

Moving Pictures . . . Maintaining Justice? Clarifying the Right Role for Victim Impact Videos in the Capital Context

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INTRODUCTION

Should a video memorializing the life of a capital crime victim determine whether the defendant lives or dies? Devastated loved ones might welcome this outcome and highlight the medium's evidentiary value. The video may be the only way to communicate critical information about the victim and the shattering effect her death has upon survivors. It could afford the victim's family a greater presence at trial or a way to honor the deceased. But where a video misrepresents information about the victim, prejudices the defendant, introduces bias, or somehow throws the trial record into doubt, we might answer the question differently. We might concede that some victim impact videos are being admitted for improper or even unethical reasons, and thus, that some life and death decisions are being made in an arbitrary fashion. With regard to what constitutes an appropriate victim impact video, I contend that while judges can play an important gatekeeper function and screen out victim impact material that is irrelevant or unduly prejudicial, the criminal justice community would benefit from more data and discussion on this issue.

In Part I of this Comment, I will review the legal foundations of victim impact videos and the criteria by which state and federal courts seem to determine their admissibility. Part II will consider whether courts admit victim impact videos that are under-probative or over-probative of the principles announced in the Supreme Court case *Payne v. Tennessee*.

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This section will also compare the standards of admissibility being applied to so-called “day-in-the-life” videos, which are used in the civil context. Part III will turn to the role of the prosecutor, and reflect on whether victim impact videos pose a threat to her ethical commitments to neutrality and the pursuit of justice. Finally, Part IV will offer suggestions to courts and prosecutors to help remove the stigma surrounding these videos and raise their status in the capital sentencing process. Ultimately, this Comment will urge that when determining the limits and admissibility of victim impact videos, restraint and vigilance are key.

I. VICTIM IMPACT VIDEOS

A. A. Origins, Anxieties

Victim impact videos represent the most modern form of victim impact evidence that can be offered at the penalty phase of capital trials.¹ Assembled from some combination of photographs, video clips, narration, and music, these videos are multimedia presentations that exhibit victims’ lives and the devastating loss their deaths represent to survivors.² Generally crafted by family members, sometimes with the help of law enforcement, funeral homes,³ or video production

¹ Victim impact evidence has been described as a misnomer. *See Kelly v. California*, 555 U.S. 1020, 1020-21 (2008) (Stevens, J., respecting the denial of the petitions for writs of certiorari) (noting that “the evidence does not describe the impact of the crime on the victim—his or her death is always an element of the offense itself. Rather, it describes the impact of the victim’s death on third parties, usually members of the victim’s family.”).

² Regina Austin, *Documentation, Documentary, and the Law: What Should Be Made of Victim Impact Videos?*, 31 CARDOZO L. REV. 979, 980 (2010); Christine M. Kennedy, *Victim Impact Videos: The New-Wave of Evidence in Capital Sentencing Hearings*, 26 QUINNIPIAC L. REV. 1069, 1069 (2008); *see also Payne v. Tennessee*, 501 U.S. 808, 823 (1991) (describing victim impact evidence as that which reveals a victim’s “uniqueness”).

³ Richard K. Sherwin, Neal Feigenson & Christina Spiesel, *Law in the Digital Age: How Visual Communication Technologies Are Transforming the Practice, Theory, and Teaching of Law*, 12 B.U. J. SCI. & TECH. L. 227, 234 (2006); Jerry Markon, *Poignant Videos of Victims Valid in Court Justices Decline to Weigh Use of Such Portrayals*, WASH. POST, Nov. 29, 2008, at A3, available at <http://www.washingtonpost.com/wp-dyn/content/article/2008/11/28/AR2008112802454.html>.

companies,⁴ victim impact videos portray happier times and the heartbreaking void of the present.⁵ These videos enable victims' loved ones to make powerful statements,⁶ share their sorrow, venerate the victim,⁷ and possibly produce some level of catharsis and healing.⁸ And, in what can seem a cold, adversarial system where crime victims and their family members were historically marginalized, victim impact videos may have a balancing effect vis-à-vis capital crime defendants, who have long been able to present extensive mitigating evidence in capital trials.⁹

⁴ See, e.g., MAKE-A-MOVIE VIDEO PRODUCTION, <http://www.makeamovievideo.com/> (last visited April 15, 2012); THE CHANGE COMPANIES, <http://www.changecompanies.net/videos.php> (last visited April 15, 2012).

⁵ See *infra* text for examples.

⁶ *Victim Impact Statements*, NAT'L CTR. FOR VICTIMS OF CRIME (1999), <http://www.ncvc.org/ncvc/main.aspx?dbName=DocumentViewer&DocumentID=32515> (“[Victim impact] statements provide a means for the court to refocus its attention, at least momentarily, on the human cost of the crime.”); see also Jane Goodman-Delahunty, Lynne Forster Lee & Robert Forster Lee, *Dealing with the Guilty Offender*, in *PSYCHOLOGY AND LAW: AN EMPIRICAL PERSPECTIVE* 445, 462 (Neil Brewer and Kipling D. Williams eds., 2005) (“Victim involvement in the criminal trial process increases victim satisfaction with the legal system, because the impact of the crime becomes known to the sentencing judge through these statements.”).

⁷ See Austin, *supra* note 2, at 986 (“The criminal trial or sentencing hearing represents an opportunity for survivors to pursue their ethical obligation to remember their loved ones and have others do the same.”).

⁸ See, e.g., Jan Hefler, *New Jersey Case Is Latest Bid to Balance Victim Impact, Defendants' Rights*, THE PHILADELPHIA INQUIRER, Aug. 2, 2011, at B3 (“Judges may well understand that victims need to get it out of their system.” (quoting a criminal law professor on the therapeutic value of victim impact videos)); Paul Gustafson, *Family Statements Go High Tech in Court; Some Experts Say the Multimedia Shows Turn Sentencing Hearings into Memorial Services*, THE MINNEAPOLIS STAR-TRIBUNE, June 26, 2007, at 1A (“For myself, it was good to get something off your chest that you feel you had to say. . . . And I think it's important that the person who does the crime hears what he has done to the family, whether he takes it to heart or not.” (quoting the father of a seventeen-year-old killed by a drunk driver and memorialized in a victim impact video presented at a noncapital trial)); Megan A. Mullett, *Fulfilling the Promise of Payne: Creating Participatory Opportunities for Survivors in Capital Cases*, 86 IND. L.J. 1617, 1628 (2011) (“Any of these avenues of participation has the potential to help survivors move toward closure as a result of the sense of catharsis that comes of speaking publicly about one's loss.”).

⁹ The advent of victim impact evidence allowed victims' families to share information about the deceased and their personal suffering following the victim's death. See, e.g., Markon, *supra* note 3, at A3 (“You're talking about 20 minutes that actually lets the jury see these people walking and breathing and moving. . . . I can see why these videos drive defense lawyers crazy because they actually balance things out.” (quoting a

Some victims' families have articulated a belief that victim impact videos are what enable them to secure the penalties they desire.¹⁰ Those prevented from playing videos they create have reported feelings of hopelessness and frustration.¹¹ Not all victims' families wish to pursue the death penalty,¹² but in states where death is an option, some legal scholars believe that victim impact evidence, including victim impact videos, constitute "the best tool a prosecutor has to obtain a death verdict."¹³ Some argue that victim impact videos are "the most compelling evidence available to the State."¹⁴ In summary, for victims' families, criminal prosecutors, and certainly for capital defendants,¹⁵ victim impact videos play an enormously powerful role.

California prosecutor who helped assemble a twenty-five-minute video of a slain couple)).

¹⁰ See Robert P. Mosteller, *Victim Impact Evidence: Hard to Find the Real Rules*, 88 CORNELL L. REV. 543, 554 n.63 (2002) ("For an example of extremely powerful evidence, see *ABC Primetime Live: You Shot the Wrong Girl* (ABC television broadcast, Aug. 13, 1997) (showing videotaped victim impact evidence created and introduced by critically injured wife of homicide victim that helped secure death penalty for [the] defendant . . . in his California capital trial)."); see also RICHARD C. DIETER, DEATH PENALTY INFORMATION CENTER, STRUCK BY LIGHTNING: THE CONTINUING ARBITRARINESS OF THE DEATH PENALTY THIRTY-FIVE YEARS AFTER ITS REINSTATEMENT IN 1976, at 27 (2011) ("The compelling video may have been the deciding factor in the jury's death sentence."), available at <http://www.deathpenaltyinfo.org/documents/StruckByLightning.pdf>.

¹¹ See, e.g., Danielle Camilli, *Court Limits Videos of Victims*, PHILLYBURBS.COM, July 31, 2011, http://www.phillyburbs.com/news/local/burlington_county_times_news/court-limits-videos-of-victims/article_0df37545-2ddb-59c9-aa31-ae1cca94e770.html ("Victims really have no rights, and what we did have—to play these videos—has essentially been taken away. It's very upsetting." (quoting the mother of a young woman killed by a drunk driver whose victim impact video was not admissible as presented)).

¹² See, e.g., Margaret Vandiver, *The Impact of the Death Penalty on the Families of Homicide Victims and of Condemned Prisoners*, in AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT 613, 633 (2d ed. 2003) ("Most of the commentary on the *Payne* ruling has concerned victims' families who wish for a death sentence to be imposed. But some families expressly do not want the death sentence imposed on the defendant. Occasionally their wishes are respected.").

¹³ Erin McCampbell, *Tipping the Scales: Seeking Death Through Comparative Value Arguments*, 63 WASH. & LEE L. REV. 379, 384 (2006).

¹⁴ Wayne A. Logan, *Through the Past Darkly: A Survey of the Uses and Abuses of Victim Impact Evidence in Capital Trials*, 41 ARIZ. L. REV. 143, 177-78 (1999).

¹⁵ James Luginbuhl & Michael Burkhead, *Victim Impact Evidence in a Capital Trial: Encouraging Votes for Death*, 20 AM. J. CRIM. JUST. 1, 2 (1995) ("[V]ictim impact

The legal basis for victim impact videos is the case *Payne v. Tennessee*.¹⁶ In *Payne*, a defendant sentenced to death for murdering a young mother and her daughter argued that presenting information relating to the impact of the crime upon the victim's surviving son at the sentencing stage constituted prejudicial violations of his Eighth Amendment rights.¹⁷ The Supreme Court of the United States granted certiorari to reconsider its holdings in *Booth v. Maryland*¹⁸ and *South Carolina v. Gathers*,¹⁹ two cases which had prevented capital sentencing juries from considering evidence relating to the unique personal characteristics of a victim, and the emotional impact her death had upon survivors.²⁰ *Booth* had created an Eighth Amendment bar to presenting victim impact evidence.²¹ *Gathers* extended the holding in *Booth* to statements a prosecutor made to a capital sentencing jury regarding the personal qualities of the victim.²² Both cases had been premised on the long-standing awareness of the "unique character of the death penalty,"²³

evidence is used to argue that a defendant should be put to death, not simply receive a longer sentence.").

¹⁶ *Payne v. Tennessee*, 501 U.S. 808 (1991).

¹⁷ *Id.* at 811-17. The jury had heard testimony from the decedent's mother and prosecutor as to the continuing effects of the murders on the decedent's three-year-old child. *Id.*

¹⁸ *Booth v. Maryland*, 482 U.S. 496 (1987).

¹⁹ *South Carolina v. Gathers*, 490 U.S. 805 (1989).

²⁰ *Payne*, 501 U.S. at 817; *Booth*, 482 U.S. at 501-02; *Gathers*, 490 U.S. at 810-12. In *Booth*, a defendant was convicted for the first-degree murder of an elderly couple and the prosecutor read a victim impact statement that included comments by family members about the victims' characters, as well as characterizations of the defendant and his crimes. *Booth*, 482 U.S. at 500-01. In *Gathers*, a defendant sentenced to death for the murder of an out-of-work, mentally handicapped individual objected to the prosecutor's comments to the sentencing jury that the victim was a religious man and a registered voter. *Gathers*, 490 U.S. at 808-10.

²¹ *Booth*, 482 U.S. at 502-03. The *Booth* Court noted that during a capital sentencing proceeding, the jury must make an individualized determination of whether to impose death, considering the character of the defendant and the circumstances of the crime. *Id.* at 502. *Booth* reasoned that victim impact evidence was "irrelevant to a capital sentencing decision, and that its admission creates a constitutionally unacceptable risk that the jury may impose the death penalty in an arbitrary and capricious manner." *Id.*

²² *Gathers*, 490 U.S. at 810-12.

²³ *Kelly v. California*, 555 U.S. 1020, 1022 (2008); see also *Furman v. Georgia*, 408 U.S. 238, 286-89 (1972) (Brennan, J., concurring) (noting that death is a "unique punishment" and that the death penalty "is in a class by itself"); *Ring v. Arizona*, 536 U.S. 584, 605-06 (2002) ("[T]here is no doubt that '[d]eath is different.'" (citation

as well as the Court's earlier holding that any decision to impose the death penalty must "be, and appear to be, based on reason rather than caprice or emotion."²⁴

Parting with *Booth* and *Gathers*, *Payne* held that a "quick glimpse" into the decedent's life, and the loss her death represented for family members and society, was constitutionally permissible.²⁵ *Payne* reasoned that the harm a defendant caused as a result of the crime he or she committed was, in fact, relevant to the blameworthiness calculus and the sentencing decision.²⁶ Justice Rehnquist, writing for the majority, explained that "two equally blameworthy criminal defendants may be guilty of different offenses solely because their acts cause different amounts of harm."²⁷ Furthermore, wrote Justice Rehnquist, "the sentencing authority ha[d] always been free to consider a wide range of relevant material."²⁸ Observing the iniquity in allowing capital defendants to offer almost any type of evidence in mitigation while barring the state from providing even this "quick glimpse of the [victim's] life . . . or demonstrating the loss to the victim's family and to society,"²⁹ the Court held that the State had a legitimate interest in offering evidence which reminded the jury that, "just as the murderer should be considered as an individual, so too the victim is an individual whose death represents a unique loss to society and in particular to his family."³⁰ Without the power to present such evidence, the victim was turned into a "faceless stranger,"³¹ depriving the State of the "full moral force of its evidence and [possibly] prevent[ing] the jury from having

omitted)); *Spaziano v. Florida*, 468 U.S. 447, 468 (1984) (Stevens, J., concurring in part and dissenting in part) ("[B]ecause of its severity and irrevocability, the death penalty is qualitatively different from any other punishment, and hence must be accompanied by unique safeguards . . ."); *Wainwright v. Witt*, 469 U.S. 412, 463 (1985) (Brennan, J., dissenting) (noting the "previously unquestioned principle" that death is "qualitatively different").

²⁴ *Kelly*, 555 U.S. at 1022; *see also Gardner v. Florida*, 430 U.S. 349, 358 (1977) ("[I]t is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion.").

²⁵ *Payne v. Tennessee*, 501 U.S. 808, 822, 827 (1991).

²⁶ *Id.* at 825.

²⁷ *Id.* at 819.

²⁸ *Id.* at 820-21.

²⁹ *Id.* at 822.

³⁰ *Id.* at 825.

