DOCUMENTATION, DOCUMENTARY, AND THE LAW: WHAT SHOULD BE MADE OF VICTIM IMPACT VIDEOS?

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I. "SARA NOKOMIS WEIR: 1974-1993"

When a majority of the Supreme Court rejected appeals in two capital cases involving the admissibility of victim impact videos, Justices John Paul Stevens and Stephen Breyer disagreed and wrote separately respecting the denials of certiorari.[1] The victim in one of the cases was Sara Weir, a nineteen-year-old young woman who was raped, stabbed with scissors twenty-nine times, and robbed by Douglas Kelly, a personal trainer who frequented the gym where she worked out.[2] Kelly left Weir's body under a bed in his girlfriend's apartment, where the body was discovered by the girlfriend's ten-year-old son.[3] Kelly was found guilty of first-degree murder and sentenced to death.

During the penalty phase of Kelly's trial, the prosecution introduced a twenty-two-minute video entitled "Sara Nokomis Weir 1974-1993," which has been posted online.[4] The video consists of a

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[1] Kelly v. California (*Kelly*), 129 S. Ct. 564, 564-67, 568 (2008) (Stevens, J., respecting the denial of the petitions for writs of certiorari) (Breyer, J., dissenting). Justice Souter would have granted certiorari in *People v. Kelly*, 171 P.3d 548 (Cal. 2007), but not in *People v. Zamudio*, 181 P.3d 105 (Cal. 2008).

[2] *People v. Kelly*, 171 P.3d at 552-53, 555.

[3] *Id.* at 552.

[4] The Weir victim impact video can be found at http://www.supremecourt.gov/media/media.aspx. It should be noted at the outset that victim impact videos do not show victims being victims, as in a day-in-the-life video that might be introduced in a personal injury action. Rather, they show victims living their lives and interacting with their friends and relatives, unaware of the fate that will befall them. A victim impact video is more nearly comparable to a settlement

montage of photographs and clips from home movies and videos featuring the victim, family members, and friends. Martha Farwell, Weir's mother, narrates the video; she does little more than identify the events taking place on the screen and her daughter's age at the time. Rather than reveal a mother's intimate knowledge of her daughter's life, Farwell rather matter-of-factly relates only cursory information about Sara Weir.

Sara Weir is a newly-adopted Canadian First Nations baby when the video begins and a young adult by the video's end. In between, there are images of special occasions from nearly every year of Weir's life—birthdays, vacations, Christmases, Halloweens, a wedding, a choir audition, an equestrian event. The video is accompanied by what Justice Stevens characterized as "soft music,"[5] which Weir's mother attributes to Enya,[6] the Irish singer and Weir's favorite. The video closes with a view of Sara Weir's grave and an image of horseback riders in Alberta, Canada—"the kind of heaven" in which her mother says she belongs.[7]

The California Supreme Court upheld the admissibility of the video.[8] The court found the video to be probative based on the following reading:

> [T]he videotape helped the jury to see that defendant took away the victim's ability to enjoy her favorite activities, to contribute to the unique framework of her family—she was of Native American descent and adopted into a Caucasian home—and to fulfill the promise to society that someone with such a stable and loving background can bring. The videotape further illustrated the gravity of the loss by showing Sara's fresh-faced appearance before she died. In the videotape, Sara appears at all times to be reserved, modest, and shy—sometimes shunning the camera. Her demeanor is something words alone could not capture. Such images corroborated evidence at the guilt phase, that could be considered in aggravation of the penalty, suggesting that defendant preyed on Sara's naïve and trusting nature. Jurors could reasonably, and relevantly, conclude that the defendant, who betrayed and raped other young women, felt comfortable exercising the ultimate act of violence and control over someone as vulnerable as Sara. The viewer knew Sara better after viewing the videotape than before, but the tape expressed no outrage

documentary prepared for a wrongful death action; both of these presentations consider the value of the victim's life and the loss of support and companionship that the victim's survivors experience following the victim's death.

[5] *Kelly*, 129 S. Ct. at 564 (Stevens, J., respecting the denial of the petitions for writs of certiorari).

[6] For more on Enya, see her website, http://www.enya.com/.

[7] *Kelly*, 129 S. Ct. at 564 (Stevens, J., respecting the denial of the petitions for writs of certiorari).

[8] *People v. Kelly*, 171 P.3d at 567-72.

> over her death, just implied sadness. It contained no clarion call for vengeance.[9]

Although the music by Enya and the closing footage of horseback riders in Weir'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.[10] Admission of the irrelevant portions of the video was harmless insofar as the penalty determination was concerned.

