN. § 56-5-2953(A)(1)(a) (2006 & Supp. 2013). In addition to these three requirements of videos under § 56-5-2953(A)(1)(A), an amendment proposed in April 2014 has requested that video recordings also include an audio recording. H.B. 4476, 120th Leg., 2d Reg. Sess. (S.C. 2013).

[78] S.C. CODE ANN. § 56-5-2953(A)(2)(a) (2006 & Supp. 2013).

and the actions of the breath test operator while conducting the test.[79] Further, if physically possible, the video must include the person's conduct during the required twenty-minute pre-test waiting period.[80]

Subsection (B) contains detailed guidelines for failure to produce the video. Such failure is not a ground for dismissal in and of itself if the officer submits a sworn affidavit certifying that the video recording equipment was in an inoperable condition, stating what reasonable efforts have been made to maintain the equipment in an operable condition, and certifying that there was no other operable breath test facility available in the county, or, in the alternative, submits a sworn affidavit that it was physically impossible to produce the video because the person needed emergency medical treatment, or exigent circumstances existed.[81] Courts are further permitted to consider any other valid reason for failure to produce the video based upon the totality of the circumstances; likewise, the defendant may offer evidence related to the officer's failure to produce the recording.[82]

The statute also forbids destruction of a video prior to termination of any related legal proceedings.[83]

a. Resulting Case Law

Following passage of South Carolina's prescriptive recording statute, it remained to be seen if the State's appellate courts would interpret it as narrowly as the statute suggests. They did so.

The South Carolina Supreme Court swiftly rejected arguments by the prosecution that a violation of the videotaping statute should not result in dismissal without a showing of prejudice to the defendant.[84] South Carolina appellate courts have "strictly construed section 56-5-2953 and found that a law enforcement agency's failure to comply with these provisions is fatal to the prosecution of a DUI case."[85]

In *State v. Johnson*,[86] the arresting officer had turned on the video camera at the breath machine when he realized that the machine was not functioning. He moved the defendant to a different machine but failed to

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[79] S.C. CODE ANN. § 56-5-2953(A)(2)(b) (2006 & Supp. 2013).

[80] S.C. CODE ANN. § 56-5-2953(A)(2)(c) (2006 & Supp. 2013).

[81] S.C. CODE ANN. § 56-5-2953(B) (2006 & Supp. 2013). Under the proposed amendment to § 56-5-2953, discussed *supra* note 77, the requirements of § 56-5-2953(B) would be extended to audio recordings as well. H.B. 4476, 120th Leg., 2d Reg. Sess. (S.C. 2013).

[82] *See id.* (citing S.C. CODE ANN. § 56-5-2953(B) (2006 & Supp. 2013)).

[83] S.C. CODE ANN. § 56-5-2953(C) (2006 & Supp. 2013).

[84] *See* City of Rock Hill v. Suchenski, 646 S.E.2d 879, 880–81 (S.C. 2007) (concluding that a dismissal of charges may result if the violation occurs, even without a showing of prejudice to the defendant).

[85] Town of Mount Pleasant v. Roberts, 713 S.E.2d 278, 285 (S.C. 2011) (citing *Suchenski*, 646 S.E.2d at 881) (citations omitted).

[86] 720 S.E.2d 516 (S.C. Ct. App. 2011).

activate the video camera for the second machine, so that Johnson could be heard but not seen taking the breath test.[87] The officer did not submit an affidavit regarding the videotape.[88] The magistrate court suppressed the breath test but denied the defendant's motion to dismiss.[89] The South Carolina Supreme Court reversed the magistrate, finding unexcused noncompliance with section 56-5-2953, and it dismissed the charges.[90]

In *Town of Mount Pleasant v. Roberts*,[91] the South Carolina Supreme Court addressed the question of whether the videotaping statute applies to police units not equipped with a video camera.[92] The arresting officer executed an affidavit stating that his vehicle had not been equipped with a videotaping device.[93] Section 56-5-2953(D) places responsibility for purchasing and supplying all videotaping equipment for use in law enforcement vehicles on the Department of Public Safety.[94] The Town argued that it was not bound by the statute if DPS failed to supply its police force with a sufficient number of cameras.[95] Again, the Supreme Court strictly construed the videotaping statute and dismissed the charges based on unexcused noncompliance, noting that "the Town's prolonged failure to equip its patrol vehicles with video cameras defeats the intent of the Legislature."[96]

Similarly, in another case, an affidavit that the video recording equipment in an officer's vehicle was inoperable at the time of the defendant's arrest was held to be deficient on its face, where it failed to state which reasonable efforts had been made to maintain the video equipment in an operable condition.[97]

The prosecution briefly got a break in *Murphy v. State*,[98] when the Court of Appeals held that an officer's dashboard videotape device did not violate the statute—even though the video did not capture a full view of

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[87] *Id.* at 520–21.