³¹ *Payne v. Tennessee*, 501 U.S. 808, 825 (1991)

before it all the information necessary to determine the proper punishment for a first-degree murder.”³² Victim impact evidence was, Justice Rehnquist declared, “simply another form or method of informing the sentencing authority about the specific harm caused by the crime in question.”³³

Payne thus established that victim impact evidence which showed a decedent’s uniqueness and the effect her death had upon survivors was admissible.³⁴ The Court did not open the door to just any victim impact evidence, however. *Payne* held that evidence which was “so unduly prejudicial that it render[ed a] trial fundamentally unfair” would still be prohibited by the Due Process Clause of the Fourteenth Amendment.³⁵ In this way, *Payne* relocated the analysis of the constitutionality of victim impact evidence from the Eighth Amendment to the Fourteenth Amendment.³⁶

As to the possibility that victim impact evidence might “shift . . . the focus of the sentencing hearing away from the defendant . . . [to] the victim’s character,”³⁷ the Court noted that evidence relating to the victim was generally before the court anyway, and that it trusted the jury to give appropriate weight to such evidence.³⁸ Anticipating a concern that punishments might be rendered not on the facts of the crime but upon value judgments between the victim’s and the defendant’s characters, Justice Rehnquist disagreed. “As a general matter,” he wrote, “victim impact evidence is not offered to encourage comparative judgments.”³⁹

Concurring opinions by Justices O’Connor and Souter exhorted state and federal courts to remain vigilant and to refrain from admitting highly inflammatory victim impact evidence.⁴⁰ Justice Souter urged

³² *Id.*

³³ *Id.*

³⁴ *Id.* at 827.

³⁵ *Id.* at 825.

³⁶ *Id.*; U.S. CONST. amends. VIII, XIV.

³⁷ *Payne v. Tennessee*, 501 U.S. 808, 823 (1991).

³⁸ *Id.* (“[T]he rules of evidence generally extant at the federal and state levels anticipate that relevant, unprivileged evidence should be admitted and its weight left to the factfinder, who would have the benefit of cross-examination and contrary evidence by the opposing party.”).

³⁹ *Payne*, 501 U.S. at 823. (why do we sometimes use the short form cite in footnotes, and in others use the long form?)

⁴⁰ *Id.* at 831 (O’Connor, J., concurring) (“The possibility that this evidence may in some cases be unduly inflammatory does not justify a prophylactic, constitutionally

courts, guided by “the command of due process,” to “search for constitutional error with painstaking care.”⁴¹ Cautioned Justice O’Connor: “where inflammatory evidence [was] improperly admitted . . . courts [must] carefully review the record to determine whether the error was prejudicial.”⁴²

Dissenting opinions by Justices Marshall and Stevens criticized the Court for departing from *stare decisis*,⁴³ and for being “moved by an argument that has strong political appeal but no proper place in a reasoned judicial opinion.”⁴⁴ Here, it seems that Justice Stevens was referring to the victims’ rights movement and its powerful effect upon surviving third parties’ ability to participate meaningfully in the criminal trial process.⁴⁵ According to Justice Stevens, victim impact evidence would “serve . . . no purpose other than to encourage jurors to decide in favor of death rather than life on the basis of their emotions rather than their reason.”⁴⁶ Moreover, because defendants could not know the aspects of a victim’s character at the time of a crime, these factors could not be relevant to determining the defendant’s responsibility and moral

based rule that this evidence may never be admitted.”); *id.* at 836 (Souter, J., concurring) (“Evidence about the victim and survivors, and any jury argument predicated on it, can of course be so inflammatory as to risk a verdict impermissibly based on passion, not deliberation.”).

⁴¹ *Id.* at 837 (Souter, J., concurring).

⁴² *Id.* at 831 (O’Connor, J., concurring).

⁴³ *Id.* at 844 (Marshall, J., dissenting).

⁴⁴ *Id.* at 859 (Stevens, J., dissenting).

⁴⁵ See *Payne v. Tennessee*, 501 U.S. 808, 834 (1991) (Scalia, J., concurring) (“*Booth*’s stunning *ipse dixit*, that a crime’s unanticipated consequences must be deemed ‘irrelevant’ to the sentence . . . conflicts with a public sense of justice keen enough that it has found voice in a nationwide ‘victims’ rights’ movement.”); see also Peggy M. Tobolowsky, *Victim Participation in the Criminal Justice Process: Fifteen Years After the President’s Task Force on Victims of Crime*, 25 N. ENG. J. ON CRIM. & CIV. CONFINEMENT 21, 22 (1999) (“[T]here has been a literal explosion of federal and state action to increase crime victim access to and participation in the criminal justice process.”); HENRY RUTH AND KEVIN R. REITZ, *THE CHALLENGE OF CRIME: RETHINKING OUR RESPONSE* 69 (2003) (noting that recent years have brought “[e]nhanced recognition at every stage of the crime response process of the rights and interests of crime victims”). For a discussion of the victims’ rights movement and the emergence of victim impact evidence, see Jennifer Culbert, *The Sacred Name of Pain: The Role of Victim Impact in Death Penalty Sentencing Decisions*, in PAIN, DEATH, AND THE LAW 103, 111 (Austin Sarat ed., 2004).

⁴⁶ *Payne*, 501 U.S. at 856 (Stevens, J., dissenting).

guilt.⁴⁷ Lastly, Justice Stevens stressed that maintaining consistency would be impossible, considering the quantity and quality of victim impact evidence that would undoubtedly be presented.⁴⁸

B. Interpreting *Payne*

Since *Payne* authorized a “quick glimpse” into a decedent’s life, victim impact videos have appeared at the penalty phase of many capital trials.⁴⁹ Important to note is the fact that while capital trials are the subject of this Comment, victim impact videos are used in non-capital cases, too.⁵⁰ Genres of victim impact videos include home movies of the deceased engaging in activities he or she enjoyed or excelled at, video and photo montages of a victim surrounded by loved ones, videos played at memorial services, and interviews victims gave to the media before death. Video was not, seemingly, a form of victim impact evidence that the Supreme Court contemplated in *Payne*.⁵¹ And so, absent clear standards,⁵² state and federal courts reference *Payne*, Rule 403 of the Federal Rules of Evidence⁵³ (or the state law equivalent), or specialized law (i.e., the Federal Capital Sentencing Statute⁵⁴) to determine whether or not victim impact videos are acceptable.⁵⁵

⁴⁷ *Id.* at 860-61 (Stevens, J., dissenting).

⁴⁸ *Id.* at 861 (Stevens, J., dissenting).

⁴⁹ See *infra* text for examples; see also John H. Blume, *Ten Years of Payne: Victim Impact Evidence in Capital Cases*, 88 CORNELL L. REV. 257, 270 (2003) (“Despite *Payne*’s supposed requirement that [victim impact evidence] should be related to the ‘emotional impact of the crimes on the victim’s family,’ most states permit the admission of much broader sentiments.”).

⁵⁰ See, e.g., *State v. Hess*, 23 A.3d 373, 376-77 (N.J. 2011) (defendant convicted of aggravated manslaughter for killing her police officer husband).

⁵¹ See Joe Frankel, *Payne, Victim Impact Statements, and Nearly Two Decades of Devolving Standards of Decency*, 12 N.Y. CITY L. REV. 87, 111 (2008).

⁵² The only standards that *Payne* provided are that the victim impact evidence must be relevant and must not unduly prejudice the defendant. *Payne v. Tennessee*, 501 U.S. 808, 825 (1991); see also Jonathan H. Levy, *Limiting Victim Impact Evidence and Argument After Payne v. Tennessee*, 45 STAN. L. REV. 1027, 1028 (1993) (“The *Payne* Court failed to create coherent, comprehensive guidelines for when victim impact evidence and argument may be used in capital sentencing hearings.”).

⁵³ FED. R. EVID. 403. Rule 403 bars victim impact evidence where the risk of unfair prejudice to the defendant substantially outweighs the probative value of that evidence.

⁵⁴ 18 U.S.C. § 3593 (2002).

⁵⁵ See Kennedy, *supra* note 2, at 1080-81 (“The legal framework that trial courts should use to evaluate the admissibility of these videos derives from several sources: *Payne*, Federal Rule of Evidence 403 (or the state law equivalent), and/or specialized laws in

According to leading scholars, however, “*Payne* and Rule 403 provide courts with very little guidance in determining just what victim impact evidence is too emotional or prejudicial to be allowed.”⁵⁶ In response, it appears that courts are applying multi-factor balancing tests in an attempt to answer the following question: is this video so unduly prejudicial that it renders the trial fundamentally unfair?⁵⁷ As Justice Stevens has observed, this is the only standard that the Supreme Court has provided.⁵⁸

As of today, capital punishment is outlawed in seventeen states.⁵⁹ On a geographic level, while some state courts, such as those in California, which has the death penalty, repeatedly allow victim impact videos,⁶⁰ courts in other states, most prominently New Jersey, which forbids capital punishment, have imposed significant restrictions upon them.⁶¹ Some courts have barred all victim impact evidence outright.⁶²

federal court (18 U.S.C. § 3593) or state court (for example, the Idaho Constitution). Despite differences in the nature of these legal authorities . . . they share a common goal: to determine whether the possible prejudicial effect resulting from the video's emotional appeal so outweighs the video's probative value that allowing the jury to see the video will be fundamentally unfair to the defendant.”)

⁵⁶ *Id.* at 1071.

⁵⁷ *See, e.g.*, *State v. Leon*, 132 P.3d 462, 467 (Idaho Ct. App. 2006) (“Although it is conceivable that a video or photographic presentation could be so prejudicial or inflammatory in its design or content that its consideration by the sentencing court would result in ‘manifest injustice,’ that is not the case here.”); *Salazar v. State (Salazar I)*, 90 S.W.3d 330, 337 (Tex. Crim. App. 2002) (“We agree with the court of appeals that the probative value of the video montage was minimal, but we disagree that the risk of unfair prejudicial was also slight.”).

⁵⁸ *See Kelly v. California*, 555 U.S. 1020, 1024 (2008) (Stevens, J., respecting the denial of the petitions for writs of certiorari) (“[T]he [*Payne*] Court merely gestured toward a standard.”).

⁵⁹ *States with and Without the Death Penalty*, DEATH PENALTY INFORMATION CENTER, <http://www.deathpenaltyinfo.org/states-and-without-death-penalty> (last visited May 14, 2012).

⁶⁰ *See, e.g.*, *People v. Garcia*, 258 P.3d 751, 753 (Cal. 2011) (“Under [a] case-by-case approach, we have had little difficulty upholding videotaped tributes to murder victims.”); *People v. Vines*, 251 P.3d 943, 985 (Cal. 2011); *People v. Brady*, 236 P.3d 312, 334 (Cal. 2010); *People v. Dykes*, 209 P.3d 1, 45 (Cal. 2009).

⁶¹ *See State v. Hess*, 23 A.3d 373, 376-77 (N.J. 2011) (holding that the defendant's counsel was constitutionally ineffective for failing to challenge an “unduly prejudicial video tribute” to the victim, and ordering the state to vacate the defendant's plea or to proceed to a new sentencing hearing).

⁶² *See United States v. McVeigh*, 153 F.3d 1166, 1221 n.47 (10th Cir. 1998) (noting that the district court prohibited the introduction of wedding photographs and home

However, most courts seem to allow some kinds of victim impact videos.⁶³ But as to what types and styles of victim impact videos are permitted, and the degree of scrutiny that is applied to them, a survey of decisions yields anything but uniform results.

Recently, the Supreme Court declined to review two capital cases involving victim impact videos.⁶⁴ In so doing, the Court missed a chance to provide bright-line rules concerning what was and was not permissible. The cases were *People v. Kelly*,⁶⁵ and *People v. Zamudio*.⁶⁶ Both cases came from the Supreme Court of California. In *People v. Kelly*, a jury watched a twenty-minute video tribute to a young woman who had been raped, robbed, and murdered by her personal trainer.⁶⁷ The video was narrated by the girl's adoptive mother and included stock footage (i.e., archival or library footage not featuring the victim) and songs by the singer and songwriter Enya.⁶⁸ In *People v. Zamudio*, the jury viewed a fourteen-minute montage of still photographs of seventy-nine- and seventy-four-year-old victims murdered by their neighbor and narrated by the victims' children.⁶⁹ It portrayed the victims' from early in their childhoods to shortly before their deaths.⁷⁰ In denying certiorari over the dissents of Justices Stevens, Souter and Breyer,⁷¹ the Court left

videos prior to the penalty phase of the trial); see also *Lynn v. Reinstein*, 68 P.3d 412, 417 (Ariz. 2003) (“[V]ictims’ recommendations to the jury regarding the appropriate sentence a capital defendant should receive are not constitutionally relevant.”); *Bivins v. State*, 642 N.E.2d 928 (Ind. 1994) (finding that victim impact evidence was irrelevant to charged aggravating circumstances); *State v. Guzek*, 906 P.2d 272, 283-84 (Or. 1995) (finding that victim impact evidence was not relevant under the statute).

⁶³ See Alicia N. Harden, *Drawing the Line at Pushing ‘Play’: Barring Video Montages as Victim Impact Evidence at Capital Sentencing Trials*, 99 KY. L.J. 845, 859 (2011) (“[V]ictim impact videos are usually admitted . . . [and] courts are generally very lenient in what forms the video can take and how far into the life of the victim it can go.”).

⁶⁴ See *Kelly v. California*, 555 U.S. 1020, 1020, 1026 (2008) (denying certiorari).

⁶⁵ 171 P.3d 548 (Cal. 2007).

⁶⁶ 181 P.3d 105 (Cal. 2008).

⁶⁷ *People v. Kelly*, 171 P.3d at 570.

⁶⁸ *Id.*

⁶⁹ *Zamudio*, 181 P.3d at 134.

⁷⁰ *Id.*

⁷¹ *Kelly v. California*, 555 U.S. 1020, 1020-27 (2008) (Stevens, J., respecting the denial of both petitions for writs of certiorari) (Souter, J., would grant the petition for a writ of certiorari in *People v. Kelly*, but not in *People v. Zamudio*) (Breyer, J., dissenting from the denial of both petitions for writs of certiorari).

unanswered questions as to what the limits applied to this form of victim impact evidence were and would be.⁷² The lack of a coherent standard, and the need for one, are the subjects of the next section.

C. In Search of a Doctrine: What Is Driving Courts to Admit or Exclude?

1. *Victim Impact Videos?*

Although broad conclusions may be impossible to draw, a handful of cases offers illuminating insights as to what victim impact videos courts will allow and disallow, and why. This next section attempts to sort victim impact videos into rough categories for the purpose of discerning what seems to be happening when courts are faced with a determination as to whether a victim impact video is permissible.

First, it appears that many courts will admit extremely brief and unedited, or sparsely edited, victim impact videos. Such videos illustrate portions of a victim's life and are not duplicative or overly emotional. Specific examples include a three-minute video clip of a teenage female victim on a camping trip with friends,⁷³ a three-minute photomontage of an adult male victim's humble beginnings in Mexico,⁷⁴ a home video of brief but unknown length showing young, murdered sisters celebrating the Christmas holiday with family members,⁷⁵ and a four-minute home video of a police officer enjoying the same holiday with family shortly before his death.⁷⁶

⁷² *Id.* at 1024, 1026 (Stevens, J., respecting the denial of the petitions for writs of certiorari) ("In the years since *Payne* was decided, this Court has left state and federal courts unguided in their efforts to police the hazy boundaries between permissible victim impact evidence and its impermissible, 'unduly prejudicial' forms. . . . Having decided to tolerate the introduction of evidence that puts a heavy thumb on the prosecutor's side of the scale in death cases, the Court has a duty to consider what reasonable limits should be placed on its use."); see also Amy G. Doehring, *Court Denies Review of Use of Victim Impact Videos*, LITIGATION NEWS, Feb. 6, 2009, http://apps.americanbar.org/litigation/litigationnews/top_stories/victim-impact-video.html; Blume, *supra* note 49, at 269 ("*Payne* expressly sanctioned evidence related to the victim's personal characteristics and the emotional impact of the murder on the victim's family. That is precious little guidance, and a review of many cases reveals that states permit a wide array of [victim impact evidence].").