Justice John Paul Stevens, on the other hand, found the videos in both *People v. Kelly* and *People v. Zamudio*[11] to be "especially prejudicial," primarily because they were irrelevant:

> Although the video shown to each jury was emotionally evocative, it was not probative of the culpability or character of the offender or the circumstances of the offense. Nor was the evidence particularly probative of the impact of the crimes on the victims' family members. The pictures and video footage shown to the juries portrayed events that occurred long before the respective crimes were committed and that bore no direct relation to the effect of crime on the victims' family members.[12]

Stevens thought that the use of visual media, photographs, and video accompanied by music made the risk of prejudice "overwhelming":

> While the video tributes at issue in these cases contained moving portrayals of the lives of the victims, their primary, if not sole, effect was to rouse jurors' sympathy for the victims and increase jurors' antipathy for the capital defendants. The videos added nothing relevant to the jury's deliberation and invited a verdict based on sentiment, rather than reasoned judgment.[13]

Concluding that the videos at issue exceeded "[i]n their form, length, and scope" what the Court contemplated when it decided to allow the introduction of victim impact evidence in capital cases, Justice Stevens called for the Court to articulate "reasonable limits" on the use of victim impact evidence.[14]

Justice Breyer found the video in *People v. Kelly* to be "poignant,

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[9] *Id.* at 571.

[10] *Id.* at 572.

[11] *Zamudio* involved the conviction of defendant Samuel Zamudio for the murders of Elmer and Gladys Benson. A video consisting of 118 photographs of the victims taken over the course of their lives and ending with a shot of their grave markers was introduced at trial. People v. Zamudio, 181 P.3d 105, 134 (Cal. 2008). The video, however, was not made a part of the Supreme Court's record.

[12] *Kelly*, 129 S. Ct. at 567 (Stevens, J., respecting the denial of the petitions for writs of certiorari).

[13] *Id.*

[14] *Id.*

tasteful, artistic, and above all, moving."[15] Its unusually strong emotional impact was the source of its problem, however.

> That emotional impact is driven in part by the music, the mother's voiceover, and the use of scenes without victim or family (for example, the film concludes with a clip of wild horses running free). Those aspects of the film tell the jury little or nothing about the crime's "circumstances," but nonetheless produce a powerful purely emotional impact.[16]

Justice Breyer concluded, "It is this minimal probity coupled with the video's *purely emotional* impact that may call due process protections into play."[17]

Since the Supreme Court in *Payne v. Tennessee*[18] allowed the introduction of victim impact statements in capital cases strictly for the purposes of demonstrating the victim's individuality and the impact of the crime on her or his survivors,[19] lower courts have considered the admissibility of victim impact videos.[20] Most of the decisions have

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[15] *Id.* at 568 (Breyer, J., dissenting).

[16] *Id.* (citation omitted).

[17] *Id.*

[18] 501 U.S. 808 (1991). *Payne* overruled two cases in which the Court barred the introduction of victim impact evidence because of the Eighth Amendment. *See* South Carolina v. Gathers, 490 U.S. 805 (1989); Booth v. Maryland, 482 U.S. 496 (1987).

[19] *Payne*, 501 U.S. at 827.

[20] *See* United States v. Sampson, 335 F. Supp. 2d 166, 191 (D. Mass. 2004) (rejecting a twenty-seven-minute video consisting of over 200 still images of the victim's life from birth to just before his death, accompanied by "evocative contemporary music"); Hicks v. State, 940 S.W.2d 855 (Ark. 1997) (upholding the admission of a 160-photograph montage video showing the chronological development of the victim and each of his two sons); People v. Bramit, 210 P.3d 1171, 1187 (Cal. 2009) (finding no abuse of discretion in the admission of a videotape, "unenhanced by any soundtrack or commentary," that consisted of nineteen poor-quality snapshots of the victim, his family, his Mexican hometown, and his "humble residence" and one studio portrait of the victim as a teenager, where all had already been introduced as stills in connection with brother's testimony); People v. Dykes, 209 P.3d 1 (Cal. 2009) (affirming the admission of an eight-minute video of the trip to Disneyland taken by the nine-year-old murder victim and his family); People v. Prince, 156 P.3d 1015, 1091, 1092 (Cal. 2007) (rejecting defense claims regarding a twenty-five-minute video of the victim consisting of "a calm, even static discussion of [her] accomplishments and interests that [took] place entirely in a neutral, bland setting" at a local television station in her home state); State v. Leon, 132 P.3d 462 (Idaho Ct. App. 2006) (affirming the decision of the lower court to admit in a non-capital case a short video, with music, of the murder victim); Whittlesey v. State, 665 A.2d 233, 250-51 (Md. 1995) (ruling that admission of a ninety-second tape of the victim "playing the piano, a skill for which he had been nationally recognized" was relevant and not redundant); State v. Gray, 887 S.W.2d 369, 389 (Mo. 1994) (rejecting claim that the presentation of a video of the family Christmas of two sisters who were raped and killed by being forced to jump off a bridge did not exceed the permissible bounds of victim impact evidence); Petruccelli v. Texas, 184 S.W.3d 747 (Tex. Crim. App. 2006) (allowing the introduction in a non-capital case of a day-in-the-life video of a victim confined to a rehabilitation facility); Hackler v. State, No. 2-04-446, 2006 WL 1563222, at *1 (Tex. Ct. App. June 8, 2006), *aff'd*, No. 1400-06, 2008 WL 366620 (Tex. Crim. App. Feb. 6, 2008) (approving the admission of a videotape of the victim's daughter's fourth birthday as providing a "quick glimpse" of the victim's family life); Salazar v. State (*Salazar I*), 90 S.W.3d 330 (Tex. Crim. App. 2002) (rejecting a seventeen-minute video montage on grounds that prejudice outweighed probity), *remanded to* 118 S.W.3d 880 (Tex. App. 2003) (ordering a new

turned on whether the video in question was so prejudicial that it would interfere with a jury's rational determination of a sentence. The fear is that victim impact videos—with their music and visual imagery—might pose an even greater threat of exciting the passions of judges and juries than oral or written statements do.[21] Yet prejudice is only part of the calculus by which admissibility is assessed. According to Federal Rule of Evidence 403, "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."[22] Most of the commentary on victim impact evidence has concentrated on its prejudicial effect rather than its relevance or probative value.[23] The latter will be the focus of this

sentencing hearing).