[88] *Id.* at 518.

[89] *Id.* at 521.

[90] *Id.* at 521–22.

[91] 713 S.E.2d 278 (S.C. 2011).

[92] *Id.* at 285.

[93] *Id.* at 280.

[94] *See* S.C. CODE ANN. § 56-5-2953(D) (2006 & Supp. 2013) ("The Department of Public Safety is responsible for purchasing, maintaining, and supplying all videotaping equipment for use in all law enforcement vehicles used for traffic enforcement. The Department of Public Safety also is responsible for monitoring all law enforcement vehicles used for traffic enforcement to ensure proper maintenance of videotaping equipment.").

[95] *See Roberts*, 713 S.E.2d at 280–81 (positing the town's argument that the statute did not take effect until the Department of Public Safety supplied the town police department with video cameras).

[96] *Id.* at 287.

[97] *See* City of Greer v. Humble, 742 S.E.2d 15, 18 (S.C. Ct. App. 2013) (concluding that the city's failure to list which reasonable efforts were exerted to maintain the video equipment in good condition violated the statutory requirements).

[98] 709 S.E.2d 685 (S.C. Ct. App. 2011).

the defendant's field sobriety tests—noting that the video need only record the accused's conduct.[99] However, section 56-5-2953 was amended in 2009 to expressly require the recording of field sobriety tests,[100] and the Court of Appeals confirmed in *State v. Gordon*[101] that *Murphy* was superseded. The officer in *Gordon* recorded Gordon's field sobriety tests, but Gordon's head was cut off during administration of the horizontal gaze nystagmus test (a test examining eye movement).[102] The Court affirmed the lower court's finding that the subject's head must be shown during the test in order for that sobriety test to be recorded:[103] "Because of the purpose of the videotaping to create direct evidence of the arrest, if the actual tests cannot be seen on the recording, the requirement is pointless."[104]

The South Carolina Supreme Court very recently addressed a similar issue in *State v. Sawyer*.[105] The video showed the officer reading Sawyer his *Miranda* rights and the implied consent information.[106] Sawyer signed the related forms. However, the audio device in the subject test area did not function.[107] It appears that the State was unaware of the audio malfunction for several months.[108] In a 3-2 opinion, the Court held that a breath test site video without audio recording of *Miranda* warnings did not meet the requirements of section 56-5-2953(A), and it affirmed the suppression of the video and breath test evidence.[109] Chief Justice Toal wrote the dissent, urging for a harmless error analysis.[110] According to the dissent, exclusion of evidence is typically reserved for constitutional violations, unless there is prejudice to the defendant.[111] Here, the dissent believed that Sawyer was not prejudiced by the video recording's lack of audio.[112] Chief Justice Toal further stated, "[i]n my view, nothing in section 56-5-2953 mandates suppression of a defective video recording, nor has this Court ever interpreted the statute as requiring strict compliance for admission of a video recording, as the majority asserts. Defects in evidence generally do

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[99] *Id.*

[100] S.C. CODE ANN. § 56-5-2953(A)(1)(a)(ii) (Supp. 2012).

[101] 759 S.E.2d 755, 758 (S.C. Ct. App. 2014).

[102] *Id.* at 756.

[103] *Id.* at 758.

[104] *Id.*

[105] Appellate Case No. 2011-201206, 2014 WL 4214429, at *1 (S.C. Aug. 27, 2014).

[106] *Id.* at *1.

[107] *Id.*

[108] *See id.* at *2 (explaining that the circuit court judge held that no exigent circumstances existed because the state did not know about the audio malfunction for months).

[109] *See id.* at *4 (holding that failure to comply with the statute's terms renders the evidence inadmissible).

[110] *Id.* at *4–6 (Toal, C.J., dissenting).

[111] *Id.* at *5.

[112] *Id.*

not affect admissibility."[113] The dissent in *Sawyer* deserves mention as the only recent judicial step away from the exceedingly strict construction of section 56-5-2953.

The South Carolina Supreme Court based its strict interpretation of the statute, at least in part, on its unique application to a DUI arrest:

> [I]t is instructive that the Legislature has not mandated videotaping in any other criminal context. Despite the potential significance of videotaping oral confessions, the Legislature has not required the State to do so. By requiring a law enforcement agency to videotape a DUI arrest, the Legislature clearly intended strict compliance with the provisions of section 56-5-2953 and, in turn, promulgated a severe sanction for noncompliance.[114]