⁷³ *State v. Allen*, 994 P.2d 728, 751 (N.M. 1999).

⁷⁴ *People v. Bramit*, 46 Cal. 4th 1221, 1240 (Cal. 2009).

⁷⁵ *State v. Gray*, 887 S.W.2d 369, 389 (Mo. 1994).

⁷⁶ *People v. Brady*, 236 P.3d 312, 337 (Cal. 2010).

In the first example, the victim appeared only briefly. She was never interviewed and she never spoke. Additionally, the victim was not shown close up, but rather from a distance.⁷⁷ The court noted that the video had been edited to “last . . . only three minutes,”⁷⁸ and that it provided no new material, since the “depiction [of the victim] in the videotape closely paralleled” a still photo the jury had already seen.⁷⁹ Also, the court indicated that the victim impact testimony family members provided in addition to the video was limited.⁸⁰ In the second example, the court held the photomontage was “not unduly emotional,” and that it “merely presented admitted evidence in a different medium, unenhanced by any soundtrack or commentary.”⁸¹ The court held that “[t]he few grainy family photographs simply ‘humanized’ the victim, as victim impact evidence is designed to do.”⁸² Regarding the third video, the court allowed it with virtually no discussion. It dismissed the defendant’s argument that the victim impact video exceeded *Payne*’s criteria as “tangential.”⁸³ Lastly, in the fourth instance, the court held that the video “supplemented but did not duplicate [family members’] testimony”⁸⁴ and also that it depicted a “rather ordinary event.”⁸⁵ The court concluded that the video was brief and “not enhanced by narration, background music, or visual techniques designed to generate emotion.”⁸⁶ Furthermore, the court held, the video “did not convey outrage or call for vengeance or sympathy.”⁸⁷

As for what might be deemed a second category, it appears that courts have engaged in longer discussion when victim impact videos

⁷⁷ *Allen*, 994 P.2d at 751.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.* at 750-51. (“The victim’s mother . . . only appeared at the penalty phase for a few minutes to lay the foundation for admitting the videotaped depiction of the victim prior to her death; she then identified the victim by pointing at her image when it appeared on the videotape.”).

⁸¹ *People v. Bramit*, 46 Cal. 4th 1221, 1241 (Cal. 2009).

⁸² *Id.*

⁸³ *State v. Gray*, 887 S.W.2d 369, 389 (Mo. 1994) (echoing *Payne*, and holding that victims are not “faceless strangers” but rather “individuals whose deaths represent a unique loss to society and their family”).

⁸⁴ *People v. Brady*, 236 P.3d 312, 338 (Cal. 2010).

⁸⁵ *Id.* at 337.

⁸⁶ *Id.* at 338.

⁸⁷ *Id.*

include music or images that focus too obviously or heavily upon the victim—as opposed to capturing a victim briefly, during a moment in time. These victim impact videos are short, like the first category, but they seem to dwell upon the victim and/or provide jurors with a heightened, sensory experience. Courts search for additional, pressing reasons to admit these videos, but eventually, it seems, admit them all the same.

Examples include a ninety-second clip of a victim playing the piano used to demonstrate that he was an accomplished musician.⁸⁸ Importantly, the video was also introduced to identify the victim, whose body had deteriorated beyond recognition.⁸⁹ Another example is a video-photomontage of a woman who had been murdered by her estranged husband.⁹⁰ The victim impact video showed her interacting with her children and family members, and it contained the sound of family conversations and music as well as images of the victim's "smiling and cheerful" children standing at her grave.⁹¹ The court held that the video, which lasted less than five minutes, enabled the victim's children, "who were too young to present verbal or written statements to the court," to participate in the proceedings.⁹² Additionally, the court observed that while the musical soundtrack "arguably did not constitute a valid exercise of a victim's right to be heard . . . [it was not] unduly inflammatory or manifestly unjust."⁹³ The court held that the emotional import of the children-at-gravesite image "could not have inflamed the court's passion more than did the facts of the crime."⁹⁴

As for a third category, professionally shot and edited videos of victims that were not produced for trial but are in some way necessary to a prosecutor's argument have also been admitted. These videos are often much longer than those mentioned, but seem to furnish, in courts' eyes, valuable information.

Examples include a twenty-minute television interview with a deceased policeman discussing the hazards of undercover work,⁹⁵ and a

⁸⁸ *Whittlesey v. State*, 665 A.2d 223, 250-51 (Md. 1994).

⁸⁹ *Id.* at 251.

⁹⁰ *State v. Leon*, 132 P.3d 462, 464-68 (Idaho Ct. App. 2006).

⁹¹ *Id.*

⁹² *Id.* at 467.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *United States v. Wilson*, 493 F. Supp. 2d 491, 505 (E.D.N.Y. 2007).

twenty-five-minute interview with a high-school student profiled by a local television station.⁹⁶ In the first instance, the court held that the video “help[ed] the jury to become acquainted with one of the victims in a way that no amount of testimony . . . would allow.”⁹⁷ It also recognized the key role the video played in determining the appropriate sentence. Specifically, the court stated that the video “b[ore] directly on both the victim-status aggravating factor and the victim-impact aggravating factor,” which the prosecutor had established—“far outweigh[ing] the danger, if any, of creating unfair prejudice, confusing the issues, or misleading the jury.”⁹⁸ With regard to the second video, the court noted that existing case law had “provide[d] . . . no bright-line rules”⁹⁹ for determining admissibility, but that the television interview of the high-school student “did not constitute an emotional memorial tribute to the victim.”¹⁰⁰ The court emphasized the trial court’s decision to exclude parts of the tape that included video clips of the victim’s musical performances.¹⁰¹ Moreover, the court noted that the video did not display the victim at home or with family members, not as an infant or even a young child.¹⁰² The court remarked that the setting was a “neutral, bland” television studio where the interviewer calmly and unemotionally asked questions about the victim’s accomplishments.¹⁰³ It found that the video presented “a straightforward, dry interview . . . not of the nature to stir strong emotions that might overcome the restraints of reason.”¹⁰⁴

As for what might be deemed a final category: victim impact videos that truly challenge courts, and seem to delineate the outer bounds of what is permissible. Courts have responded to these videos in different ways in determining why they are, or are not, acceptable. These videos may be slightly shorter than the videos just discussed, but they contain a large number and variety of images, as well as musical soundtracks, and

⁹⁶ *People v. Prince*, 156 P.3d 1015, 1091 (Cal. 2007).

⁹⁷ *Wilson*, 493 F. Supp. 2d at 505.

⁹⁸ *Id.*

⁹⁹ *Prince*, 156 P.3d at 1092.

¹⁰⁰ *Id.* at 1093.

¹⁰¹ *Id.* at 1091-92. The trial court had concluded that clips of her musical performances were cumulative. *Id.*

¹⁰² *Id.* at 1093.

¹⁰³ *Id.* at 1092.

¹⁰⁴ *Id.* at 1093.

poignant narration. This category also includes victim impact videos that appear to be created solely for trial or for memorial services. When presented with these videos, courts engage in extensive discussion, and they do not always allow them. When courts do, or when they allow portions of them, it is with great effort. However, analyzing examples reveals it is difficult to discern what is actually driving courts' decisions to admit or prohibit these videos, since different courts presented with similar videos reach startlingly dissimilar conclusions.

For example, it appears that a video's duration can prove to be a determinative factor. While some courts have allowed juries to view fourteen-¹⁰⁵ and twenty-minute victim impact videos¹⁰⁶ in their entirety, one court permitted only portions of a fourteen-minute video to be played,¹⁰⁷ and another prevented any portion of a seventeen-minute video from being shown.¹⁰⁸ One court found that a twenty-seven-minute video was simply too long.¹⁰⁹

As to the number of images these victim impact videos may contain, one court prohibited a video showing two hundred photos,¹¹⁰ and another court remanded for prejudice a video containing one hundred and forty photos,¹¹¹ while a third court held that a video containing one hundred and sixty images was not "excessive,"¹¹² and a fourth court found that a video-photomontage, spanning twenty minutes, was permissible.¹¹³ While in this last instance the precise number of images was not indicated, twenty minutes would lead one to believe that many images were employed.

The scope of images presented in these videos reveals other considerations courts seem to be making. For example, one court admitted a video that chronicled an elderly couple's entire life in

¹⁰⁵ *People v. Zamudio*, 181 P.3d 105, 136 (Cal. 2008).

¹⁰⁶ *People v. Kelly*, 171 P.3d 548, 570 (Cal. 2007).

¹⁰⁷ *Hicks v. State*, 940 S.W.2d 855, 856 (Ark. 1997).

¹⁰⁸ *Salazar v. State (Salazar I)*, 90 S.W.3d 330, 332 (Tex. Crim. App. 2002); *Salazar v. State (Salazar II)*, 118 S.W.3d 880, 885 (Tex. App. 2003) (on remand, the defendant was awarded a new sentencing hearing due to the combined prejudicial effect of the video's audio and visual components.).

¹⁰⁹ *United States v. Sampson*, 335 F. Supp. 2d 166, 191 (D. Mass. 2004).

¹¹⁰ *Id.*

¹¹¹ *Salazar I*, 90 S.W.3d at 333.

¹¹² *Hicks*, 940 S.W.2d. at 856-58.

¹¹³ *People v. Kelly*, 171 P.3d 548, 570 (Cal. 2007).

photographs.¹¹⁴ Similarly, another court allowed a video-photomontage that captured a nineteen-year-old's life from infancy to death,¹¹⁵ as well as stock footage of horseback riders not featuring the victim.¹¹⁶ Conversely, another court disallowed a video capturing the childhood and youth of a twenty-year-old young man.¹¹⁷ In that instance, the court held the video seemed to "add victims," by implying that the defendant killed not one individual, but several people.¹¹⁸ According to the court, "the implicit suggestion is that appellant murdered this angelic infant; he killed this laughing, light-hearted child; he snuffed out the life of the first-grade soccer player and of the young boy hugging his blond puppy dog."¹¹⁹ The court held that "[t]he danger of unconsciously misleading the jury [was] high."¹²⁰ Interestingly, and by contrast, the court that had admitted the images from infancy to youth of the nineteen-year-old victim *lauded* the breadth of images used. It noted that "the videotape did not emphasize any particular period of [the victim's] life but reviewed all of it."¹²¹ The court held that such a review was "relevant," and because the presentation was "not unduly emotional," permissible.¹²²

¹¹⁴ *People v. Zamudio*, 181 P.3d 105, 136-37 (Cal. 2008) ("Although the videotape included a few photographs of the [victims] as young children or teenagers, it 'did not emphasize any particular period of [their lives] but reviewed all of [them]. Doing so was relevant and, because the presentation was not unduly emotional, permissible.'" (internal citation omitted).

¹¹⁵ *See People v. Kelly*, 171 P.3d at 569-71. *People v. Kelly* cautioned against videos that "emphasize the childhood of an adult victim" but nonetheless allowed the video, describing it as "a factual chronology of [the victim's] life, from her infancy to her death in early adulthood, which helped the jury to understand 'the loss to the victim's family and to society which ha[d] resulted from the defendant's homicide.'" *Id.* (internal citation omitted).

¹¹⁶ *See id.* at 576 (Moreno, J., concurring and dissenting) (noting that the video ended with stock footage of a "lone horseman riding against a range of mountains").

¹¹⁷ *Salazar v. State (Salazar I)*, 90 S.W.3d 330, 337 (Tex. Crim. App. 2002) ("The probative value of the vast majority of these 'infant-growing-into-youth' photographs is *de minimis*."); *see also* *United States v. Sampson*, 335 F. Supp. 2d 166, 191 (D. Mass. 2004) (rejecting twenty-seven-minute video that contained images of the victim's life from birth to just before his death).

¹¹⁸ *Salazar I*, 90 S.W.3d at 337.

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *People v. Kelly*, 171 P.3d 548, 570 (Cal. 2007).

¹²² *Id.*

While some courts seem bothered by videos that communicate emotionally fertile themes, such as fatherhood or religiosity,¹²³ others accept videos that emphasize stirring aspects of a victim's ancestry. Native American tribal membership¹²⁴ or impoverished beginnings in a developing country¹²⁵ are two examples.

Regarding soundtracks and narration, victim impact videos that are set to highly emotional tracks of music are sometimes, but not always, permitted.¹²⁶ Some judges bar victims' family members from embroidering upon videos as they are playing,¹²⁷ while other courts allow them to comment freely,¹²⁸ or even to refute charges about the deceased's

¹²³ *Hicks v. State*, 940 S.W.2d 855, 860 (Ark. 1997) (Brown, J., concurring) (noting that almost half of the photos used were of the deceased's two sons, which conveyed a "legitimate fatherless" theme, but that "at some point the line is crossed from pure information, and raw emotion takes hold").

¹²⁴ *People v. Kelly*, 171 P.3d at 571-72 ("[T]he videotape helped the jury to see that . . . [the victim] was of Native American descent and adopted into a Caucasian home . . . someone with such a stable and loving background . . . fresh-faced.").

¹²⁵ *People v. Bramit*, 46 Cal. 4th 1221, 1240 (Cal. 2009) ("The photographs depict a young Mr. Fierros, his family, his hometown in Mexico, and his family's humble residence.").

¹²⁶ *Salazar v. State (Salazar I)*, 90 S.W.3d 330, 333-34 (Tex. Crim. App. 2002) (excluding a video that included a music accompaniment by Enya and concluded with Celine Dion singing "My Heart Will Go On" from the movie *Titanic*); *United States v. Sampson*, 335 F. Supp. 2d 166, 191 (D. Mass. 2004) (excluding a video with "evocative contemporary music" by The Beatles and James Taylor); *People v. Zamudio*, 181 P.3d 105, 136 (Cal. 2008) (noting that the trial court excluded the audio portion of the video which was "unduly prejudicial and inappropriate"). *But see People v. Kelly*, 171 P.3d at 569-70 (cautioning against victim impact videos that were "accompanied by stirring music" but admitting a video including music by the artist Enya, which the court held was "generally soft, not stirring," and footage of the victim singing songs with a school group, in which part of the time she was singing solo).

¹²⁷ *Hicks*, 940 S.W.2d. at 856 ("The judge also ordered the State to instruct . . . [the] narrator, to describe the pictures, but not embellish them, or the judge would stop the tape."); *Zamudio*, 181 P.3d at 136. In *Zamudio*, the trial court directed the narrating witness to "be very objective as to what the [video] shows' and to refrain from making 'inappropriate' comments that might arouse emotions." *Id.*

¹²⁸ *See People v. Kelly*, 171 P.3d 548, 570 (Cal. 2007) ("The video ends with a brief view of [the victim]'s unassuming grave marker followed by a video clip of people riding horseback in Alberta, Canada, over which the mother says this was where [the victim] came from and was the 'kind of heaven' in which she belonged."). *But see id.* at 572 (characterizing this portion as "theatric without imparting any additional relevant material").

character.¹²⁹ Appellate courts seem to weigh whether or not a trial court prescreened the video before showing it to a jury,¹³⁰ and whether or not a victim's family members provided victim impact statements apart from the narration in a video.¹³¹ Finally, it seems that some courts simply fall back on their intuition of what "emotionally inflammatory" and "unduly prejudicial" mean, and whether victim impact videos fit those characterizations.¹³² While a few emotionally charged moments may raise eyebrows, so long as the video as a whole is not overly emotional, it is likely to pass muster.¹³³ That said, it is difficult to assert anything

¹²⁹ *Hicks*, 940 S.W.2d. at 856.