Media reports describe additional videos that have been admitted in criminal proceedings. *See* Jennifer Emily, *Tears of Solidarity Follow Life Sentence*, DALLAS MORNING NEWS, Feb. 28, 2009, at 1B (describing interaction testimony of mother of nineteen-year-old victim that included playing of a "lively video"; http://www.youtube.com/watch?v=YXGs2a8hjVA) (showing a memorial video of the nineteen-year-old victim, University of North Texas student Melanie Goodwin); *see also* Vesna Jaksic, *"Victim Videos" Grow—But Still Controversial; Defense Counsel Object to Prejudicial Impact of Victim Videos*, NAT'L L.J., Dec. 22, 2008, at 6 (reporting on the introduction of a video made by the father of a troubled fifteen-year-old victim telling her family how much she loves them); Jerry Markon, *Poignant Videos of Victims Valid in Court*, WASH. POST, Nov. 29, 2008, at A3 (reporting on three videos including the two-minute memorial video of Jesse Heller, which was shown at the trial of the drunk driver who was sentenced to twenty-two years in prison for the teen's death); Don Plummer & Don Melvin, *If Tokars Guilty, Jury May See Video of Wife's Life Before Sentencing Him*, ATLANTA J.-CONST., Feb. 8, 1997, at 9E (describing victim impact video of a murdered mother and her children from which the court stripped music, newspaper headlines of the murder, and readings of sons' comments at their mother's gravesite, but not scenes from her funeral).

Videos are often made of montages of still photographs. Numerous cases deal with the admission of still photographs of victims in life as victim impact evidence. *See, e.g.*, State v. Garza, 163 P.3d 1006, 1019 (Ariz. 2007) (concluding that display of photographs of victims during their mothers' victim impact testimony not an abuse of discretion); People v. Hamilton, 200 P.3d 898, 951 (Cal. 2009) (finding no error in the admission of one of two photos of victim's husband with sons in sports uniforms as proof of his effort "to make a home and a happy life" for his children after their mother's death and despite his depression and alcohol abuse); State v. Storey, 40 S.W.3d 898, 908-09 (Mo. 2001) (finding no error in the admission of photographs of the victim, a special education teacher, with her first class, a balloon release, and a memorial garden as evidence of her "value to the community and the impact of her death upon her friends and co-workers," but not a photo of the inscription of her tombstone, which was irrelevant but not enough to deprive the defendant of a fair trial).

[21] *See* Note, Christine M. Kennedy, *Victim Impact Videos: The New-Wave of Evidence in Capital Sentencing Hearings*, 26 QUINNIPIAC L. REV. 1069 (2009).

[22] FED. R. EVID. 403.

[23] *See generally* Susan Bandes, *Empathy, Narrative, and Victim Impact Statements*, 63 U. CHI. L. REV. 361 (1996) (arguing that victim impact evidence should be excluded because it interferes with the jury's ability to consider evidence that humanizes the defendant); Angela P. Harris, *The Jurisprudence of Victimhood*, 1991 SUP. CT. REV. 78 (1991) (arguing that victim impact evidence is a threat to rational decisionmaking because it produces strong emotions and encourages reliance on stereotypes about victims); *but see* Paul G. Cassell, *In Defense of Victim Impact Statements*, 6 OHIO ST. J. CRIM. L. 611, 619-26 (2009) (arguing that victim impact

Article, which will rely heavily on the insights of cinema and cultural studies.[24]

The admission of victim impact videos is concededly a charged issue. Victim impact evidence may increase the likelihood of a death sentence, and videos are thought to have more of an impact than oral statements. However, the U.S. Supreme Court is not likely to reverse its decisions admitting victim impact evidence in capital cases anytime soon. Advances in digital media technology and amateur video production capabilities suggest that victim impact videos will proliferate in noncapital cases. Even those who condemn the admission of any form of victim impact evidence should recognize the need to develop strategies for challenging the admission of victim impact videos until such time as the law changes. The only recourse is to keep the videos out of individual cases where their probative value is weak and their prejudicial impact great, and to seek rulings that tightly control the content when the videos are admitted.

II. PROBING THE IMPROBABLE PROBATIVE VALUE OF VICTIM IMPACT VIDEOS

A. *Digital Technology and the Moral Obligation to Remember*

The victim impact videos described in recent court opinions and in the media reflect changes in mourning rituals wrought by the omnipotence of popular culture, the greater accessibility of digital media technology for nonprofessionals, and the community-creating capabilities of the Internet.[25]

The Weir video has much in common with the memorial videos that are now commonly prepared in connection with funerals and memorial services. Memorial videos basically consist of montages of family photographs and clips of home movies featuring the dearly departed, arranged in chronological order and synchronized with

statements inform the sentencing body about the harm a crime has caused, benefit the victim therapeutically, explain to the defendant the impact of her or his crime, and increase the fairness of the sentencing process).