2. *The Illinois State Police Act*

In 2008, the Illinois legislature passed section 30(b) of the State Police Act, titled *Patrol Vehicles with In-Car Video Recording Cameras*.[115] Section 30(b) required the Department of State Police to install in-car video camera recording equipment in all patrol vehicles by June 1, 2009.[116] The Act provides that "[a]ny enforcement stop resulting from a suspected violation of the Illinois Vehicle Code shall be video and audio recorded."[117] Section 30(f) requires the State Police to retain recordings for at least ninety days.[118] In addition, recordings made by any agency "as a part of an arrest" or which "are deemed [to be] evidence in any criminal, civil, or administrative proceeding," cannot be destroyed until final disposition and a court order.[119] The officer operating a patrol vehicle is required to report "any technical difficulties, failures, or problems" with the recording equipment to his commander, who "shall make every reasonable effort to correct and repair" the equipment and shall "determine if it is in the public interest to permit the use of the patrol vehicle."[120]

a. *People v. Kladis*

The most cited Illinois Supreme Court decision tackling the issue of lost video recordings, *People v. Kladis*,[121] did not base its holding on the videotaping statute. The defense made a discovery request for the officer's

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[113] *Id.* (citations omitted).
[114] Town of Mount Pleasant v. Roberts, 713 S.E.2d 278, 286 (S.C. 2011).
[115] 20 ILL. COMP. STAT. ANN. 2610/30(b) (West 2013).
[116] *Id.*
[117] 20 ILL. COMP. STAT. ANN. 2610/30(e) (West 2013).
[118] 20 ILL. COMP. STAT. ANN. 2610/30(f) (West 2013).
[119] 720 ILL. COMP. STAT. ANN. 5/14–3(h–15) (West 2013).
[120] 20 ILL. COMP. STAT. ANN. 2610/30(h) (West 2013).
[121] 960 N.E.2d 1104 (Ill. 2011).

dash-camera video five days after the defendant's arrest.[122] When the prosecutor forwarded the request to the police department, following the first court date, it was discovered that the recording had been destroyed earlier that same day in accordance with the department's policy of purging all videos after thirty days.[123] The trial court effectively suppressed any testimony—as portrayed in the video—regarding the events leading up to the defendant being placed in the squad car.[124]

Illinois is among the states following *Youngblood* and the bad faith test in lost evidence due process analysis.[125] The Illinois Court of Appeals and Supreme Court deftly sidestepped *Youngblood* by defining the issue as a discovery violation governed by the relevant Illinois Supreme Court Rule,[126] rather than a due process violation.[127] Rejecting the State's position that videos did not constitute discovery as previously defined by the court, the Illinois Supreme Court declared that "routine video recording of traffic stops has now become an integral part of those encounters, objectively documenting what takes place by capturing the conduct and the words of both parties[,]" and clarified that video recordings are discoverable in misdemeanor DUI cases.[128] Both courts upheld the sanction imposed by the trial court.[129]

In its opinion, the Supreme Court also referred to the recent legislative amendment to the State Police Act.[130] In its discussion of legislative intent, the Court explained the use of recordings to both the State and the defendant, emphasizing that video recordings have the power to cement a defendant's guilt as well as support the defense, assisting the trier of fact in either instance.[131]

The court also found significant the later provision extending the

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[122] *Id.* at 1106.

[123] *Id.*

[124] *Id.* at 1108.

[125] *See, e.g.*, People v. Sutherland, 860 N.E.2d 178, 213–16 (Ill. 2006) (applying *Youngblood* for lost evidence); People v. Pecoraro, 677 N.E.2d 875, 886–87 (Ill. 1997) (discussing and applying *Youngblood*); *In re* C.J., 652 N.E.2d 315, 319–20 (Ill. 1995) (analyzing the defendant's claim of due process violations for failure to preserve evidence under the *Youngblood* bad faith test).

[126] *See* ILL. SUP. CT. R. 415(g)(i) (West 2004) ("If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with an applicable discovery rule or an order issued pursuant thereto, the court may order such party to permit the discovery of material and information not previously disclosed, grant a continuance, exclude such evidence, or enter such other order as it deems just under the circumstances.").

[127] *See Kladis*, 960 N.E.2d at 1109–11 (analyzing whether the state's actions constituted a discovery violation); *see also* People v. Kladis, 934 N.E.2d 58, 63–65 (Ill. App. Ct. 2010) (comparing the two ways in which a discovery violation can be analyzed, then determining that a due process analysis need not occur because the state found a discovery violation independent of due process).

[128] *Kladis*, 960 N.E.2d at 1109–11.

[129] *Id.* at 1113; People v. Kladis, 934 N.E.2d 58, 75 (Ill. App. Ct. 2010).

[130] *Kladis*, 960 N.E.2d at 1111.