¹³⁰ Examples of courts that reviewed victim impact videos prior to showing them to juries include *People v. Kelly*, 171 P.3d at 570 ("[H]ere the trial court watched the videotape and exercised its discretion."); *Zamudio*, 181 P.3d at 136 ("[T]he trial court here reviewed the videotape and exercised its discretion."); *Hicks*, 940 S.W.2d at 856-57 ("[The] trial judge viewed the videotape before allowing it to be played to the jury, and he ruled portions of the tape inadmissible. . . . The record reflects that the trial court carefully reviewed and closely monitored the videotape shown at Hicks's sentencing phase."). *But see* *Salazar v. State (Salazar I)*, 90 S.W.3d 330, 337 (Tex. Crim. App. 2002) ("It is equally difficult for a trial judge to weigh the probative value against the potentially unfair prejudice of a particular item of evidence without first reviewing it. . . . The cart came before the horse.").

¹³¹ *People v. Kelly*, 171 P.3d at 570 ("The videotape supplemented, but did not duplicate, the mother's testimony."); *Zamudio*, 181 P.3d at 137 ("[The video] did not duplicate the testimony of the other victim impact witnesses. It 'humanized [the victims], as victim impact evidence is designed to do.'") (internal citation omitted).

¹³² *See, e.g., People v. Kelly*, 171 P.3d at 571 (explaining that the video admitted during Kelly's sentencing "expressed no outrage" and contained no "clarion call for vengeance," but "just implied sadness").

¹³³ *See, e.g., Kelly v. California*, 555 U.S. 1020, 1021-22 (2008) (noting that while the inclusion of music by Enya and a dramatic horseback riding scene might have been error, it was not prejudicial); *id.* (Stevens, J., respecting the denial of the petitions for writs of certiorari) (noting that in *People v. Kelly*, only Justice Moreno expressed concern that the evidence had the potential to "imbue the proceedings with 'a legally impermissible level of emotion'" (quoting Justice Moreno)); *see also* Austin, *supra* note 2, at 981 ("Although the music by Enya and the closing footage of horseback riders in [the victim]'s native Canada were not factual, had no relevance to the defendant's sentencing, and added an emotional and theatrical element to the video, in the view of the California court they were not prejudicial given that the bulk of the video *was* factual and relevant." (discussing *Kelly*)); *Hicks v. State*, 940 S.W.2d 855, 860 (Ark. 1997) (Brown, J., concurring) ("I could find no case that has gone as far as the instant case in allowing the sheer number of photographs coupled with the narration by a family member. I concur in the result because the trial judge had no guidance on this point and did exercise his discretion in curbing part of the presentation. Moreover, I

definitively, as what might be considered the most emotional form of victim impact video, one made for a memorial service, are sometimes permitted.¹³⁴

If this handful of cases suggests anything, it is a situation precluding any sort of doctrine. Why this might be problematic, and whether some victim impact videos should receive greater scrutiny, are the subjects of the next section.

II. ADMISSIBILITY AND ALERTNESS TO PREJUDICE IN DOUBT

This next section explores whether some victim impact videos might be under-probative of the factors *Payne* authorized as the valid criteria for determining admissibility. Namely, *Payne* established that evidence pointing to a victim's uniqueness and the loss survivors feel is permitted. Additionally, this section asks whether some victim impact videos might be over-probative of *Payne's* factors. Finally, the section considers why an elevated degree of scrutiny is being applied to so-called "day-in-the-life" videos, which are used in the civil context, and where life and death are not on the line.

A. Are Some Victim Impact Videos Under-Probative of Uniqueness and Loss?

Two Supreme Court justices have suggested that some victim impact videos may fall short of *Payne's* criteria. According to Justice Stevens, who would have granted certiorari in *Kelly v. California*, "the video shown to each jury [in *Kelly* and *Zamudio*] . . . was . . . [not] particularly probative of the impact of the crimes on the victims' family members . . . their primary, if not sole, effect was to rouse jurors' sympathy . . . and increase jurors' antipathy for the capital

cannot conclude that the presentation of the videotape rendered Hicks's trial *fundamentally unfair*. And that is the standard.").

¹³⁴ See *Salazar I*, 90 S.W.3d at 333-36 ("What may be entirely appropriate eulogies to celebrate the life and accomplishments of a unique individual are not necessarily admissible in a criminal trial."); see also *Sampson*, 335 F. Supp. 2d at 191-93 (noting the video was made for a memorial service and that the video's "evocative" music and images would have "inflamed the passion and sympathy of the jury"). But see *People v. Kelly*, 171 P.3d at 570-72 (permitting video showing a clip of a horseback rider with a voiceover of the victim's mother stating that this was "the kind of heaven" in which [her daughter] belonged"); *id.* at 576 (Moreno, J., concurring and dissenting) (noting that the video was more appropriate to a memorial service and that it "concluded on a frankly religious note").

defendants.”¹³⁵ Justice Stevens continued, “[t]he videos added nothing relevant to the jury’s deliberation and invited a verdict based on sentiment, rather than reasoned judgment.”¹³⁶ In Justice Stevens’ opinion, the victim impact videos in *Kelly v. California* and *People v. Zamudio* represented a “far cry” from the victim impact evidence present in *Booth* and *Payne* and “vastly exceed[ed] the ‘quick glimpse’ the Court’s majority contemplated when it overruled *Booth*.”¹³⁷ Finally, Justice Breyer, who would also have granted review in *Kelly v. California*, referred to the video and stated that “[i]t is this minimal probity coupled with the video’s *purely emotional* impact that may call due process protections into play.”¹³⁸

While it is understandable that virtually any image of a victim will hold enormous value for a victim’s family, it is possible that some victim impact videos, or parts of them, do not communicate what *Payne* allows. Regarding choice of images, a video showing pictures of a victim performing activities common to many individuals’ experiences seems under-probative. For example, photographs of school days, birthdays, holiday celebrations, and recreational activities¹³⁹ might not reveal that particular victim’s individuality.¹⁴⁰ These images might accomplish other things: they may establish bonds between the victim and the jury, whose members have similar memories and identify with familiar tableaux.¹⁴¹

¹³⁵ *Kelly*, 555 U.S. at 1025.

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.* at 568 (Breyer, J., dissenting).

¹³⁹ See *People v. Kelly*, 171 P.3d 548, 570 (Cal. 2007) (“[The video] concern[ed] [the victim]’s life, not her death. It show[ed] scenes of her swimming, horseback riding, at school and social functions, and spending time with her family and friends.”); see also *Zamudio*, 181 P.3d 105, 134 (Cal. 2008) (“The montage . . . showed . . . [the victims] raising their three children, serving in the military, hunting, fishing, vacationing, bowling, celebrating holidays and family events, attending recognition dinners for Gladys’s community service, working—and often with friends or family members, including their children, parents, siblings, grandchildren, great-grandchildren, nieces, and nephews.”).

¹⁴⁰ Austin, *supra* note 2, at 987 (“In most cases . . . the probative value of the typical memorial video that relies exclusively or heavily on homemade visual artifacts will be limited, because it almost always reflects generic portrayals of family life and does a poor job of showing the unique attributes or character of the victim and the reality of life with her or his survivors.”).

¹⁴¹ Kennedy, *supra* note 2, at 1104 (“In their ability to present a more coherent and visually compelling life story of the victim, victim impact videos draw the jury in,

But *Payne* did not authorize images that first and foremost forge bonds between decedents and juries. It authorized the use of images that reveal a victim's distinctive character, based upon a conviction that the state might conclude a jury needs to see how unique that victim was.¹⁴²

Victim impact videos that contain images that do not feature the victim at all might not comport with *Payne*, either. An example is a video featuring images of a decedent's headstone.¹⁴³ A juror who sees that headstone, or even reads its inscription, might respond to this sobering symbol of death with pity or rage, while not gleaned anything about the decedent's individuality. Rather than conveying uniqueness, images like these arguably contribute to the "faceless[ness]" *Payne* sought to remedy.¹⁴⁴

With regard to music, while listening to a deceased musician playing an instrument may demonstrate personhood in a way a photo cannot,¹⁴⁵ presenting clips of a child victim participating in a mandatory school musical performance seems to fall short of *Payne*.¹⁴⁶ More troubling are the videos that contain professional soundtracks compiled for, and added to, the videos. It is questionable whether a song or series

increase the jurors' sense of identification with the victim, and fill in blanks in the victim's story with the jurors' own understanding, thereby exacerbating excessive emotionality and bias in sentencing decisions.").

¹⁴² *Payne v. Tennessee*, 501 U.S. 808, 825-27 (1991).

¹⁴³ *Zamudio*, 181 P.3d at 134 ("[The] last three photographs in the montage showed, in order, Gladys's grave marker with the inscription legible, Elmer's grave marker with the inscription legible, and both grave markers from a distance, each accompanied by a vase of flowers. The inscription on Gladys's grave marker read: 'Mom, you remain in every hearty laugh, nice surprise and reassuring moment of our lives.' The inscription on Elmer's grave marker read: 'Dad, you found and shared treasures in life where no one else noticed them.'"); *People v. Kelly*, 171 P.3d at 570 ("The video ends with a brief view of [the decedent]'s unassuming grave marker followed by a video clip of people riding horseback."); see also *State v. Leon*, 132 P.3d 462, 467 (Idaho Ct. App. 2006) (the video included an image of the decedent's children "posing at her grave").

¹⁴⁴ *Payne*, 501 U.S. at 825.

¹⁴⁵ See, e.g., *Whittlesey v. State*, 665 A.2d 223, 251 (Md. 1994).

¹⁴⁶ See *People v. Kelly*, 171 P.3d 548, 571 (Cal. 2007) ("The portion of the videotape showing [the victim]'s singing performance seems relevant to the purpose of demonstrating what she was like. It reflects her demeanor in the difficult situation her mother described—a shy girl performing solo before her classmates. Her choice of song to sing at that age and in those circumstances also seems relevant to forming an impression of the victim. Her musical performance was not excessively emotional."). But see *id.* at 570 ("Part of the time she was singing solo, with her mother explaining that every student was required to sing solo.").

of songs that were not written by or about the victim, or were possibly even known to the victim, are an appropriate way to illustrate the decedent to the jury.¹⁴⁷ They may move the jury to feel emotions prompted by the songs' music, lyrics, or mood, but that is not what *Payne* envisioned.¹⁴⁸

The second authorized use of victim impact evidence is the investigation of loss. Examining some victim impact videos raises additional questions about whether they are showing loss. A victim impact video replete with images of gay times arguably represents more of a testimony to life than sadness. Evaluating the video containing the image of "smiling and cheerful" children at their mother's gravesite, one wonders whether the image conveys the decedent's family's grief so much as it provokes jurors' feelings of pity and rage.¹⁴⁹ Again referencing the image of the headstones, one wonders whether loss to survivors can be demonstrated if no individuals are portrayed.¹⁵⁰ While family members watching the video alongside the jury may communicate grief through their expressions, *Payne* seems to require that loss be conveyed within the confines of the evidence itself—i.e., the victim impact video.¹⁵¹ While it is in no way suggested that family members who make victim impact videos harbor any intentions other than to communicate their grief, the law demands that victim impact videos remain true to *Payne*'s requirements.

Apart from uniqueness and loss, various scholars have noted the possibility that victim impact videos might encourage juries to make decisions based upon factors that are arbitrary and irrelevant in the eyes

¹⁴⁷ See *id.* at 570-71.

¹⁴⁸ See Austin, *supra* note 2, at 996 ("Those opposed to victim impact evidence argue that judges and jurors already empathize with victims, so victim impact evidence is unnecessary. Moreover, it will totally counteract the effect of the defendant's mitigation evidence.").

¹⁴⁹ State v. Leon, 132 P.3d 462, 467 (Idaho Ct. App. 2006); see also Susan Bandes, *Reply to Paul Cassell: What We Know About Victim Impact Statements*, 1999 UTAH L. REV. 545, 545 (1999) (stating that the admission of victim impact evidence inflames jurors by invoking "emotions toward the defendant like rage, hatred").

¹⁵⁰ Zamudio, 181 P.3d 105, 134 (Cal. 2008); see also *People v. Kelly*, 171 P.3d at 570 (admitting a video containing a "brief view" of a victim's "unassuming grave marker").

¹⁵¹ *Payne v. Tennessee*, 501 U.S. 808, 825 (1991) ("Victim impact evidence is simply another form or method of informing the sentencing authority about the specific harm caused by the crime in question, evidence of a general type long considered by sentencing authorities.").

of the law at sentencing. These factors include race,¹⁵² and inequalities between the defendants' and jurors' backgrounds.¹⁵³ One can imagine a scenario in which a jury, predisposed to feelings and viewpoints irrelevant at sentencing, gives into them after seeing a victim impact video. As will be explained in the next section, the medium of film possesses a unique ability to speak to our conscious and subconscious minds. In conclusion, it appears that victim impact videos, or portions of them, might be admitted in ways that are not sufficiently probative of the criteria set forth in *Payne*.

B. Are Some Victim Impact Videos Over-Probative of Uniqueness and Loss?

It is equally possible that some victim impact videos might be over-probative of *Payne's* criteria. Describing the videos in *Kelly* and *Zamudio*, Justice Stevens maintained that those videos had exceeded "[i]n their form, length, and scope" what *Payne* had contemplated in allowing victim impact evidence in capital cases.¹⁵⁴ Justice Stevens reminded the Court that the brief oral testimony in *Payne* and the short written

¹⁵² *State v. Muhammad*, 678 A.2d 164, 203 (N.J. 1996) (Handler, J., dissenting) ("Victim-impact evidence will be the Trojan horse that will bring into every capital prosecution a particularly virulent and volatile form of discrimination. . . . discrimination based on the victim's race."); Blume, *supra* note 49, at 280 ("[E]xpansive VIE [victim impact evidence] will inevitably make way for racial discrimination to operate in the capital sentencing jury's life or death decision."); Niru Shanker, *Getting a Grip on Payne and Restricting the Influence of Victim Impact Statements in Capital Sentencing: The Timothy McVeigh Case and Various State Approaches Compared*, 26 HASTINGS CONST. L.Q. 711, 733 (1999) ("[C]ritics assert that the introduction of victim impact evidence will perpetuate racial discrepancies in the capital sentencing process."); Austin, *supra* note 2, at 999 ("Naturally, there are many ways in which the judge or jury can discern a victim's race. For example, blood relatives may be seated in the courtroom or take the stand to testify, and the Supreme Court allows survivors to wear portraits of the victim in the courtroom. Nonetheless, a visual image of the victim when she or he was alive and well is perhaps more likely to keep the race of the victim and the perpetrator in the mind's eye of the judge or jury and heighten the likelihood of their identifying with the victim and rendering a sentence affected by racial prejudice.").

¹⁵³ Bandes, *supra* note 149, at 545 ("Victim impact statements . . . exacerbate existing inequalities in the jury's attitudes toward the parties, based not only on the spillover effect from the guilt phase, but on the fact that the defendant generally comes from a very different background from the jury's. Thus, victim impact statements further skew, rather than level, the playing field.").

¹⁵⁴ *Kelly v. California*, 555 U.S. 1020, 1025 (2008) (Stevens, J., respecting the denial of the petitions for writs of certiorari).

testimony in *Booth* were distinguishable from the lengthy and involved victim impact videos under discussion.¹⁵⁵

As for examples of videos that might be over-probative of *Payne*, one example might be a video that portrays a victim as a member of a marginalized class or laudable organization with which he or she only briefly or weakly identified. Including images that depict a relatively insignificant aspect of a victim's biography might stretch the truth as to how important that aspect was to the decedent.¹⁵⁶ Certain characterizations carry emotionally-charged connotations. A jury could conclude that a victim had been mistreated all her life or had lived more nobly than most people do, and thus, that the decedent's family is deserving of greater justice.¹⁵⁷

A victim impact video could encourage comparative life arguments or comparative worth arguments to be made.¹⁵⁸ In *Payne*, the

¹⁵⁵ *Id.* (Stevens, J., respecting the denial of the petitions for writs of certiorari).