[24] Introduction of victim impact videos is not limited to the sentencing phase of capital cases. Victim impact evidence has been considered during the sentencing phase of noncapital criminal trials, either by inclusion in the pre-sentence report or through the introduction of oral or written statements at the sentencing hearing or at sentencing. Victims are generally permitted to offer statements at parole hearings. In addition, victim impact evidence has been considered at hearings regarding bail, pre-trial release, and plea bargaining.

[25] *See generally* JAMES W. GREEN, BEYOND THE GOOD DEATH: THE ANTHROPOLOGY OF MODERN DYING 160-86 (2008) (discussing obituaries, spontaneous roadside memorials, and online virtual cemeteries).

sentimental background music.[26] The Internet lists a plethora of videographers who produce memorial videos on an expedited basis to be shown at funerals and memorial services. Some funeral homes offer such services, using templates and software that are sold online. In addition, survivors can enlist the services of sites like Legacy.com and Virtual-Memorials.com to assist with the creation of online memorial tributes that contain biographies, obituaries, timelines, slide shows, photo galleries, videos, poem and prose selections, lists of hobbies and favorite things, guest books where visitors to the site (including strangers) can post messages, and the opportunity to make virtual gifts in the deceased's honor. The sponsors and creators of these memorial tributes can pay for them to be posted on the websites for short or long periods of time. Of course, some people create websites on their own, which stand alone or are linked to a family website. Numerous memorial videos are also streamed on the Internet on video-sharing sites like YouTube, where the subjects are typically young people, and Tangle.com (formerly GodTube), which bills itself as "an online community for Christians."

Most of these memorial video projects contain music. A majority of the videos and websites incorporate secular or romantic songs that speak of loss through death, like Sarah McLachlan's "Angel"[27] and country singer Kenny Chesney's "Who You'd Be Today."[28] The music used in tributes on Legacy.com seems to be religious in nature; "Amazing Grace" is a favorite. Copyright laws do not appear to be an impediment. Mourners who want to make their own videos, slide shows, and websites and wish to comply with the copyright laws can either buy royalty-free music that is appropriate for inclusion in their visual memorials or perform music that is in the public domain.

Mourning rituals and mores that involve the extensive usage of digital media technology and the Internet to remember and memorialize the dead reflect changes in the moral obligations of mourners. In *Beyond the Good Death: The Anthropology of Modern Dying*, James Green argues that the modern praxis toward the dead is governed by a "cult of memory," whereby we commit "the dead to living memory rather than a locale beyond the natural world."[29]

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[26] *See* JAY RUBY, SECURE THE SHADOW: DEATH AND PHOTOGRAPHY IN AMERICA 134 (1995). Video memorials offer several benefits to survivors: "the commemoration of the life of the deceased, a legacy to be passed on to future generations, a document for family members unable to attend the funeral, the occasion for personalized service, and the opportunity to work through and express feelings about the deceased and to grieve in the privacy of home." JAMES M. MORAN, THERE'S NO PLACE LIKE HOME VIDEO 93 (2002).

[27] SARAH MCLACHLAN, *Angel*, *on* SURFACING (Nettwerk/Arista Records 1997). It was released as a single in 1998.

[28] KENNY CHESNEY, *Who You'd Be Today*, *on* THE ROAD AND THE RADIO (BNA Records 2005).

[29] GREEN, *supra* note 25, at 160.

> The focus is on what the dead did with their lives, their interests and peculiarities, and how survivors "shared" that life with them. Memory as moral practice is both the selectively remembered past and the imaginative redacting of a relationship . . . . It is a distinctly postmodern idiom, the dead granted the only kind of immortality they (and we) can be sure of, namely, abiding remembrance in the hearts of survivors.[30]

The cult of memory promotes the kind of idealization of family members that has been a standard aspect of home media genres in general.[31] The emphasis on memorializing the dead—which exists apart from traditional religious practices and is accompanied by its own visual production practices—is likely to increase the number of cases in which the courts will be asked to consider visual victim impact evidence. 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. The fact that a victim lost her or his life due to criminal violence heightens her or his entitlement to being remembered. The question is how well this idealization meshes with the purposes for which victim impact evidence is admitted.

The effect of the murder of a loved one on surviving family members and friends turns on their history together, what they remember about the victim, and what they miss now that the person is gone. Their loss is connected to memories that are sources of both pleasure and pain. Homemade visual artifacts (photos, home movies, and videos) aid in the tasks of recalling, missing, and longing for a deceased loved one. The images they capture stimulate the memories of relatives and friends. As one commentator has noted, family photographs have the power to "delude, obscure, or reveal . . . . They are always relics which remind us of what we had forgotten, make us want to forget what we remember, and bring into relief what we already knew."[32] The recollections revive stories about the victim and provoke descriptions of the void that the victim's absence has produced. It seems natural that survivors would use photos and home movie or video footage in victim impact videos—not as substitutes for, but rather as supplements to, written or oral statements—as the visual images "add[] a sense of the 'real' to that which may otherwise remain abstract and difficult to latch on to or invest in emotionally."[33]

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[30] *Id.* at 160-61.