[131] *Id.* at 1111–12.

ninety-day preservation requirement to the full duration of any criminal, civil, or administrative proceeding.[132]

It is important to note that unlike the South Carolina courts, who founded their strict enforcement exclusively on the South Carolina videotaping statute, the Illinois Supreme Court in *Kladis* discussed the State Police Act merely as support for its decision rather than its basis.[133] That basis lay firmly in Supreme Court Rule 415(g).[134]

b. *People v. Borys*

Two years later, the Illinois Court of Appeals dealt more explicitly with the State Police Act in *People v. Borys*.[135] Similar to the facts in South Carolina's *Town of Mt. Pleasant v. Roberts*, the defendant was arrested for DUI by an Illinois State Trooper whose assigned patrol vehicle was not equipped with a video camera.[136] Following her conviction by the trial court, the defendant appealed, contending that the alleged statutory violation of section 30 of the State Police Act "should be treated in the same manner as a discovery violation."[137]

The court disagreed, stating "[n]othing in the plain and unambiguous language of section 30 of the Act indicates that an officer's testimony concerning a traffic stop is inadmissible if his patrol vehicle does not have the required video recording equipment."[138] The court placed importance on section 30(h), permitting the use of a patrol vehicle without video equipment so long as the lack of recording equipment had been documented and a superior officer determined that using the vehicle was in the public's interest.[139]

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[132] *See id.* at 1111 (citation omitted) ("[T]he General Assembly clarified and broadened the production and preservation safeguards for police recordings. It established the general rule that when any law enforcement agency makes an in-squad video and audio recording . . . that recording shall be retained for a minimum period of 90 days . . . . We note that this heightened protection is triggered either where, as here, an arrest occurred or where the recording is considered to be evidence in *any* criminal, civil or administrative proceeding. Significantly, the General Assembly placed no restriction on this latter factor, encompassing all proceedings.").

[133] *Id.* at 1111 (citing 20 ILL. COMP. STAT. ANN. 2610/30 (West 2008)). Of course Section 30(b) of the State Police Act is limited in its application to state police officers, not officers of other police departments such as the Northlake police officer in *Kladis*. *See* 20 ILL. COMP. STAT. ANN. 2610/1 (West 2008) (noting that the "Department," as used in the State Police Act, refers to the State Police Department).

[134] ILL. SUP. CT. R. 415(g) (West 2014).

[135] 995 N.E.2d 499 (Ill. App. Ct. 2013).

[136] *Id.* at 502.

[137] *Id.* at 505 (citing 20 ILL. COMP. STAT. ANN. 2610/30 (West 2008)).

[138] *Id.* at 506 (citation omitted).

[139] *Id.* at 504–506 (citing 20 ILL. COMP. STAT. ANN. 2610/30(h) (West 2008)). Extending the language of section 30(h), particularly of "technical difficulties, failures, or problems with *the* in-car video camera recording equipment," 20 ILL. COMP. STAT. ANN. 2610/30(h) (West 2008) (emphasis added), to situations where no video equipment was installed at all, rather than to technical problems with existing equipment, does appear to be a stretch for a court intent on plain language interpretation.

The Court of Appeals then turned to the mandatory-directory dichotomy to determine whether the requirements of section 30 are mandatory or directory provisions.[140] The mandatory-directory dichotomy determines whether failure to comply with a procedural requirement has the effect of invalidating the governmental action.[141] Statutes where the legislative intent dictates a consequence for failure to comply are deemed mandatory, whereas statutes without such intent and without particular consequence for noncompliance are directory.[142]

Noting that the "language issuing a procedural command to a government official is presumed to indicate an intent that the statute is directory," the court then inquired if the directory presumption is overcome by "negative language prohibiting further action in the case of noncompliance," or by threatened injury under a directory reading to "the right the provision is designed to protect" (here, a defendant's right to a fair trial).[143] Finding neither condition met in the language of section 30, the court declined to read the requirements of the Act as mandatory.[144] Regarding the defendant's right to a fair trial, the court stated: "[a]lthough a recording of defendant's traffic stop could have provided objective evidence and assisted the truth-seeking process, it was not indispensable to a fair trial, particularly where there was no discovery violation or indication of bad-faith action by the police or the prosecution."[145]

In explanation of the stark contrast to *Kladis* only two years earlier, the court stressed the distinction between failure to preserve evidence under the State's control (*Kladis*) and failure to collect evidence (*Borys*).[146] While the first presented a discovery violation independent of section 30, the facts in *Borys* depended on a statutory provision granting courts the authority to take action against noncompliance.[147]

In sum, the Court of Appeals made it clear that section 30 of the Illinois State Police Act in its current version lacks teeth; it is a directory provision without an enforcement component.[148] That point was succinctly made by Justice Hall in her two-paragraph special concurrence: "I write separately to express my concern that the legislature's failure to include mandatory statutory language in section 30(b) of the Act . . . could have the practical effect of nullifying the legislative purpose underlying the

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[140] *Borys*, 995 N.E.2d at 506–07.

[141] *Id*. (citing People v. Robinson, 838 N.E.2d 930, 935–38 (Ill. 2005)).