¹⁵⁶ See Austin, *supra* note 2, at 998 for an extensive discussion on "rehabilitating less than ideal victims." Cf. Susan Saulny & Jacques Steinberg, *On College Forms, a Question of Race, or Races, Can Perplex*, N.Y. TIMES, June 13, 2011, at A1 (article chronicles the challenges Americans of mixed race heritage face when applying to college, but also the "gamesmanship" that occurs, when individuals overstate aspects of their biographies for particular ends).

¹⁵⁷ See generally Janice Nadler & Mary R. Rose, *Victim Impact Testimony and the Psychology of Punishment*, 88 CORNELL L. REV. 419 (2003); Bryan Myers & Edith Greene, *The Prejudicial Nature of Victim Impact Statements: Implications for Capital Sentencing Policy*, 10 PSYCHOL. PUB. POL'Y & L. 492, 493 (2004); CARL PLANTINGA, MOVING VIEWERS: AMERICAN FILM AND THE SPECTATOR'S EXPERIENCE 111 (2009) ("Viewers sympathize with, have antipathy for, are conflicted about, and are indifferent to various characters. Engagement involves cognitive assessment, viewer desires for various outcomes, and sympathetic and antipathetic emotions in response to a character's situations. Most classical Hollywood films encourage strong sympathy for one or more characters. This sympathy is pleasurable in itself, but it also ensures strong emotional responses, since when the audience cares deeply about a character, it also has deeper concerns about the unfolding narrative. And deeper concerns often lead to stronger emotions.").

¹⁵⁸ See Susan Bandes, *Empathy, Narrative, and Victim Impact Statements*, 63 U. CHI. L. REV. 361, 406 (1996) ("Victim impact statements permit, and indeed encourage, invidious distinctions about the personal worth of victims. In this capacity, they are at odds with the principle that every person's life is equally precious, and that the criminal law will value each life equally when punishing those who grievously assault human dignity."); Amy K. Phillips, *Thou Shalt Not Kill Any Nice People: The Problem of Victim Impact Statements in Capital Sentencing*, 35 AM. CRIM. L. REV. 93, 105 (1997) (cautioning judges to limit the admission of victim impact evidence to ensure the death penalty is not imposed based on the social worth of victims).

Court asserted that victim impact evidence should not be presented to foster such arguments or to encourage discriminatory distinctions,¹⁵⁹ stating that victim impact evidence could instead be presented to show “*each* victim’s uniqueness as an individual human being, whatever the jury might think the loss to the community . . . might be.”¹⁶⁰ Still, courts and scholars have suggested that by presenting evidence that speaks to uniqueness and loss, defendants will be compared to decedents, and decedents to defendants.¹⁶¹

Indeed, one can envisage a scenario in which a defendant who murdered a war hero is given a harsher sentence than a defendant who killed one of millions in the secretarial pool. Or the death of a mother of three or a church volunteer is deemed a greater loss to society than the death of a “deadbeat dad” or a gang member. Values that society esteems, presented on film, could lead a jury to hand down a sentence greater than they would otherwise have given. Someone who appears different, famous, attractive, courageous, or peculiarly endowed, as compared to other people and as compared to the defendant, might be accorded more

¹⁵⁹ *Payne v. Tennessee*, 501 U.S. 808, 823 (1991).

¹⁶⁰ *Id.*

¹⁶¹ See, e.g., *Humphries v. Ozmint*, 366 F.3d 266, 270 (4th Cir. 2004) (“The problem is that the prosecutor . . . drew repeated comparisons between the value and worth of the victim’s life and that of the defendant, an argument which any reasonable observer would have found designed to secure a death sentence from the jury. The way in which the victim led his life was contrasted, at identical points in time, with the way the defendant had led his.”); *Hall v. Catoe*, 601 S.E.2d 335, 341 (S.C. 2004) (“We hold that the solicitor impermissibly compared Hall’s life to the victims’ lives. . . . [The comparison] was . . . emotionally inflammatory . . . unquestionably directed the jurors to conduct an arbitrary balancing of worth, which required that Hall be sentenced to death if the jury found Hall’s life was worth less than the lives of his victims . . . is totally unrelated to the circumstances of the crime . . . and . . . is distinguishable from traditional impact evidence in that it was not actually offered to show the impact of the crime on the victims or the victims’ family.”); Bandes, *Empathy, Narrative, and Victim Impact Statements*, *supra* note 158, at 406 (“But saying it doesn’t make it so. As one satirical article put it, ‘the entire tenor of the Court’s *Payne* opinion implicitly stamps an imprimatur upon this blunt fact: Some murder victims are necessarily more valuable than others.’” (citing Teree E. Foster, *Beyond Victim Impact Evidence: A Modest Proposal*, 45 HASTINGS L.J. 1305, 1312 (1994))); Kennedy, *supra* note 2, at 1077 (“[D]espise *Payne*’s repudiation of comparative judgments . . . [a]n obvious danger is that juries will use this victim impact evidence not only to make comparisons between victims, as prohibited by *Payne*, but to make comparative judgments between the victim and the defendant as well.”).

pity and her murderer a more severe penalty.¹⁶² Victims and their families could be treated differently by juries solely based on how interesting or popular that victim was portrayed as being in the video.

Videos that depict the passage of time are also arguably far from the “quick glimpse” *Payne* envisioned. Referred to by some as “life histories,” these are the videos that chart a decedent’s life from infancy to death.¹⁶³ They showcase multiple childhood photos of individuals who were adults when they died.¹⁶⁴ Such videos could create a misleading portrait of who the victim was at death, and whom he or she has left behind. They could also run the risk of suggesting certain themes to a jury. For instance, a video that presents images of a slain elderly couple enjoying their youth could connote long, rich lives lived before their untimely ends, but there is at least the possibility that the images trigger a sense that young lives were cut short unjustly, which could elicit more sorrow from jurors.¹⁶⁵ Or, consider the image of the children at their mother’s gravesite: these might not convey loss nearly so much as superhuman resilience in the face of adversity, or the injustice and perversity that children at any age and stage of life should carry out the remainder of their lives as orphans.¹⁶⁶ There is an implied recognition of loss and grief given the nature of capital sentencing proceedings. But in some of these videos, it seems that such loss is augmented with other narratives.

Having examined various ways in which some victim impact videos might fall short of *Payne*’s criteria, or impermissibly extend its

¹⁶² See, e.g., DIETER, *supra* note 10, at 27 (“The compelling video may have been the deciding factor in the jury’s death sentence, even though it made the crime no worse than a similar one in which the victim had a tough life that was not amenable to a moving portfolio of a photogenic family.” (referencing the video in *Kelly v. California*)).

¹⁶³ See, e.g., Zamudio, 181 P.3d 105, 134 (Cal. 2008).

¹⁶⁴ See, e.g., *id.* (“The montage contained 118 photographs, including one of Elmer as a boy, two of Gladys as a girl, and a high school graduation picture of each of them. Most of the remaining photographs showed Elmer, Gladys, or both of them, at various ages during their adult lives . . . and often with friends or family members, including their children, parents, siblings, grandchildren, great-grandchildren, nieces, and nephews.”).

¹⁶⁵ See e.g., Zamudio, 181 P.3d at 134. The same could be said for videos that present multiple childhood photos of adult victims. See, e.g., *People v. Kelly*, 171 P.3d 548, 570 (Cal. 2007); cf. SUSAN WALLBANK, *FACING GRIEF: BEREAVEMENT AND THE YOUNG ADULT* 74 (2003) (“Some deaths are harder to understand than others. . . . The death of any young person is never easy to understand. It challenges our ideas of rightness and wrongness in life.”).

¹⁶⁶ See, e.g., *State v. Leon*, 132 P.3d 462, 467 (Idaho Ct. App. 2006).

boundaries, it might be wise to examine the techniques that many filmmakers and video editors use. These are not victim impact filmmakers and editors whom I refer to, but general professionals in the video production business. I raise this issue merely to illustrate that videos can be complex creations which move or motivate viewers to act in ways that judges and juries might not be aware. By way of an introduction, from the early days when motion pictures were presented to courts, the potential for filmic manipulation has been a topic of trepidation.¹⁶⁷ And while our modern-day legal culture is permeated with pictures and technology,¹⁶⁸ and access to film capture and production

¹⁶⁷ See CHARLES T. MCCORMICK, HANDBOOK ON THE LAW OF EVIDENCE 673 (Edward W. Cleary et al. eds., 3d ed. 1984) (noting that early motion pictures were regarded with skepticism due to possibility of distortion); LOUIS-GEORGES SCHWARTZ, MECHANICAL WITNESS: A HISTORY OF MOTION PICTURE EVIDENCE IN U.S. COURTS 4-6 (2009) (“From the early twentieth century and through the 1910’s, films were sometimes at issue in trials . . . [but] not shown in court, instead, a witness who had seen the film testified about what he or she had seen. . . . Courtrooms lacked the proper equipment and personnel to project films and judges distrusted film as a medium.”); see, e.g., Feeny v. Young, 181 N.Y.S. 481, 482 (N.Y. App. Div. 1920) (refusing to permit the plaintiff to show a video of her cesarean section in court, despite the fact that she was suing her obstetrician for using images from the film without her consent); Gibson v. Gunn, 202 N.Y.S. 19, 19 (N.Y. App. Div. 1923) (“Aside from the fact that moving pictures present a fertile field for exaggeration of any emotion or action . . . [the film of plaintiff’s vaudeville act] tended to make a farce of the trial.”); Mass. Bonding & Ins. Co. v. Worthy, 9 S.W.2d 388, 393 (Tex. Civ. App. 1928) (“It is a matter of common knowledge that pictures showing a person in action may be made very deceptive by the operator of the machine used in taking the pictures.”). But see McGoorty v. Benhart, 27 N.E.2d 289, 294 (Ill. App. Ct. 1940) (rejecting argument that the film was misleading since it did not show a continuity of action, given the photographer’s testimony regarding how the pictures were taken and that he could only capture a few minutes of film at each location); Heiman v. Market St. Ry. Co., 69 P.2d 178, 180-81 (Cal. Ct. App. 1937) (rejecting the plaintiff’s argument that the movie should be excluded because “pranks and tricks” can be developed on the screen, noting the “same contention can be made regarding many classes of evidence”); Barham v. Nowell, 138 So. 2d 493, 496 (Miss. 1962) (acknowledging the possibility of distortion in motion pictures but stating that oral testimony can be distorted more easily).

¹⁶⁸ NEAL FEIGENSON & CHRISTINA SPIESEL, LAW ON DISPLAY: THE DIGITAL TRANSFORMATION OF LEGAL PERSUASION AND JUDGMENT xi (2009) (listing the various ways in which pictures and multimedia displays influence the court room) (“[D]ashboard camera videotapes, digitally enhanced crime scene photos, computer animations, PowerPoint slide shows . . . multimedia displays combining photographs and videos, drawings and diagrams, the sounds of witnesses’ voices . . . 3-D virtual reality evidence . . . and, thanks to videoconferencing technology and the Internet, entire legal proceedings may soon go online.”).

equipment is growing,¹⁶⁹ it is important to consider how cognizant individuals are of film's potential to represent, yes, but also distort.¹⁷⁰

C. The Medium and the Manipulation

From the early days when motion pictures were first presented to state and federal courts, the legal community has worried about film's ability to manipulate.¹⁷¹ Of course, it is not the judge's role to monitor the production of a victim impact video, but a judge can always decide whether or not to allow a video to be shown or considered at sentencing.¹⁷² Still, the range of skills and tools theoretically available to individuals who assemble victim impact videos is astonishing.

First, the manner in which an image is shot can have an enormous bearing on the mood and power of a piece.¹⁷³ Manner depends

¹⁶⁹ MARK COUSINS, *THE STORY OF FILM* 434 (2004) ("The possibility of shooting on videotape with a camera the same size as or smaller than a loaf of bread, using crews of two people rather than ten or more, editing on home computers and dubbing in the simples of sound suites meant that the world of film production was no longer a charmed one into which only the lucky few could enter.").

¹⁷⁰ Countless works have been written on the power of film and its representational, as well as its illusionistic, nature. *See, e.g.*, KARL HEIDER, *ETHNOGRAPHIC FILM* 7 (1976) ("Cinema has developed primarily as a medium for imaginative statements in which questions of scientific-type accuracy are often irrelevant. Much of what is taught in film schools is how to translate or distort reality for aesthetic effect."); IRVING SINGER, *REALITY TRANSFORMED: FILM AS MEANING AND TECHNIQUE* xiii (1998) ("[F]ilm is not inherently a re-presenting or recording of reality but rather a pictorial and usually narrative transformation of it.").

¹⁷¹ *See supra* note 170.

¹⁷² *See, e.g.*, *Payne v. Tennessee*, 501 U.S. 808, 831 (1991) (O'Connor, J., concurring) ("Trial courts routinely exclude evidence that is unduly inflammatory; where inflammatory evidence is improperly admitted, appellate courts carefully review the record to determine whether the error was prejudicial."); *see also* Randall Coyne, *Inflicting Payne on Oklahoma: The Use of Victim Impact Evidence During the Sentencing Phase of Capital Cases*, 45 OKLA. L. REV. 589, 611 (1992) ("Bear in mind that *Payne* simply holds that the Eighth Amendment to the United States Constitution erects no *per se* barrier to the admission of certain types of victim impact evidence. States remain free to provide more protection for the rights of the accused than the Supreme Court is willing to mandate as a matter of federal constitutional law.").

¹⁷³ *See* ROBERT A. FERGUSON, *THE TRIAL IN AMERICAN LIFE* 311 (2007) ("Camera work can deceive as easily as any other mode of controlled perception. The angle of vision, the shot selected for repetition, the exploitation of space by lens control, and the elimination of context manipulate reality as surely as the yellowest journalism in a newspaper, and they tend to manage the deception with greater subtlety."); DAVID GILES, *MEDIA PSYCHOLOGY* 110 (2003) (discussing the cognitive and behavioral effects

on, and extends from, the type of camera used to the lens employed to the texture of film stock (i.e., the tape) that is selected. It encompasses the angle of a shot, the degree of focus, the direction and speed of capture, and the depth of field in a shot.¹⁷⁴ While most victim impact videos will rely on material shot by amateurs, even amateur images can carry enormous pathos. Then, inside a video-editing suite, an editor can apply a raft of techniques and special effects to these amateur images that amplify or minimize their action, mood, tone, and emotion, or express a certain aesthetic point of view.¹⁷⁵

Ordering and juxtaposing images, adjusting their speed,¹⁷⁶ applying dramatic lighting shifts and camera zooms,¹⁷⁷ employing music or silence,¹⁷⁸ and even subliminal images¹⁷⁹ are just some of the scores of

of advertising, including “perceptual effects, such as low camera angles to make the speaker seem authoritative”). For a good review of the fundamentals of film directing, see NICHOLAS T. PROFERES, *FILM DIRECTING FUNDAMENTALS: SEE YOUR FILM BEFORE SHOOTING* (2d ed. 2005).

¹⁷⁴ See generally RAYMOND SPOTTISWOODE, *FILM AND ITS TECHNIQUES* 40-57 (7th ed. 1963).

¹⁷⁵ GABRIELLA OLDHAM, *FIRST CUT: CONVERSATIONS WITH FILM EDITORS* 8-9 (1992); HEIDER, *supra* note 170, at 63 (“A film without a point of view is inconceivable. The selection and omission of the images which go into making a film must be based on some concept, or idea.”).