[31] Patricia R. Zimmermann, *Introduction. The Home Movie Movement: Excavations, Artifacts, Minings*, *in* MINING THE HOME MOVIE: EXCAVATIONS IN HISTORIES AND MEMORIES 24 (Karen L. Ishizuka & Patricia R. Zimmermann eds., 2008) [hereinafter MINING THE HOME MOVIE] (asserting that the living have a responsibility "to name these ghosts" in recovered images and "to remember, not with nostalgia . . . but with hope that the materiality of these images can be restored and opened to the future . . . .").

[32] JULIA HIRSCH, FAMILY PHOTOGRAPHS: CONTENT, MEANING, AND EFFECT 10 (1981).

[33] Chris Greer, *News Media, Victims and Crime*, *in* VICTIMS, CRIME AND SOCIETY 20, 31

B. *The Limited Probative Value of the Ideal and the Idyllic*

It is certainly possible that a memorial video composed of family photographs, home movies, and home videos can accomplish the purposes of victim impact evidence—namely, to create a portrait of the victim as a unique individual and to underscore the impact of the crime on the survivors. In most cases, however, 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. Home photography, cinematography, and videography capture fairly common mainstream rituals of family togetherness such as holidays, vacations, religious and patriotic celebrations, rites of passage like birthdays and weddings, educational or occupational milestones like graduations and retirements, and significant acts of material accumulation like the purchase of a new car or the acquisition of a new pet.[34] Family-made visuals are reserved for special occasions, not everyday life. True, candid shots that reflect humor or embarrassment may be treasured for their realism.[35] Home movies have recurring stock characters, such as the family clown, the piano player, the cook, and the camera-shy female. Yet families rarely hold on to images that record family members as they behave badly toward one another or look disheveled, out of sorts, or gravely ill.[36] (Photos of those who are no longer part of the family because of divorce or disgrace are ripped up or thrown out.)[37] Rarely too does the camera set out to capture the complex individual physical or psychological characteristics that mark some family members as "special" or "different," or the structural constraints that limit the family's economic or social mobility. Thus, standard home photo, movie, or video images that are incorporated into victim impact videos will not tell a trier of fact much about the singular qualities of the victim or the reasons why survivors will especially suffer from that *particular* victim's demise.

Family albums, home movies, and videos contain a rather idyllic or uncomplicated portrait of family life, not unlike the portraits that masses of other people have captured. The images do not tell a particular

(Pamela Davies et al. eds., 2007).

[34] RICHARD CHALFEN, SNAPSHOT VERSIONS OF LIFE 61-63 (1987).

[35] MORAN, *supra* note 26, at 42.

[36] HIRSCH, *supra* note 32, at 12-13 (noting that photos that do not "buttress family pride and sustain a sense of security" or that attest to the failure of family dreams are discarded); *see also id.* at 32 (arguing that both contemporary formal and candid family photography avoid depicting social issues like domestic violence, divorce, mental illness, and juvenile delinquency).

[37] *Id.* at 13, 118.

family's unique story so much as they urge viewers to infer or intuit a universal story—one that is acted out by nearly everyone who follows the practices of the traditional, solidly working- or middle-class patriarchal family.[38] The uniformity of these amateur images of family and home life and the similarity of the stories with which they are associated are the product of a common culture. In his book *Snapshot Versions of Life*, visual anthropologist Richard Chalfen extensively analyzed the home mode of visual communication that produces home photography, home movies, and home videos. The home mode is characterized by "expression[s] of conspicuous success, personal progress, and general happiness. . . . Illness, depression, painful experiences, interpersonal conflicts, personal disappointments, social failures and dreary settings have no place . . ."[39] The culture that underlies the production of imagery in the home mode "promotes the visual display of proper and expected behavior, of participation in socially approved activities, according to culturally approved value schemes. People are shown . . . conforming to social norms, achieving status and enjoying themselves, in part, as the result of a life well lived."[40]

Although the content of family-made photos, movies, and videos is likely to be the same, the various media do have a different impact on the viewer. Moving images of a victim who has died an untimely and unfortunate death are likely to be more arresting and affecting than still photographs.[41] Seeing the victim on screen—happy and oblivious to her or his fate in what seems to be the here and now—makes viewers uncomfortable because they know that the victim will never be that way again. It is a bit like watching a ghost. No one can stop time or turn back the clock. The "angst" that the viewers experience has been described as an "intolerable nostalgia" stemming from the "present absence" of the victim.[42] In such a state, viewers are not likely to question the idealism of home movies and videos or whether they are a realistic portrayal of family life. As strangers to the family, they may not know the backstory behind the images, but will call upon widely-held social understandings and their own experiences to reach romanticized, utopian suppositions about the images' context and the love and regard in which the images' subjects were held.

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[38] CHALFEN, *supra* note 34, at 142.

[39] *Id.* at 99.

[40] *Id.* at 139; *see also* Roger Odin, *Reflections on the Family Home Movie as Document*, *in* MINING THE HOME MOVIE, *supra* note 31, at 255, 262 (arguing that home movies refuse to present anything "shocking and embarrassing," "pessimistic," or "threatening to the image of the ideal family").