[142] *Id*. at 507.

[143] *Id.*

[144] *Id.*

[145] *Id.* at 508.

[146] *Id.* at 505.

[147] *Id.* at 507.

[148] *See id.* ("Section 30 of the Act lacks any negative language prohibiting further action if the Department of State Police does not comply with the recording equipment installation.").

statute by allowing law enforcement to simply ignore the requirement."[149] Citing *Town of Mount Pleasant v. Roberts*, Justice Hall continued, stating that "the requirements of section 30(b) of the Act could be circumvented in perpetuity if the Department of State Police simply decided not to install the video camera recording equipment in its patrol vehicles."[150]

3. *Comparing the South Carolina and Illinois Statutes*

A comparison of the South Carolina and Illinois videotaping statutes reveals the vastly different outcomes that seemingly similar provisions can produce. Where the South Carolina statute directs in painstaking detail what must be recorded and what shall be the consequence of noncompliance, the Illinois statute, when pulled apart, is reduced to a mere directory provision with no enforcement power. Within Illinois, *Kladis* and *Borys* also illustrate the practical effects of the failure to collect-failure to preserve division. Whereas *Kladis* could sanction the failure to preserve a video based on general discovery rules,[151] or sanction for the failure to make a video in *Borys* depended on the existence of an enforceable statute.[152]

One cannot leave out of the equation the courts interpreting enforcement issues. The Illinois Court of Appeals in *Borys* seemed quite intent on poking holes in the State Police Act. In South Carolina, on the other hand, we encounter a unique convergence of a highly prescriptive statute and high courts unusually motivated to enforce the statute to its fullest and most rigid extent.[153] The result is a currently unparalleled line of cases, ordering suppression or dismissal for even minor or partial noncompliance.

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[149] *Id.* at 512 (Hall, J., specially concurring).

[150] *Id.* (citing Town of Mount Pleasant v. Roberts, 713 S.E.2d 278, 286 (S.C. 2011)).

[151] *See* People v. Kladis, 960 N.E.2d 1104, 1112 (Ill. 2011) (footnote omitted) ("We therefore agree with the courts below that upon receiving the written Rule 237 notice to produce the video recording five days after [the] defendant was arrested—and 25 days before it was destroyed—the State was placed on notice . . . . In sum, we hold that the trial court did not abuse its discretion in finding that the video recording of defendant's stop and arrest was subject to discovery in her misdemeanor DUI case and that the State committed a discovery violation by allowing the destruction of the recording.").

[152] *See Borys*, 995 N.E.2d at 506–07 (declining to impose sanctions on the State in light of the court's conclusion that section 30 was directory, not mandatory).

[153] *See Town of Mount Pleasant*, 713 S.E.2d at 285 (citing City of Rock Hill v. Suchenski, 646 S.E.2d 879, 881 (S.C. 2007)) (citations omitted) (noting that South Carolina appellate courts have strictly construed the requirements of section 56-5-2953 and have sanctioned the State when their law enforcement officers fail to meet such requirements); *see also* State v. Sawyer, Appellate Case No. 2011-201206, 2014 WL 4214429, at *4 (S.C. Aug. 27, 2014) (affirming the grant of a motion to suppress where the State failed to meet statutory requirements).

C. *Judicial Enforcement Without a Recording Statute*

At this point in time, the great majority of states do not have a videotaping statute. What power do courts in those states have to address issues with video recordings? The Tennessee Supreme Court gives us an illustration in *State v. Merriman*.[154]

Tennessee rejects the strict bad faith test of *Youngblood* and instead requires a trial court to determine whether a trial, conducted without the lost or destroyed evidence, would be fundamentally unfair.[155] If the State failed in its duty to preserve material evidence, the trial court must consider: "(1) [t]he degree of negligence involved; (2) [t]he significance of the destroyed evidence, considered in light of the probative value and reliability of secondary or substitute evidence that remains available; and (3) [t]he sufficiency of the other evidence used at trial to support the conviction."[156]

Angela Merriman was charged with DUI and reckless driving.[157] She refused to take a blood alcohol test.[158] For reasons unknown, the State was unable to locate the video recording of her arrest.[159] Applying the factors above, the trial court found that it would be fundamentally unfair to require the defendant to go to trial without the video and it dismissed the charges.[160]

The Tennessee Supreme Court affirmed the trial court's dismissal.[161] The court first determined that the loss of the video resulted from simple negligence, and then considered the significance of the recording and the sufficiency of the remaining evidence.[162] According to the Tennessee Supreme Court, the video "was significant because it recorded [the defendant's] conduct, which provided the factual basis for her charges."[163] The court also noted that "the video recording was the only non-testimonial evidence," because no breath test results were available.[164] Balancing these factors, the Tennessee Supreme Court found that the defendant was deprived of her right to a fair trial.[165]