¹⁷⁶ SARAH HATCHUEL, *SHAKESPEARE: FROM STATE TO SCREEN* 63 (2004) (“Slow motion brings power, producing a lyrical and passionate pause . . . underlines a scene or draws attention to one element . . . produces an effect of contemplation, of emotional emphasis.”); RON MILLER, *SPECIAL EFFECTS: AN INTRODUCTION TO MOVIE MAGIC* 56 (2006) (“Slow motion is used not only to make small objects appear larger, but to emphasize certain scenes for dramatic effect.”).

¹⁷⁷ PATRICIA HOLLAND, *THE TELEVISION HANDBOOK* 70 (2000) (“Over the history of cinema and then of television, different lighting styles have been used for dramatic effect.”); see also Jeffrey Kaczmarczyk, *Filmmaker Ken Burns, Creator of ‘The Civil War,’ ‘Baseball’ and ‘Jazz’ Talks in Grand Rapids About Power of Film to Move People*, MLIVE, Apr. 21, 2011, http://www.mlive.com/entertainment/grand-rapids/index.ssf/2011/04/filmmaker_ken_burns_creator_of.html (describing the “Ken Burns effect,” a technique commonly used in historical documentaries to enhance dramatic effect of images, of zooming or panning the camera over still images).

¹⁷⁸ Bennett Capers, *Crime Music*, 7 OHIO ST. J. CRIM. L. 749, 769 (2010) (“[W]e have yet to fully comprehend [how] music, through its emotive power, can tell a listener how the story should end. Whether a life should end.”); Aaron Copland, *The Aims of Music for Films*, N.Y. TIMES, March 10, 1940, §11 at 6, available at http://www.nytimes.com/books/99/03/14/specials/copland-aims.html?_r=1 (“The quickest way to a person’s brain is through his eye but even in the movies the quickest way to his heart and feelings is still through the ear.”); see also PROFERES, *supra* note

mechanical and creative devices that can imbue one frame of film with multiple layers of effects. Imperceptibly slowing the pace of a video may coax the audience to linger on elements of a victim's life that may influence the sentencing decision.¹⁸⁰ Tinting the color of a shot could endear a decedent and his or her family to a jury, or heighten feelings of compassion and sadness.¹⁸¹ Subtle audio touches, such as a few strings of a lullaby or funeral bagpipes, could be applied to a shot to play upon jurors' emotions.¹⁸²

173, at 156 ("There are films that are carried by the sound track."); JEAN MITRY, *THE AESTHETICS AND PSYCHOLOGY OF THE CINEMA* 249 (1997) ("Film music is not explanation; nor is it accompaniment; it is an *element of signification*.").

¹⁷⁹ GAEL CHANDLER, *FILM EDITING: GREAT CUTS EVERY FILMMAKER AND MOVIE LOVER MUST KNOW* 128 (2009) ("[Cuts] can ratchet up the tension to help make the audience uneasy . . . expose the past, foreshadow the future, or show what a character is experiencing"); cf. GILES, *supra* note 175, at 111 ("Most authors trace the origins of subliminal advertising to a 1950's study by advertising expert James Vicary (reported in *Life* magazine) in which he claimed to have flashed the messages "eat popcorn" and "drink Coca-Cola" onto a cinema screen . . . this led, it was claimed, to an . . . increase in sales of popcorn and . . . Coke at that particular cinema.").

¹⁸⁰ For a good discussion on the dangers of a class-based sentencing regime developing, see Austin, *supra* note 2, at 990 ("[A] video composed of homemade artifacts may increase the likelihood that sentencing will turn on the social worth or class, race, age, and gender of the victim—factors that may be readily discerned from a victim impact video."); Shaker, *supra* note 145, at 733 ("Such evidence encourages distinctions about the personal worth and social status of victims, which conflicts with the notion that every person's life is equally precious . . . arbitrary and capricious imposition of the death penalty could be easily exacerbated based on the victim's perceived status in society.").

¹⁸¹ See MILLER, *supra* note 176 (noting that color "may place a greater premium on variables that are not congruent with legal norms concerning the trial decision-making process; i.e., the color format may magnify the importance of image at the expense of information."); see also PATTI BELLANTONI, *IF IT'S PURPLE, SOMEONE'S GONNA DIE* 1-209 (2005) (exploring, through dozens of film examples, the use of red, "the caffeinated color," yellow "the contrary color," blue "the detached color," purple "the beyond-the-body color," etc.); MITRY, *supra* note 178, at 229 ("[C]olor enables the filmmaker to make a deeper (or subtler) analysis of reality through the selection and presentation of various chromatic relationships.").

¹⁸² Compare 18 U.S.C. § 3593(f) (2002) ("[I]n considering whether a sentence of death is justified, [the jury] shall not consider the race, color, religious beliefs, national origin, or sex of the defendant or of any victim . . .") with FERGUSON, *supra* note 173, at 26 ("[I]t is against human nature to resist the nonlegal narratives in a case.").

To reiterate, even simple alterations can have outsized effects and heighten the conscious and subconscious experience had by a viewer.¹⁸³ The end result might be a video that gets close to the truth of an individual, an entity, or an idea; conversely, a video might alter reality, introduce a new reality, or urge a particular interest, ideology, or even bias.¹⁸⁴ Even if no techniques are applied, the individual that jurors end up seeing on screen might be a version of the victim that is optimistic, reductive, or even rehabilitated. The version jurors see might not be an interpretation the victim would have wanted if he or she were still alive. Finally, whom jurors see might be whom jurors wish to see, based not on the evidence before them but on their personal desires or prejudices. While it is no secret that legal decisions often turn on more than facts and law, emotional manipulation has no place in capital sentencing. If anywhere, it is in the context of these cases that relevance must first be established and prejudice avoided, so that a defendant's fate is determined by reason alone.

Scientific research regarding how juries respond to victim impact evidence, and to video in the courtroom in general, yields disquieting results. Researchers at the University of Maryland recently conducted a randomized, controlled experiment where potential jurors were shown a videotape of an actual penalty trial in which victim impact evidence was used.¹⁸⁵ The researchers found that "positive feelings toward the victim and family were . . . related to a heightened risk of them imposing the death penalty," and that "part of the effect of [the victim impact

¹⁸³ See generally JOSEPH V. MASCELLI, *THE FIVE C'S OF CINEMATOGRAPHY: MOTION PICTURE FILMING TECHNIQUES* 8 (1965). Joseph Mascelli catalogs the scores of effects available to filmmakers and states its aims as being "to make the reader aware of the many factors involved in telling a story with film, and to show how theatrical filming techniques can be successfully applied to non-theatrical pictures." *Id.*

¹⁸⁴ COLIN MCGINN, *THE POWER OF MOVIES: HOW SCREEN AND MIND INTERACT* 7-9 (2005) ("The movie *adds* something to reality, and this is part of its power . . ."); FEIGENSON & SPEISEL, *supra* note 168, at 8 ("[I]f we quickly stop thinking about a picture once we think we've gotten the point, we are less likely to reflect on it critically—including how the picture's emotional associations may be contributing to our belief in the picture's truthfulness."); KATHERINE THOMSON-JONES, *AESTHETICS AND FILM* 123-24 (2008) ("A film's camerawork, lighting, editing . . . music, and sound effects can be used to trigger emotional responses that, in turn, reinforce the significance of narrative events. But even when what is depicted has little or no narrative significance, the way it is depicted can have an emotional effect. . .").

¹⁸⁵ See Ray Paternoster & Jerome Deise, *A Heavy Thumb on the Scale: The Effect of Victim Impact Evidence on Capital Sentencing*, 49 *CRIMINOLOGY* 129, 129 (2011).

evidence] on the decision to impose death was mediated by emotions of sympathy and empathy.”¹⁸⁶ The upshot, according to the researchers, was a “causal story that links [victim impact evidence] to an increased inclination to impose death as well as explore possible remedies.”¹⁸⁷ A study conducted in the 1970’s on how jurors respond to video in the courtroom revealed that while a judge can direct a jury to disregard portions of a video, the damage might already have been done.¹⁸⁸ This is so because jurors do not always heed instructions when videos are shown to them yet later determined to be off-limits for the decision-making processes.¹⁸⁹

As access to video and photo skills and equipment grows, victim impact videos could become more sophisticated. A victim impact video production industry might arise. One could imagine a situation in which families who are able to pay will pay to create more influential videos to aid them in securing the sentences they desire.¹⁹⁰ Families who cannot pay, or those who did not possess the ability to capture their loved ones in photos or on film, will be unable to take advantage of this service. While the central focus in capital sentencing should be that a person was killed and not how convincingly the individual is documented in death,

¹⁸⁶ *Id.* at 130.

¹⁸⁷ *Id.*

¹⁸⁸ DR. GERALD R. MILLER & DR. NORMAN E. FONTES, REAL VERSUS REEL: WHAT'S THE VERDICT? THE EFFECTS OF VIDEOTAPED COURT MATERIALS ON JUROR RESPONSE 139 (1975), available at <https://www.ncjrs.gov/pdffiles1/Digitization/68340NCJRS.pdf>.

¹⁸⁹ *Id.*; see also Luginbuhl & Burkhead, *supra* note 15, at 9 (finding that roughly half of mock jurors presented with victim impact evidence voted to sentence the defendant to death compared to the twenty percent who did not read the victim impact statements and voted for death). But see Brooke Butler, *The Role of Death Qualification in Venirepersons' Susceptibility to Victim Impact Statements*, PSYCHOL. CRIME & L. 133, 140 (2008) (“[T]he presence of victim impact statements did not significantly affect venirepersons’ sentence preferences.”); Theodore Eisenberg, Stephen P. Garvey, & Martin T. Wells, *Victim Characteristics and Victim Impact Evidence in South Carolina Capital Cases*, 88 CORNELL L. REV. 306, 341 (2003) (finding that victim impact evidence did not have a strong effect on sentencing outcomes).

¹⁹⁰ See *Supreme Court Declines to Hear Challenge to Victim Impact Videos in Death Penalty Trials*, TALKLEFT THE POLITICS OF CRIME, Nov. 29, 2008, <http://www.talkleft.com/story/2008/11/29/144955/76> (“Video evidence is more likely to exist when the victim comes from the kind of well-functioning family that takes pictures or uses a camcorder to chronicle a child’s life: birthday parties and concert performances and little league games.”).

or whether they were documented at all, a jury might intuit that individuals who are documented were more loved, and that their families deserve a greater degree of justice.¹⁹¹

Without clear standards from the Supreme Court, judges could continue to improvise standards of admissibility, leading those who assemble victim impact videos to respond to them in ways that could ensure the admission of their videos.¹⁹² For instance, if high production value is frowned upon, video editors could produce “organic-looking” victim impact videos that are shakily shot and jarringly edited to look unedited.¹⁹³ An editor could apply a “deteriorating effect” to make clips look dated and trigger feelings of sentimentality, longing, and nostalgia.¹⁹⁴ Likewise, if length of video or number of images becomes a problem, a savvy editor could “do less with more.” An editor could produce a shorter film with a smaller set of images but apply compelling effects to them to increase their pathos. An editor could sweeten the audio of the voices and activity on the screen to make them seem more immediate or real. Finally, if professional soundtracks become a problem, an editor could use a song deliberately written to sound like a famous song,¹⁹⁵ or add a virtually undetectable musical track to heighten the video’s emotion without viewers’ conscious minds registering it.

¹⁹¹ See Shanker, *supra* note 152, at 733 (“Victim impact statements may also bias the jury in favor of those who grieve most, or best.”); Bades, *Empathy, Narrative, and Victim Impact Statements*, *supra* note 158, at 407 (“With *Payne*, the Court has disinterred a primitive version of privatized justice, one that not only pits the defendant against the victim’s family, but revives the notion that different victims call for different levels of compensation.”).

¹⁹² See Markon, *supra* note 3 (“Without limits on the use of this technology, capital trials become theatrical venues, and the determination whether a defendant receives a death sentence turns on the skill of a videographer.” (quoting from the brief of the lawyer who failed to persuade the Supreme Court to take up the *Kelly v. California* victim impact video challenge)).

¹⁹³ See, e.g., ROBERT HENRY STANLEY, MAKING SENSE OF MOVIES: FILMMAKING IN THE HOLLYWOOD STYLE 11 (2003).

¹⁹⁴ See, e.g., GREG PERRY, DIGITAL VIDEO WITH WINDOWS XP IN A SNAP 175 (2004).

¹⁹⁵ See, e.g., *Sound-alikes Music*, AUDIOSPARX, http://www.audiosparx.com/sa/display/submain.cfm/sound_group_iid.3680/aatemp.0 (last visited May 14, 2012). Audiosparks is a music library and stock audio website, which advertises “sound-alikes,” i.e. “[m]usic that sounds very similar to well known music from movies, famous bands, hit songs and other popular music.” *Id.* Audiosparks advertises that if “you’re looking for a specific feel but don’t want to spend tens of thousands of dollars to license the original track, sound-alikes are for you!” *Id.*

It is conceded that given the scarcity of resources in capital cases, most victim impact videos will not be expensive, sophisticated, and resource-intensive productions. Most victim impact videos will likely be rough assemblages of home materials: amateur video, photos, and the like. But as this section has suggested, in both seen and unseen ways, it does not take much to make even a simple video exceptionally powerful and exceedingly emotional. And while judicial training in how to screen videos for unduly prejudicial content is probably not the answer, more awareness about the medium and what it actually accomplishes is surely advisable.

Turning to another type of courtroom video, the so-called “day-in-the-life” video, one confronts another question: why is a higher level of scrutiny applied to videos in the civil context than in the criminal, capital one?

D. “Day-in-the-Life Videos” Offer Disquieting Findings

Day-in-the-life videos depict victims of accidents or injuries who struggle to perform daily functions they once did easily.¹⁹⁶ These videos attempt to clear the hurdles of a courtroom setting, which does not always allow an injured plaintiff to illustrate the obstacles he or she faces.¹⁹⁷ Day-in-the-life videos are designed exclusively for litigation. They portray the pain and anguish of a plaintiff who seeks damages.¹⁹⁸ As with victim impact videos, the Supreme Court has provided no guidance on what is and is not admissible in a day-in-the-life video. Nonetheless, state and federal courts have been impressively discerning in articulating these videos’ probative value and possible prejudicial effects. Courts have flagged the improprieties that can occur regarding day-in-the-life video content and production.

¹⁹⁶ Jane A. Kalinski, *Jurors at the Movies: Day-in-the-Life Videos as Effective Evidentiary Tool or Unfairly Prejudicial Device?*, 27 SUFFOLK U.L. REV. 789, 789 (1993) (describing a typical day-in-the-life video); see also *Day in the Life Video*, CERTIFIED LEGAL VIDEO SPECIALIST, <http://www.clvslc.com/day-in-the-life-video> (last visited Mar. 16, 2012) (“The purpose of Day in the Life video[s] . . . is to maximize recovery potential for the injured client. . . . The production is most effective when it introduces the victim to the audience; reveals the human dimension of the jury; focuses on the damages; shows the injured client’s life-altering functionality; expresses a sense of need and a sense of hope.”).

¹⁹⁷ FRED I. HELLER, VIDEO TECHNOLOGY: ITS USE AND APPLICATION IN LAW 27 (1984).

¹⁹⁸ See, e.g., *Grimes v. Emp’rs Mut. Liab. Ins. Co.*, 73 F.R.D. 607, 610 (D. Ala. 1977).