[41] DEBORAH JERMYN, CRIME WATCHING: INVESTIGATING REAL CRIME TV 126-28 (2007) (describing the impact of surveillance footage on capturing crime victims).

[42] *Id.* at 128 (citing the work of Roland Barthes and John Ellis).

Naturally, neither culture nor the technology that captures it is frozen in time. Experience has long undermined the ideal of the intact, traditionally patriarchal family.[43] Domestic arrangements that were once considered aberrant or deviant have become commonplace and acceptable.[44] Consider contemporary rates of cohabitation outside of marriage, serial marriages, joint custody, single parenthood, same-sex relationships, and transracial and international adoptions. At the same time, the digital revolution has made amateur home video production easier and cheaper than home movie production. Today, the home videomaker, unlike the home moviemaker, can shoot on relatively inexpensive tape for substantial periods of time, record synchronous sound, effortlessly integrate photo stills and moving images, produce a VHS tape or DVD with a computer and without the need for laboratory processing, and screen the finished video on a television set equipped with a VCR or DVD player.[45] Liberated from social constraints that limited whom one could consider "family" and from the economic and technological constraints of producing moving images on celluloid film, the contemporary digital videomaker can more freely push back against the notion that home movies or video should portray family members without revealing the complexity and contradictions of their actual domestic behavior.[46]

Functionally speaking, the home photographer or videomaker can do more with her or his digital camera than has traditionally been done and attempt to "represent[] everyday life" with authenticity,[47] "explore and negotiate the competing demands of [one's] public, communal, and private, personal identities;"[48] "articulate[e] . . . generational continuity over time;"[49] "construct[] an image of home as a cognitive and affective foundation situating [one's] place in the world;"[50] and "communicat[e] family legends and personal stories."[51] Video gives families greater opportunity to explore these aspects of their lives with a discerning and confounding eye. As more schools provide visual literacy training and as the production of video essays becomes technically easier,[52] the subject matter of home video should change—and with it the richness of the material on which victim impact videos are based.

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43 MORAN, *supra* note 26, at 44-48 (arguing that scholars of home visual production overstate the impact of the sentimental model of domesticity associated with the mainstream traditional middle or working-class nuclear family that predominated following World War II).

44 *Id.* at 47.

45 *Id.* at 41-43.

46 *Id.* at 43.

47 *Id.* at 59.

48 *Id.* at 60.

49 *Id.*

50 *Id.* at 61.

51 *Id.*

52 Kevin Kelly, *Becoming Screen Literate*, N.Y. TIMES, Nov. 23, 2008, § 6 (Magazine), at 48.

If the foregoing analysis is applied to the Weir video, the reading of the California Supreme Court proves wholly predictable. The court saw in the video an attractive ("fresh-faced"),[53] well-behaved ("reserved, modest and shy")[54] young woman who enjoyed the benefits and activities associated with a traditional middle-class family ("a stable and loving background").[55] Her future portended fulfillment of the promise of growing up in such a family, as well as the contribution she might make as a person of Native American descent. If there were a less rosy or dark side to Sara Weir's life, it likely would not have been captured by family photos and home movies. If she had been less attractive and more conflicted about her assimilation into a Caucasian family, there might have been no visuals to show that. Even if such evidence existed, it was unlikely to wind up in the family photo album, the holiday highlights home movie, or the victim impact video. Home genre photos, movies, and videos tend to convey the positive or upside of family life for nearly every family member; the Weir video is no exception.

Because of the idyllic, uncomplicated quality of the images contained in home photos, movies, and videos, they are unlikely to convey much specific information about the actual character of a crime victim and her or his contributions to the lives of those left behind. Indeed, 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.[56] Arguably, reliance on the victim's characteristics in sentencing "entrenches relations of power between races, sexes, ages, sexualities, and economic classes. The discourse of 'innocent victims' . . . ignores most victims of violent crimes by requiring them to establish their innocence and their worth as human beings on the basis of their characteristics."[57] This issue will be explored further below.

C. *Optimistic Narrations Like Those in the Home Setting*

In the home setting, the stories that photos, movies, and videos tell

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[53] People v. Kelly, 171 P.3d 548, 571 (Cal. 2007).

[54] *Id.*

[55] *Id.*

[56] *See generally* 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 (1997) (arguing that judges should exercise their discretion to limit the admission of victim impact evidence to prevent the imposition of the death penalty based on the social worth of victims).

[57] Jennifer Wood, *Refined Raw: On the Symbolic Violence of Victims' Rights Reforms*, 26 C. LITERATURE 150, 165 (1999).

are not solely manifestations of the visual images. Even home movies and videos that contain synchronous sound seem to demand external narration.[58] The commentary is usually provided by participants in the activities captured by the photographs or video footage and intimates of those involved. Generally, family albums and movies are shown to relatives and close friends who, in addition to serving as the audience, participate in the construction of the accompanying narration. Indeed, talking back to the screen is allowed.