Merriman proves that state courts can be powerful enforcers of video preservation if they choose. Even without a recording statute, courts can

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[154] 410 S.W.3d 779 (Tenn. 2013).
[155] *Id.* at 785 (citing State v. Ferguson, 2 S.W.3d 912, 917 (Tenn. 1999)).
[156] *Id.*
[157] *Id.* at 783.
[158] *Id.*
[159] *Id.*
[160] *Id.* at 784.
[161] *Id.* at 797.
[162] *Id.* at 795.
[163] *Id.*
[164] *Id.* at 793.
[165] *Id.* at 796.

use state and common law on lost evidence to sanction the State for mishandling videos. It bears repeating that these courts are limited to instances where an existing video was lost or destroyed but cannot force police to make videos: "The State had no duty to create a video recording of Ms. Merriman's traffic stop. When the video was recorded, however, it became part of the State's evidence against Ms. Merriman and its disclosure was required."[166]

D. *Internal Police Regulations*

Since the Albuquerque Police Department issued the standard operating procedure in May 2012, every A.P.D. officer is required to make a video of every citizen encounter on his or her A.P.D. issued camera.[167] It follows that every officer who does not make a video acts in violation of this procedure.[168] But what does this mean?

Every rule is only as good as its enforcement. What is the consequence of an officer's failure to make a recording? If there is a consequence at all, who can impose it and on whom should it be imposed? Is it solely a matter for internal officer discipline through the police department, or can a trial court sanction the State for an officer's violation of a police standard operating procedure?

Standard operating procedures are the internal rules and procedures set out by an agency for the agency, to be amended at the discretion of the agency.[169] They are not laws enacted by a legislative body. They are not rules adopted by the state supreme court. As a result, they possess no binding authority in criminal courts. From the defense perspective, the dilemma is glaring: if trial courts cannot—and the police will not—enforce compliance, police regulations become meaningless.

1. *Considering Police Regulations to Determine Bad Faith*

While recording regulations are not binding authority, an argument can be made that trial judges may very well consider them under the general law on lost and uncollected evidence.

Turning back to *Youngblood* and its progeny of bad faith jurisdictions, courts have significant discretion in deciding what makes the requisite

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[166] *Id.* at 794.

[167] Albuquerque Police Dep't, *Standard Operating Procedures: General Order 1-20: Use of In Car Video System*, CITY OF ALBUQUERQUE, http://www.cabq.gov/police/our-department/standard-operating-procedures (last visited Aug. 5, 2014).

[168] *See id.* (providing that "[i]t is the policy of the Albuqueque Police Department" to videotape certain arrests and providing further that "[o]fficers are directed to use in car video systems").

[169] *See* Iowa State Univ., *Overview of Standard Operating Procedures (SOPs)*, IOWA ST. U. EXTENSION AND OUTREACH http://www.extension.iastate.edu/foodsafety/ toolkit/communication/ OverviewofSOPs.pdf (last visited Sept. 25, 2014) (defining standard operating procedures).

"intent to deprive the defense of information."[170] Sporadic errors in making or preserving videos, spread out over time, should never meet the bad faith standard without anything further. A court may, however, take a different view when there is a pervasive pattern of not producing videos. Continued failure by an officer (or a whole agency) to make or preserve recordings in violation of a regulation, without plausible explanation of why the investigations could not be recorded, could be reasonably interpreted as intent to prejudice the defense and may thus allow the trial judge to find bad faith.

The Ohio Court of Appeals, in *State v. Durnwald*,[171] demonstrates just how effectively courts can employ police regulations.[172] Ohio follows *Youngblood* in reasoning that "[t]he failure to preserve evidence that by its nature or subject is merely potentially useful violates a defendant's due process rights only if the police or prosecution acted in bad faith."[173] Defining bad faith, the Court of Appeals stated, "'bad faith' generally implies something more than bad judgment or negligence. 'It imports a dishonest purpose, moral obliquity, conscious wrongdoing, breach of a known duty through some ulterior motive or ill will partaking of the nature of fraud.'"[174] In *Durnwald*, the videotape containing the defendant's investigation was destroyed when cadets in training were left unattended in the trooper's unit and recorded over it.[175] Taking into consideration the many similar cases across the states with various scenarios of unintended tape erasure, surely this type of accident must qualify as mere "bad judgment or negligence" rather than bad faith?[176] Not according to the Ohio Court of Appeals. The court began by explaining that Ohio State Highway Patrol policy regulations now require troopers to video record all traffic stops and preserve videotapes as evidence until all criminal and civil proceedings have been completed.[177] Then, turning to the facts at hand, the court issued the following harsh words:

> [T]he erasure occurred due to the trooper's complete and utter failure to safeguard evidence relevant to a crime and arrest. In view of the obvious ease in simply removing the videotape after an evening's shift and the Highway Patrol's own regulation requiring preservation of this evidence, the failure to protect and preserve the videotape under these

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[170] State v. Baldwin, 618 A.2d 513, 522 (Conn. 1993).
[171] 837 N.E.2d 1234 (Ohio Ct. App. 2005).
[172] *Id.* at 1246.
[173] *Id.* at 1241 (citing Arizona v. Youngblood, 488 U.S. 51, 57 (1988)).
[174] *Id.* at 1241 (quoting State v. Wolf, 797 N.E.2d 109 (Ohio Ct. App. 2003)).
[175] *Id.* at 1238.
[176] *Id.* at 1241.
[177] *Id.* at 1238.

> circumstances encompasses more than mere negligence or an error in judgment. In our view, such a continuing cavalier attitude toward the preservation of DUI videotape evidence rises to the level of bad faith.[178]

The tone of the opinion suggests that the court's frustration with this issue must have been mounting for some time ("this court finds it incredible that such 'accidental' erasures continue to occur"),[179] but the Ohio courts probably considered their hands tied by *Youngblood* and the bad faith standard. Continuous violation of the police agency's own regulation supplied the vehicle for elevating the trooper's level of culpability beyond mere negligence and over the bad faith hurdle.[180]

V. LOST EVIDENCE AND RECORDING ISSUES IN CONNECTICUT

The Connecticut Supreme Court declined to limit itself to *Youngblood*'s litmus test of bad faith in *State v. Morales*,[181] explaining that "[t]he due process clause of the Connecticut constitution shares but is not limited by the content of its federal counterpart."[182] Expressing concern with *Youngblood*'s simplistic bad faith standard, the court stated that "[f]airness dictates that when a person's liberty is at stake, the sole fact of whether the police or another state official acted in good or bad faith in failing to preserve evidence cannot be determinative of whether the criminal defendant has received due process of law."[183] Instead, Connecticut continues to apply its pre-*Youngblood* balancing test, established in *State v. Asherman*.[184] Under the *Asherman* test, trial courts must weigh "the reasons for the unavailability of the evidence against the degree of prejudice to the accused."[185] In order to balance the totality of the circumstances surrounding the missing evidence, courts must consider "[1] the materiality of the missing evidence, [2] the likelihood of mistaken interpretation of it by witnesses or the jury, [3] the reason for its nonavailability to the defense[,] and [4] the prejudice to the defendant caused by the unavailability of the evidence."[186]

This rather liberal test might appear like the ideal breeding ground for

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[178] *Id.* at 1242.

[179] *Id.* at 1241.

[180] *Id.* at 1242.

[181] 657 A.2d 585 (Conn 1995).

[182] *Id.* at 590 (quoting Roundhouse Constr. Corp. v. Telesco Masons Supplies Co., 168 Conn. 371, 374 (1975)).

[183] *Id.* at 593 (footnote omitted).

[184] *See* 478 A.2d 227, 246 (Conn. 1984) (listing factors to consider when determining whether missing evidence has caused a violation of the defendant's due process rights).

[185] *Morales*, 657 A.2d at 594.

[186] *Asherman*, 478 A.2d at 246 (citations omitted).

some interesting lost-evidence case law in the area of police videotaping. Yet, at the time of this Essay, issues of police officers recording their investigations in the field with dashboard or body cameras are virtually nonexistent in Connecticut jurisprudence, even though dashboard and other small cameras are coming into common use in Connecticut police departments[187] and some Connecticut police departments are purchasing body cameras for their officers.[188] The author can only speculate as to whether these officers never lose a video, or if Connecticut attorneys have yet to litigate lost video cases in the higher courts. While the Connecticut Appellate Court is as yet unconcerned by questions surrounding videotaping in the field, the Connecticut Supreme Court has grappled with the issue of recording custodial interrogations. In *State v. Lockhart*,[189] the court rejected the defendant's claim that the Connecticut Constitution imposes a recording requirement for police interrogations.[190] That holding was to be expected; out of all states' high courts, only the Alaska Supreme Court has concluded that electronic recording is mandated by the due process clause of the Alaska Constitution.[191] More noteworthy than the majority opinion, however, is Justice Palmer's concurrence. In a lengthy and enthusiastic opinion, Justice Palmer urged the court to adopt a recording requirement under its supervisory powers, citing a long history of false confessions and refuting each of the majority's arguments against such a requirement.[192]

An interesting dichotomy exists in Connecticut between the coverage of recordings *of* as opposed to recordings *by* police. Numerous incidents of Connecticut citizens recording police officers in the exercise of the officers' duties, sometimes at the peril of getting arrested themselves, have sparked widespread coverage of the citizen's right to record law

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[187] *See* STEVEN A. TOMEO & JONATHAN R. SILLS, 21 CONN. PRAC. SERIES, CONN. DRIVING UNDER THE INFLUENCE LAW § 2:9 (2014 ed.) ("Many of the newer police vehicles in Connecticut are equipped with in-dash motor vehicle recorders.").