Indeed, judicial inquiries into day-in-the-life videos appear somewhat more comprehensive than those made of victim impact videos.¹⁹⁹ Questions judges ask when deciding whether to admit day-in-the-life videos include whether the activities the plaintiff is portrayed doing are those that he or she actually does frequently,²⁰⁰ and whether the relationships with family members and friends depicted are as close as they appear.²⁰¹ Courts may flag the potentially prejudicial impact that sound,²⁰² lighting, and even film speed²⁰³ can have on a jury. Some courts require images to be deleted if they are extremely inflammatory, over-inclusive, or duplicative.²⁰⁴ Courts also require relevance and

¹⁹⁹ Gregory T. Jones, *Lex, Lies & Videotape*, 18 U. ARK. LITTLE ROCK L.J. 613, 639-40 (1996) (“Efforts to use day-in-the-life videos have been challenged on grounds that they constitute hearsay, that they are cumulative, that they are inflammatory, and that they delve into collateral issues. Likewise, questions over the methodology of recordation, staging, editing, or other material alterations remain as stumbling blocks for admissibility.”).

²⁰⁰ *See, e.g.*, *Bannister v. Noble*, 812 F.2d 1265, 1270 (10th Cir. 1987) (“Although there are a couple of scenes that show [the plaintiff] conducting activities that he would be unlikely to do frequently, the film as a whole demonstrates Bannister’s adaptation to his injury.”); *Grimes*, 73 F.R.D. at 610 (“The admission of the film will not be unduly prejudicial if the plaintiff shows that the daily activities were or are typical activities for the plaintiff.”).

²⁰¹ *See, e.g.*, *Colon ex rel. Molina v. BIC USA, Inc.*, 199 F. Supp. 2d 53, 99 (S.D.N.Y. 2011) (admitting a day-in-the-life video of plaintiff in hospital with his mother so that the jury could observe the plaintiff’s condition following the accident, despite the fact that the mother only infrequently visited her son in the hospital—thus rejecting the defendant’s argument that the video “unfairly represent[ed the plaintiff’s] hospital stay because it depict[ed] his mother beside him”).

²⁰² *See id.* (reserving decision, pending *in camera* review, as to the sound component of the video).

²⁰³ *See, e.g.*, John Farell Fay, *Video Trial Exhibits*, 11 UTAH BAR J., Mar. 1998, at 10, 11-12 (“Defense counsel can also object to [video exhibits] by citing that it unfairly depicts the plaintiff by using certain camera tricks, self-serving editing of the video or improper lighting or film speeds. To use a slower film speed than proper can show the plaintiff to be more disabled than he really is. To cleverly stage the film’s background or to use certain lighting conditions, camera angles or telephoto lenses can lead to misleading impressions. Defense counsel needs to show this, not just speculate about it in objections. When failing to exclude, defense counsel can address these same issues and how they ‘trick’ the jury during both his/her opening and closing.”).

²⁰⁴ *See, e.g.*, *Apache Ready Mix Co. v. Creed*, 653 S.W.2d 79, 84 (Tex. App. 1983) (“We have seen the videotape and find that it is repetitious of the extensive evidence and testimony, live and by deposition, of doctors, therapists . . . others who recreated the scene of the accident, and the ensuing treatment of [the victim] as well as [the victim’s

authentication to be established.²⁰⁵ Other courts subpoena outtakes of day-in-the-life films or request that a defendant's film crew be present during the filming and able to conduct extensive cross-examination about the process at a later time.²⁰⁶ Some courts, recognizing that day-in-the-life videos will "dominat[e] . . . the evidentiary scene . . . [and] distract the jury," decide to exclude them, provided that the plaintiff and his or her caregivers can testify.²⁰⁷

This is not true in every case. From time to time, courts admit exceedingly long²⁰⁸ or even dramatized day-in-the-life films.²⁰⁹ Generally speaking, however, courts seem to apply a higher level of scrutiny to these videos than to victim impact videos. Whether it is because day-in-the-life videos have been around longer than victim impact videos have,²¹⁰ or that civil defendants' often deep pockets ensure a higher level of scrutiny is applied, this state of affairs clearly informs our discussion. Namely, it seems amiss that videos used to sue civil defendants for damages should receive greater scrutiny than videos used to determine whether a criminal defendant lives or dies.

III. COULD THE USE OF VICTIM IMPACT VIDEOS COMPROMISE THE PROSECUTOR'S ETHICAL OBLIGATIONS?

Turning to the prosecutor's role when a victim impact video is presented to a jury, *Payne* offers no uncertain guidance: "We now reject the view . . . that a State may not permit the prosecutor to similarly argue to the jury the human cost of the crime of which the defendant stands

mother's] mental reaction to her daughter's condition."); *Helm v. Wisman*, 820 S.W.2d 495, 497 (Mo. 1991) (finding that a day-in-the-life video was properly excluded because the injured plaintiff was present in court for the jury to see).

²⁰⁵ See, e.g., *Grimes v. Emp'rs Mut. Liab. Ins. Co.*, 73 F.R.D. 607, 609 (D. Ala. 1977). Authenticating a day-in-the-life video in a civil suit involves showing evidence as to how the film was made and proof that the film is a "true and accurate" representation of the plaintiff's pain and suffering. See *id.* While relevance and authentication are required for victim impact videos in capital cases, as discussed *supra*, these videos might present a less than "true and accurate" representation of the victim. See *supra* discussion in text on the potentially misleading nature of "life history" videos that showcase multiple childhood photos of individuals who were adults or even elderly citizens when they died.

²⁰⁶ See, e.g., *Grimes*, 73 F.R.D. at 611.

²⁰⁷ See, e.g., *Thomas v. C.G. Tate Const. Co.*, 465 F. Supp. 566, 571 (D.S.C. 1979).

²⁰⁸ See, e.g., *Trapp v. Cayson*, 471 So. 2d 375, 380-82 (Miss. 1985) (upholding trial court's decision to admit video that was one-hour-and-twenty-minutes long).

²⁰⁹ *Walls v. Armour Pharm. Co.*, 832 F. Supp. 1505, 1509 (M.D. Fla.1993).

²¹⁰ For a history of day-in-the-life videos, see *Kalinski*, *supra* note 196, at 796-800.

convicted. . . . ‘Justice, though due to the accused, is due to the accuser also.’²¹¹ In a word, *Payne* established that prosecutorial argument relating to the victim and the impact of the victim’s death upon the victim’s family is permissible at the capital sentencing stage. In response, this final section explores the prosecutor’s powers in the capital context, as well as his or her unique ethical obligations, and asks whether victim impact videos might in any way imperil them.

A. Prosecutorial Powers and Responsibilities

Prosecutors have absolute discretion in deciding whether to seek death and whether to resolve cases through capital trials. By extension, they assume the greatest ethical responsibilities.²¹² The seminal decision establishing the criminal prosecutor’s power in the capital context is the case *McCleskey v. Kemp*.²¹³ *McCleskey* concerned a challenge to the state of Georgia’s capital punishment system based upon evidence of race discrimination in charging and penalty verdicts. Writing for the majority, Justice Powell provided that “[s]ince decisions whether to prosecute and what to charge necessarily are individualized and involve infinite factual variations, coordination among district attorney offices across a State would be relatively meaningless.”²¹⁴

At each stage of a capital trial, including whether or not a capital trial will occur,²¹⁵ the prosecutor determines which and how many violations to charge, how severely, and whether or not to negotiate a plea bargain.²¹⁶ At the sentencing phase, the prosecutor may introduce

²¹¹ *Payne v. Tennessee*, 501 U.S. 808, 827 (1991) (quoting Justice Cardozo in *Snyder v. Mass.*, 291 U.S. 97, 122 (1934)).

²¹² Robert H. Jackson, *The Federal Prosecutor*, 24 J. AM. JUDICATURE SOC’Y 18, 18 (1940) (“The prosecutor has more control over life, liberty and reputation than any other person in America.”).

²¹³ *McCleskey v. Kemp*, 481 U.S. 279 (1987).

²¹⁴ *Id.* at 295 n.15.

²¹⁵ See Lucy Adams, *Death By Discretion: Who Decides Who Lives and Dies in the United States of America?*, 32 AM. J. CRIM. L. 381, 387 (2005) (“At each stage of the process of a potential capital trial, including most importantly whether or not it is indeed to be a capital trial, the discretion of the prosecutor has the power to shape the final decision and indeed the fate of the accused.”); Stephen B. Bright, *Discrimination, Death and Denial: The Tolerance of Racial Discrimination in Infliction of the Death Penalty*, 35 SANTA CLARA L. REV. 433, 450 (1995) (“The most important decisions that may determine whether the accused is sentenced to die are those made by the prosecutor.”).

²¹⁶ See Michael Radelet & Glenn Pierce, *Race and Prosecutorial Discretion in Homicide Cases*, 19 L. & SOC’Y REV. 587, 588 (1985); see also MICHAEL A. FOLEY, *ARBITRARY*

aggravating factors that warrant imposition of the death penalty.²¹⁷ Each state determines what offenses are capital crimes and what aggravating factors the prosecutor may present, and what mitigating factors the defense may present, to a jury for consideration.²¹⁸ It is only when the aggravating factors outweigh the mitigating factors that a decision to impose death is appropriate.²¹⁹ As has been written about extensively, the financial resources available in a prosecutor's jurisdiction,²²⁰ the local political climate,²²¹ the media,²²² and the prosecutor's own personal views²²³ can all affect the decision of whether or not to seek the death penalty.

AND CAPRICIOUS: THE SUPREME COURT, THE CONSTITUTION, AND THE DEATH PENALTY 197 (2003) ("Prosecutorial discretion exists at all levels of the criminal justice system."); P.S. Kane, *Why Have You Singled Me Out? The Use of Prosecutorial Discretion for Selective Prosecution*, 67 TUL. L. REV. 2293, 2294 (1993) ("Single-handedly, the prosecutor decides whether and what charge to file, what penalty to seek.").

²¹⁷ See Katie Morgan & Michael J. Zydney Mannheimer, *The Impact of Information Overload on the Capital Jury's Ability to Assess Aggravating and Mitigating Factors*, 17 WM. & MARY BILL RTS. J. 1089, 1094-95 (2009).

²¹⁸ Mary R. Falk & Eve Cary, *Death-Defying Feats: State Constitutional Challenges to New York's Death Penalty*, 4 J.L. & POL'Y 161, 177 (1995) ("[A]ggravating and mitigating factors are different and differently framed in different states, and the burden of proof at sentencing varies from state to state.").

²¹⁹ See Ashley Paige Dugger, *Victim Impact Evidence in Capital Sentencing: A History of Incompatibility*, 23 AM. J. CRIM. L. 375, 385 (1996). In some states, death may be imposed even when aggravating factors do not outweigh the mitigating factors. *Kansas v. Marsh*, 548 U.S. 163, 181 (2006) ("We hold that the Kansas capital sentencing system, which directs imposition of the death penalty when a jury finds that aggravating and mitigating circumstances are in equipoise, is constitutional.").

²²⁰ DIETER, *supra* note 10, at 26-27 (quoting prosecutors on the effect of financial concerns on decisions to seek the penalty, or even prosecute other crimes).

²²¹ See Richard C. Dieter, *Killing for Votes: The Dangers of Politicizing the Death Penalty Process*, DEATH PENALTY INFORMATION CENTER (1996), <http://www.deathpenaltyinfo.org/node/379> (discussing the political effects of electing prosecutors, and how that impacts their decisions in capital cases).

²²² Thomas Johnson, *When Prosecutors Seek the Death Penalty*, 22 AM. J. CRIM. L. 280, 280 (1994) (noting the impact media portrayal of a case has on prosecutors' decision to seek the death penalty); E. Michael McCann, *Opposing Capital Punishment: A Prosecutor's Perspective*, 79 MARQ. L. REV. 649, 669 (1996) (noting that some prosecutors may seek death penalty to gain media attention and "emerge as a folk hero").

²²³ Rachel King, *The Impact of Capital Punishment on Families of Defendants and Murder Victims' Family Members*, 89 JUDICATURE 292, 295 (2006) ("[T]he prosecutor must make the ultimate decision whether to seek the death penalty based on what he or she

B. The Prosecutor's Duties to Neutrality and to Seek Justice

"Neutral" is not necessarily the first word that springs to mind when envisioning the criminal prosecutor. But, in fact, neutrality to each constituency involved in a criminal trial is part and parcel of the prosecutor's ethical duties. This differs from the civil context where a plaintiff's attorney owes an exclusive fiduciary duty to the plaintiff.²²⁴ In the criminal context, the prosecutor has a duty to the victim, the defendant, and the public at large.

The American Bar Association (ABA) and the National District Attorneys Association have promulgated standards to advise prosecutors on how they are to engage with victims.²²⁵ Accordingly, "prosecutors should never assume the role of the victim's attorney. . . . Their goals are much broader than those of the victim and may sometimes even conflict with the victim's wishes."²²⁶ The National Prosecution Standards iterate that a prosecutor "must place the rights of society in a paramount position in exercising prosecutorial discretion."²²⁷ With respect to defendants, the ABA's Model Rules of Professional Conduct state that a "prosecutor has the responsibility of a minister of justice and not simply that of an advocate," and that the "responsibility carries with it specific

believes is best for the community."); Stephen B. Bright, *Why the United States Will Join the Rest of the World in Abandoning Capital Punishment*, in *DEBATING THE DEATH PENALTY: SHOULD AMERICA HAVE CAPITAL PUNISHMENT?* 152, 157, 165 (Hugo Adam Bedau & Paul G. Cassell, eds., 2004) ("[W]hether the death sentence is imposed may depend more on the personal predilections and politics of local prosecutors than the heinousness of the crime or the incorrigibility of the defendant.").

²²⁴ RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §16(3) (2000); *see also* Deborah A. DeMott, *The Lawyer as Agent*, 67 *FORDHAM. L. REV.* 301, 301 (1998) ("The law of agency provides the foundational structure for many of the legal consequences that follow from the relationship between a lawyer and a client . . . the lawyer-client relationship is a commonsensical illustration of agency. A lawyer acts on behalf of the client, representing the client, with consequences that bind the client.").

²²⁵ *See* ABA STANDARDS FOR CRIM. JUSTICE 3-3.2 (1993), http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_pfunc_toc.html; *see also* NDAA NAT'L PROSECUTION STANDARDS 2-9 (3d. ed.), <http://www.ndaa.org/pdf/NDAA%20NPS%203rd%20Ed.%20w%20Revised%20Commentary.pdf>.

²²⁶ *See* ANGELA J. DAVIS, *ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR* 76 (2007).

²²⁷ NDAA NAT'L PROSECUTION STANDARDS 1-1.2.

obligations to see that the defendant is accorded procedural justice, that guilt is decided upon the basis of sufficient evidence, and that special precautions are taken to prevent and to rectify the conviction of innocent persons.”²²⁸

To assert that the prosecutor must be neutral is not to preclude his or her use of fervent argument, or even exhibitionism.²²⁹ On the contrary, judges, lawyers, and legal scholars are careful to distinguish between neutrality and a lack of fervor. Prosecutors “are necessarily permitted to be zealous in their enforcement of the law.”²³⁰ There is a recognized “duality” inherent in the prosecutor’s role,²³¹ and a recognition that his or her responsibilities are “bifurcated.”²³² The expectations with respect to prosecutorial neutrality relate to “non-bias, nonpartisanship, and principled decision-making,”²³³ but not to detached and aloof argumentation. Notwithstanding this recognition, the Supreme Court has emphasized that justice must always prevail.²³⁴

Secondly, a prosecutor has an ethical duty to seek justice. Specifically, a prosecutor must refrain from prosecuting charges where probable cause is lacking. Codes and standards in criminal law all emphasize that it is the prosecutor’s obligation to seek justice, and not simply to convict. According to the Model Rules of Professional Conduct, prosecutors are “minister[s] of justice.”²³⁵ The Model Code of Professional Responsibility states that prosecutors must “seek justice.”²³⁶ The ABA Standards for Criminal Justice articulate that “the duty of the

²²⁸ MODEL RULES OF PROF’L CONDUCT R. 3.8 cmt. 1 (2006).