The narration is typically consistent with the story of optimism and progress that culture considers an appropriate accompaniment for home-made visual images. The family stories get repeated every time the photo album is pulled out or the videotape or DVD is popped into the VCR or DVD player; the "redundancy . . . serves to revive memories, maintain a continuity through time, and reify a sense of belonging, of social affiliation, and of personal existence."[59] Strangers to the family who are familiar with the way in which family photo albums and home movie and video footage are enjoyed can relate to the viewing experience with very little effort. Thus, viewed in the context of the rituals that accompany the screening of a home video, the chronological narration delivered by Weir's mother conveys more content than her mere words suggest.

The defense in *People v. Kelly* argued that the Weir video was irrelevant to the issue at hand, i.e., the impact of Weir's death on her family. According to the prosecution's reply brief in the appeal to the California Supreme Court, Weir's mother told "the jury prior to viewing the videotape that [she] thought of her daughter at different ages when she thought of her loss."[60] The arrangement of images of events in Sara Weir's life in the order in which they occurred was intended to supply the narrative thread by which viewers of the video were to construct her "not just [as] a victim," but "as a person."[61] Sara's biological maturation evidenced her social and psychological maturation. Such evidence of "growth" is a common reading of family photographs and videos:

> Themes of growth, decline, and even renewal seem to emerge from our family photographs because they are part of the very chronology

[58] CHALFEN, *supra* note 34, at 129-30; Peter Forgács, *Wittengenstein Tractatus: Personal Reflections on Home Movies*, *in* MINING THE HOME MOVIE, *supra* note 31, at 47, 48; Richard Fung, *Remaking Home Movies*, *in* MINING THE HOME MOVIE, *supra* note 31, at 35; Nico de Klerk, *Home Away from Home: Private Films from the Dutch East Indies*, *in* MINING THE HOME MOVIE, *supra* note 31, at 148.

[59] CHALFEN, *supra* note 34, at 130.

[60] Brief of Respondent at 43, People v. Kelly, 171 P.3d 548 (Cal. 2008) (S049973). Mrs. Farwell explained: "[W]hen I think of her, I see her sometimes as a 10-year-old, sometimes as a 12[-] or 13-year-old. I see her in different perspectives depending on which memories are coming up." *Id.* at 183 (quoting page 2463 of the trial record).

[61] *Id.*

> of our lives. The movement from birth to maturity to expansion into another generation of children and in-laws is easy to document because it is part of our biology. Such an order can overlook much of our [individual] experience[, however].[62]

The story the Weir video tells relies heavily on the stages of human physical and social development. The story is not unique to Weir, nor does it portray Weir as a complex, multidimensional individual. Perhaps at nineteen her character and personality were still being formed. Perhaps the prosecution feared that if Mrs. Farwell elaborated on the images, the video would be stricken as too manipulative or prejudicial. Voiceover narrations in documentary films are often criticized for telling the viewer exactly what to think. What the chronological narrative lacks in specificity, though, it makes up for in the appearance of neutrality and objectivity—but that appearance is a deceptive one. Without explicitly saying so, the narration reinforces the storyline that Sara Weir was a good daughter who did what good daughters of her family's status are expected to do when they are expected to do it. Sara was the type of child a family could be proud of.

"Sara Nokomis Weir: 1974-1993" is not just a documentary about a life; it is the "creative treatment of the reality" of a murder victim's life.[63] It tells a story that has been pieced together or constructed in ways that appear seamless but are not. Choices were made with regard to the photos and clips to be included and the content of the voiceover. Although Farwell's recitation of events and dates is circumscribed, it nonetheless contains a few contradictions that suggest that Weir's life was more complex than the chronology indicates. For instance, although Sara took up horseback jumping, she stopped after one competition; no explanations are offered. Was her interest in horseback riding connected with her First Nations ancestry? Her mandatory solo performance as a choir member suggests that she was no singer. Why then was she in the choir? Did she have any alternative hobbies or avocations at which she might have been more proficient? Although she was said to be camera-shy, she nonetheless tried her hand at modeling. The viewer might have wanted to know more from the victim's mother about the struggles her daughter experienced in finding something that she was good at and how those struggles affected her character and her physical and emotional vulnerability—traits which the defendant allegedly took advantage of in the view of the California Supreme Court.

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[62] HIRSCH, *supra* note 32, at 118.

[63] IRA KONIGSBERG, THE COMPLETE FILM DICTIONARY 103-04 (2d ed. 1997) (attributing the term to filmmaker John Grierson).

D. *Musical Soundtracks That Tug at the Heartstrings*

If there are any doubts that victim impact videos like Weir's are documentaries, consider their use of musical soundtracks.

In traditional documentaries, music is used to accentuate and underscore points.[64] It "provides an arch of energy that pushes through scenes and shots"—it "create[s] a mood."[65] It picks up on "the tempo, the speed of the cuts, the speed of the dialogue, the rhythm the movie puts [the viewer] in."[66] Music has been used to serve the same purpose in victim impact videos. A musical soundtrack may even substitute for a spoken narration.