[188] *See* Christine Dempsey, *Police Body Cameras Gain Popularity*, HARTFORD COURANT (Apr. 29, 2013), http://articles.courant.com/2013-04-29/news/hc-milford-police-body-cameras-20130429-1_1_body-cameras-milford-chief-keith-mello-milford-officers (reporting that the Milford, Hartford, and Branford police departments use body cameras and that the Hamden and Danbury departments would also begin using them in the near future).

[189] State v. Lockhart, 4 A.3d 1176 (Conn. 2010).

[190] *Id.* at 1200.

[191] *See id.* at 1191 (citing Stephan v. State, 711 P.2d 1156 (Alaska 1985)) ("[*O*]*nly* the Supreme Court of Alaska has concluded that electronic recording is mandated by the due process clause of its state constitution.").

[192] *See id.* at 1205–06 (Palmer, J., concurring) (footnote omitted) ("The reasons favoring such a recording requirement are truly compelling, whereas the arguments against it are wholly unpersuasive.").

enforcement.[193] Most notoriously, the arrest of Roman Catholic priest James Manship by two East Haven police officers made the news in 2009.[194] Father Manship was videotaping the arrest of a Latino man inside an East Haven store; the officers claimed in the police report not to know what the silver object in Father Manship's hand was, but the dialogue on the priest's recording left no doubt that the officers understood it was a camera.[195] Thanks in part to the priest's video recording, the officers were convicted of federal civil rights violations and are serving prison sentences.[196]

So, the people of Connecticut have a healthy appreciation for their right to record police. Given that they are conscious of the advantages of creating permanent video evidence, perhaps it is only a matter of time until Connecticut's residents demand that all officers video-record their investigations; that is, until Connecticut demands recordings *by* the police, not merely secures the right to make recordings *of* police.[197]

VI. CONCLUSION

There is something almost amusing about the early case law on lost police videos. The tone of the various opinions addressing the issue suggests that courts viewed these videos as quaint, relatively insignificant pieces of evidence, and their treatment of instances where officers mishandled videos reflected this view. Gradually, within this past decade, there has been a noticeable shift away from the nonchalance of the early 1990s. It is difficult to pinpoint what brought on the change. Was it a rising demand for police accountability? Has a new tech-savvy generation infiltrated our legislatures and appellate courts, bringing along new ideas of what should be expected of our law enforcement agencies? Perhaps the

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[193] *See, e.g.*, Mario Cerame, Note, *The Right to Record Police in Connecticut*, 30 QUINNIPIAC L. REV. 385, 385–88 (2012) (listing accounts of five separate confrontations between police and individuals attempting to record officers).

[194] *Id.* at 386.

[195] *See* Christine Negroni, *Priest's Video Contradicts Police Report on Arrest*, N.Y. TIMES, Mar. 13, 2009, at A23 (describing how, although one of the East Haven officers later wrote that "he felt 'unsafe'" before arresting the priest, he can be heard on the video asking, "Is there a reason that you have a camera on me?").

[196] *See* Dave Altimari, *Ex-East Haven Officer Gets 30 Months in Civil Rights Case*, HARTFORD COURANT (Jan. 21, 2014), http://articles.courant.com/2014-01-21/news/hc-east-haven-cops-0122-20140121_1_david-cari-dennis-spaulding-cari-and-spaulding (reporting that a federal judge sentenced one of the officers to thirty months in prison after a jury found him guilty of three charges relating to a civil rights probe); *see also* Evan Lips, *Ex-East Haven Cop Dennis Spaulding Sent to Federal Prison for 5 Years*, NEW HAVEN REG. (Jan. 23, 2014), http://www.nhregister.com/general-news/20140123/ex-east-haven-cop-dennis-spaulding-sent-to-federal-prison-for-5-years (reporting that the same judge sentenced the other officer involved to five years in prison).

[197] For a recent call for legislative action to equip Connecticut officers with body cameras, see Chris Powell, *Missouri Isn't Needed to See Police Brutality*, NEW CANAAN ADVERTISER (Aug. 29, 2014), http://www.ncadvertiser.com/37370/missouri-isnt-needed-to-see-police-brutality/.

staggering number of wrongful convictions created a new appreciation for all types of "objective" evidence. In any event, a growing number of states are now using a combination of statutes and case law to force law enforcement to make and preserve videos. These states are still a minority and most states, like Connecticut, have yet to tackle the issue. Considering, though, how many of the cases and statutes discussed in this Essay stem from the past five years, this trend towards stricter recording guidelines will more than likely continue to evolve in the very near future.