²²⁹ See FERGUSON, *supra* note 173, at 71 (“Legal arguments require evidence, evidence must be *exhibited*, and *exhibition* encourages *exhibitionism*.”).

²³⁰ Marshall v. Jerrico, Inc., 446 U.S. 238, 248 (1980).

²³¹ Viereck v. United States, 318 U.S. 236, 247-48 (1943).

²³² See, e.g., H. Richard Uviller, *Symposium: The Neutral Prosecutor: The Obligation of Dispassion in a Passionate Pursuit*, 68 FORDHAM L. REV. 1695, 1713 (2000).

²³³ Bruce A. Green & Fred C. Zacharias, *Prosecutorial Neutrality*, 2004 WIS. L. REV. 837, 903 (2004).

²³⁴ United States v. Agurs, 427 U.S. 97, 110-11 (1976) (stating that justice is the “overriding interest”).

²³⁵ MODEL RULES OF PROF’L CONDUCT R. 3.8 cmt. 1 (2006) (“A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice, that guilt is decided upon the basis of sufficient evidence, and that special precautions are taken to prevent and to rectify the conviction of innocent persons.”).

²³⁶ MODEL CODE OF PROF’L RESPONSIBILITY EC 7-13 (1980).

prosecutor is to seek justice, not merely to convict.”²³⁷ The prosecutor’s duty is similarly enshrined in The National Prosecution Standards.²³⁸ Importantly, every state has adopted this “do justice” standard from the Model Rules or Model Code.²³⁹

The next section asks whether victim impact videos could pose problems for prosecutors given their duties under law. Are there instances where introducing and later referencing victim impact videos in an argument might violate the prosecutor’s ethical obligations?

C. Upholding the Prosecutor’s Ethical Obligations

1. *When Victim Impact Videos Are in Play*

When prosecutors make permissible arguments with victim impact videos, they encourage jurors to use them to acquaint themselves with a decedent’s uniqueness and to assess the impact of a crime on third parties affected by the decedent’s death.²⁴⁰ Some scholars fear that the ability to use victim impact evidence, including videos, may tempt prosecutors to go farther, however, due to the lack of limitations placed upon victim impact videos.²⁴¹ The question before us is not, at this stage, how and what juries and judges see when prosecutors present victim impact videos, but rather what prosecutors’ motivations are when they present them.

a. Could Victim Impact Videos Upset the Prosecutor’s Three-Fold Duties to the Victim, the Defendant, and Society?

Beginning with the prosecutor’s duty of neutrality, a prosecutor’s decision to present a victim impact video might allow the decedent or his

²³⁷ ABA STANDARDS FOR CRIM. JUSTICE 3-1.2(c).

²³⁸ NDAA NAT’L PROSECUTION STANDARDS 1-1.1; *see also id.* at 4-2.2 (articulating that charges are proper only when the prosecutor “reasonably believes” they can be substantiated by admissible evidence at trial).

²³⁹ Bennett L. Gershman, *Prosecutorial Ethics and Victims’ Rights: The Prosecutor’s Duty of Neutrality*, 9 LEWIS & CLARK L. REV. 559, 562 n.15 (2005).

²⁴⁰ *See Payne v. Tennessee*, 501 U.S. 808, 825-27 (1991).

²⁴¹ *See Blume, supra* note 49, at 268 (stating that the trend in the use of victim impact evidence is towards “the unfettered admission of a wide array of [it] and arguments” upon it because few jurisdictions provide any substantive or procedural limitations upon its uses); Logan, *supra* note 14, at 145 (describing the uses of victim impact evidence and noting that there is “precious little in the way of substantive limits, procedural controls, or guidance in how it is to be used”).

or her family to play an unwarranted role in the sentencing process. While a victim's family might understandably desire to do everything in its power to secure the ultimate sentence,²⁴² presenting victim impact videos that contain highly emotional narration from multiple members of a victim's family, or which "add victims" by presenting the deceased at various stages of life, could allow victims' families to have outsized influence at trial.²⁴³ While we might condone the use of victim impact videos in situations where victims' families do not speak, barely speak aside from the video, are unable to speak,²⁴⁴ or where speaking from the grave is necessary for some other purpose,²⁴⁵ authorizing victims to speak at great length about their loved ones might usurp the prosecutor's rightful role. There is a difference between offering loved ones a microphone and handing them what is, in essence, a megaphone. Otherwise, the sentencing phase could turn into a contest between the victim's family and the defendant, or the victim and the defendant.²⁴⁶

b. Could Victim Impact Videos Encourage Prosecutors to Make Comparative Worth and Comparative Life Arguments More Frequently Than They Already Do?

Payne did not consider comparative worth or comparative life arguments to be a problem.²⁴⁷ Yet clearly, comparing the characteristics of the victim and the defendant, or suggesting that the victim lived a worthier life than the defendant did, violates prosecutorial neutrality. While no victim impact video is necessary to make a comparative worth

²⁴² Laurence H. Tribe, Op-Ed, *McVeigh's Victims Had a Right to Speak*, N.Y. TIMES, June 9, 1997, at A25 ("Should such pain and passion be part of the legal proceedings? Of course.").

²⁴³ Brent Staples, Editorial, *When Grieving 'Victims' Can Sway the Courts*, N.Y. TIMES, Sept. 22, 1997, at A26.

²⁴⁴ See, e.g., *State v. Leon*, 132 P.3d 462, 467 (Idaho Ct. App. 2006) (allowing video showing victim's young children at gravesite).

²⁴⁵ See, e.g., *United States v. Wilson*, 493 F. Supp. 2d 491, 505 (E.D.N.Y. 2007) (holding that victim impact evidence was relevant to prove a statutory aggravating factor); *Hicks v. State*, 940 S.W.2d 855, 857 (Ark. 1997) (holding that victim impact evidence was relevant to refute the defendant's self-defense claim).

²⁴⁶ See Bandes, *Empathy, Narrative, and Victim Impact Statements*, *supra* note 158, at 406-07 ("Commentators have observed that the victims' rights movement revives the concept of privatized justice by portraying the criminal case as a struggle between the defendant and the victim's family and by seeming to erase the role of the state.").

²⁴⁷ *Payne v. Tennessee*, 501 U.S. 808, 823 (1991).

argument, it is possible that the tendency to present such arguments, combined with the growing trend to present victim impact videos, will encourage prosecutors to make more comparative worth and comparative life arguments at capital sentencing. This is due to the unique ability videos have to let a viewer see, hear, and respond emotionally to an individual in real-time, and to compare that individual, now deceased, to the defendant sitting there alive in the courtroom or to other, theoretical victims. A prosecutor could be tempted to misinform jurors as to how they should consider the victim impact evidence (i.e., as evidence of the victim's character as opposed to her uniqueness), and the standards by which the jury should judge it (not in a careful weighing of aggravating and mitigating factors, but by carefully weighing whom the jury liked best).

c. Could Victim Impact Videos Result in Inflammatory Advocacy?

The fields of law and film are both narrative regimes,²⁴⁸ but it is important to maintain the distinctions.²⁴⁹ Stories have enormous power in the courtroom, but courtrooms are not theaters. Jurors are not audiences. And the defendant's life—as opposed to the jury's entertainment, or the prosecutor's career—is on the line. In *Gardner v. Florida*, the Supreme Court stated that “it is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion.”²⁵⁰ Fear that juries might be overwhelmed by emotional statements from third parties testifying about their suffering was a key reason why victim impact evidence was disallowed in *Booth* and *Gathers*.

²⁴⁸ DAVID A. BLACK, LAW IN FILM: RESONANCE AND REPRESENTATION 34 (1999); Robert M. Cover, *The Supreme Court 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 5 (1983) (“Law and narrative are inseparably related.”); Kim Lane Scheppele, *Foreword: Telling Stories*, 87 MICH. L. REV. 2073, 2073 (1989) (“Law has always been concerned with narratives.”).

²⁴⁹ See W. LANCE BENNETT & MARTHA S. FELDMAN, RECONSTRUCTING REALITY IN THE COURTROOM: JUSTICE AND JUDGMENT IN AMERICAN CULTURE 8 (1981) (“The interpretive powers of stories take on special significance in the courtroom. The overriding judgmental tasks in a trial involve constructing an interpretation for the defendant's alleged activities and determining how that interpretation fits into the set of legal criteria that must be applied to the defendant's behavior. . . . There are several characteristics of stories that make them suitable frameworks of legal judgment.”).

²⁵⁰ *Gardner v. Florida*, 430 U.S. 349, 358 (1977).

In *Payne*, Justice Souter voiced a concern that arguments based upon victim impact evidence would be so inflammatory as to encourage death on the basis of passion as opposed to reasoned deliberation.²⁵¹ Justice Stevens warned that arguments on victim impact evidence would impermissibly shift jurors' focus from reason to emotion.²⁵²

Many, if not most, victim impact videos are fundamentally emotional creations. They can't help but be, considering the context and the individuals who create them. With few limits placed upon victim impact videos, prosecutorial arguments will inevitably be drawing on a highly emotional source of evidence. It is foreseeable that some prosecutors, having maintained a proper tone throughout the trial, could capitalize on a victim impact video at the penultimate moment. After all, these videos are presented "at the precise time when the balance is at its most delicate and the stakes are highest—when jurors are poised to make the visceral decision of whether the offender lives or dies—after the defendant has been convicted of the most horrendous crime possible."²⁵³ Jurors, knowing that the end is near, may be tempted to focus on factors and indulge in emotions, biases, and prejudices that should not be considered at capital sentencing.²⁵⁴

d. Could Victim Impact Videos Encourage Decisions Based on an Illegitimate Record?

A prosecutor may seek the death penalty only when it is clearly justified. In *Payne*, the dissenting justices raised the possibility that "wholly arbitrary and capricious" decisions could be made "on a matter so grave as the determination of whether a human life should be taken or spared" when victim impact evidence is introduced.²⁵⁵ Consider the victim impact video that presents a false and misleading portrait of the victim, or the video that features valid and true information about the victim yet has no place in the sentencing decision. If this information is "hidden" via any number of video capture and editing techniques, it

²⁵¹ *Payne v. Tennessee*, 501 U.S. 808, 836 (1991) (Souter, J., concurring).

²⁵² *Id.* at 856 (Stevens, J., concurring).

²⁵³ Logan, *supra* note 14, at 178.

²⁵⁴ See *Videos in the Courtroom: The Use of Emotional Video Montages on the Rise in Criminal Cases . . . But Are They Fair?*, COLLINS, MCDONALD, & GANN, P.C. (Jan. 25, 2012), <http://cmgesqblog.com/?p=439> ("[E]motions can often run so high during viewing these videos that judgment may be improperly skewed.").

²⁵⁵ *Payne*, 501 U.S. at 861 (Stevens, J., dissenting).

violates *Payne*. In this instance, a prosecutor's decision to present a victim impact video could violate her duty to do justice by delegitimizing the record upon which a defendant's sentence is determined. Alarming, scholars note that "court reversals for admitting [victim impact evidence] or argument are . . . rare."²⁵⁶

e. Could a Powerful Victim Impact Video Preclude a Plea Bargain?

Finally, prosecutors make the life-death decisions long before they have videos or know whether they will have videos, or even think about them.²⁵⁷ Still, it is possible, if a bit speculative, to suggest that a prosecutor who has a compelling victim impact video might decide to not enter plea negotiations, but to take the case to trial. In this way, victim impact videos could tempt a prosecutor to abrogate his or her duty to do justice, swayed by the ability to do more courtesy of a film.

IV. CONCLUSION

"No legal regime can afford to be naive about the world around it."²⁵⁸ The impact of technological change on the courtroom is far-reaching, and this includes the effects wrought by victim impact videos.²⁵⁹ While I do not advocate the prohibition of victim impact videos, and while I acknowledge their enormous importance and value, a more careful look at what these videos accomplish and how they are evolving in the capital context is critical. After all, victim impact videos can play a powerful role in the sentencing process, but they must not result in arbitrary and prejudicial decisions of life and death.

²⁵⁶ See Blume, *supra* note 49, at 279.

²⁵⁷ This is so because of the bifurcated nature of capital trials. Every jurisdiction that allows capital punishment requires a separate penalty phase where sentencing is determined according to the state's capital statute. See, e.g., William J. Bowers, Benjamin D. Fleury-Steiner & Michael E. Antonio, *The Capital Sentencing Decision, in AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT: REFLECTIONS ON THE PAST, PRESENT AND FUTURE OF THE ULTIMATE PENAL SANCTION* 413, 425 (James R. Acker, Robert M. Bohm & Charles S. Lanier eds., 2d ed. 2003).

²⁵⁸ See FERGUSON, *supra* note 173, at 331.

²⁵⁹ See Gustafson, *supra* note 8 ("It's the wave of the future." (quoting the communications director for the National Association of Criminal Defense Lawyers)); Sherwin, *supra* note 3, at 270 ("[T]he imperative that legal scholars face is to rethink the theory and practice of law in and through the visual. Thus we may begin to come to grips with the various ways in which visual communication technologies are transforming the practice, theory, and teaching of law in the digital age.").

Ideally, the Supreme Court will soon provide bright-line standards. With such clarity, victims' families will be able to produce victim impact videos that avoid some of the challenges presented in this Comment. Judges will have clear parameters within which they can work confidently and comfortably. Victim impact videos could become a venerated part of the capital sentencing phase. In the meantime, courts and prosecutors would be wise to revisit their use of, or decisions involving, victim impact videos. The collective goal must be to ensure that victim impact videos truly illustrate *victim* impact.

A. The Videos

Beginning with the victim impact videos themselves, their content should be limited to *Payne's* criteria. Videos should be shorter and more limited in scope, which would likely occur if *Payne's* commands regarding allowable uses are respected. Victim impact videos should distinguish the victims, but refrain from becoming life histories. The victim should be portrayed more or less as he or she was at the time of death. Special effects and savvy editing that introduce creative and mechanical techniques to heighten emotion should be strongly discouraged. Emotion must not be tolerated for its own sake, and emotional elements should be allowed only insofar as they speak to *uniqueness* and *loss*. Music may be used when relevant, but the use of music to heighten sentiment should be avoided.

B. Courts

More alertness should be given to irrelevant and prejudicial content. Rigorous, *in camera* viewings in light of the concerns outlined here must be mandatory. Judges should review victim impact videos and decide whether they may be considered at sentencing before they are shown to juries, not during the sentencing proceeding. Judges might implement methods by which the producers of these videos can be evaluated, too. One possibility would be for judges to require affidavits from individuals who produce victim impact videos. In extreme cases, where professional video production facilities are used, judges should perhaps subpoena video editors or ask to see the video projects prior to output. Judges could offer special sentencing instructions regarding what victim impact videos may and may not portray. Finally, judges should continue to monitor the videos when they are presented to juries, and

jurors should be expected to attest that their decisions do not rely on passion, as opposed to deliberation and reason.

C. Prosecutors

Prosecutors may not offer victim impact videos so as to invite juries to look beyond *Payne's* authorized criteria to impermissible and emotionally charged issues. Instead, as the individuals who know the law, prosecutors must keep victim impact videos true to *Payne's* edict. Prosecutors must not exploit the current confusion in the law with regard to victim impact videos' admissibility standards, but rather counsel victims' families on what *Payne* allows and review the videos with their producers. When victim impact videos are presented, and when referencing victim impact videos in their final arguments, prosecutors arguing for the maximum punishment must remind the jury that their decision must rest on the law and the facts of the case alone. In this way, faith in the judicial process, and in the capital sentencing phase specifically, will be preserved.