Court opinions suggest that the choice of music may be a prejudicial element of victim impact videos. In *Salazar v. State*, for example, the soundtrack "include[d] such selections as 'Storms in Africa' and 'River' by Enya, and conclude[d] with Celine Dion singing, 'My Heart Will Go On,' from the movie *Titanic*."[67] The Court of Criminal Appeals of Texas found the music to be consistent with the tone and tenor of the visuals, which were "entirely appropriate for a memorial service."[68] The state argued that the music was "not relevant," but not "unduly prejudicial."[69] The court, however, concluded that the "background music greatly amplified the prejudicial effect of the original error [to admit the visual portion of the video]."[70] On remand, the defendant was awarded a new sentencing hearing because of the combined prejudicial effect of the video's audio and visual elements.[71]

People use music to express sentimental feelings about the dead in much the same way that they select and send commercial sympathy cards containing moving visual images and touching messages. The music speaks for them like a greeting card does. The "culture of sentiment" is fully commercialized and "sentimental eloquence" has been outsourced to professional writers and musicians.[72] People have also adopted the language and tone of commercial expressions of grief

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[64] Lisa Leeman, *Composers Confab: Creating the Best Score for Your Film*, DOCUMENTARY, Summer 2008, at 36, 40, *available at* http://www.documentary.org/content/composers-confab-creating-best-score-your-film (discussing documentary scoring with a group of composers).

[65] *Id.*

[66] *Id.* at 41.

[67] *Salazar I*, 90 S.W.3d 330, 333 (Tex. Crim. App. 2002).

[68] *Id.* at 333-34 ("The music, too, is appropriately keyed to the various visuals, sometimes soft and soothing, then swelling to a crescendo chorus.").

[69] *Id.* at 338.

[70] *Id.* at 339.

[71] Salazar v. State (*Salazar II*), 118 S.W.3d 880, 885 (Tex. App. 2003).

[72] *See* BARRY SHANK, A TOKEN OF MY AFFECTION: GREETING CARDS AND AMERICAN BUSINESS CULTURE 23 (2004).

when writing condolences of their own. Given how little practice people have at expressing their innermost emotions in public, some may find it difficult to describe in their own words the loss that they experience due to a loved one's death; nor can they elaborate on the many acts of kindness, courage, intelligence, or skill that their loved one performed before dying. Thus, for ease of expressing their feelings, proponents of victim impact videos tell their stories through music that mainstream culture deems appropriate for the remembrance of the dead.

Depending on the listener's perspective, music colors or taints the visual material that it accompanies by shaping that material's interpretation. As such, what is heard (the soundtrack) may sometimes be in tension with what is seen (the images). Music can insert the imaginary into a video that appears to have captured reality. Take the choice of "Where Are You Going?" by Dave Matthews Band as the soundtrack for a memorial video for a teenage victim of domestic abuse.[73] The song's chorus contains the following lyrics: "Where you are is where I belong / I do know, where you go, is where I wanna be . . . ."[74] This is a sentiment that a person in mourning might genuinely feel or claim to feel, but most listeners would hope that the sentiment was meant figuratively and would dismiss it as hyperbole. The mourner avoids the problem associated with the sentiment if a pop song expresses the idea on the mourner's behalf.

The choice of music used in victim impact videos is mostly employed to enhance or exaggerate the impact of the video. For example, it may be used to prompt the judge or jury to draw conclusions about the victim's character. Social psychological research suggests that musical tastes are a reflection of a person's character or personality.[75] Notions linking musical taste to social class are widespread but of less scientific merit. It would not be appropriate or sensible to embark on an in-depth analysis of the social psychology of popular music appreciation during the sentencing phase of a criminal proceeding. In lieu thereof, proponents of victim impact videos rely on common assumptions or stereotypes that link specific kinds of music with class status and individual character traits. As a result, a judge or jury would be unlikely to learn that the victim featured in an impact video preferred music that was eccentric, raucous, or otherwise inappropriate for a memorial service.

Music used in a victim impact video would have genuine probative value if it accurately reflected the victim's musical tastes, musical appreciation, or performance activities. The link between the victim's

[73] DAVE MATTHEWS BAND, *Where Are You Going*, *on* BUSTED STUFF (RCA Records 2002).

[74] *Id.*

[75] *See generally* ADRIAN NORTH & DAVID HARGREAVES, THE SOCIAL AND APPLIED PSYCHOLOGY OF MUSIC 102-117 (2008).

individuality and character and her or his choice of music should be made explicit. It would also be probative to include music that actually played a role in the relationship between the victim and her or his family and friends. Furthermore, music may be the most obvious clue to the subjective, constructed nature of the video's content. Defense attorneys should so argue, the judge should acknowledge as much, and the jury should be so informed.

Copyright laws may be the biggest impediment to the use of music in victim impact videos. Screening a video that contains extensive excerpts from copyrighted recorded music during a criminal proceeding in open court is arguably a public performance that requires licenses.[76] Posting the video on a video-sharing website and then showing it in court would not necessarily obviate the problem. Not all websites that host consumer-generated videos containing copyrighted music have the necessary licenses to stream the material.[77] Even if use of the music in the web version of a video is licensed, the authorization might not extend to the projection of the video on courtroom screens. However, the fair use exception to the copyright laws would seem to permit the unlicensed public screening of a victim impact video containing limited snippets of copyrighted music if the music illustrates an argument or claim about who the victim was and what made her or him that way.[78] The music itself would not be intended to entertain, engage, or move the viewer, but to inform the viewer of facts relevant to an assessment of

[76] *See* MICHAEL C. DONALDSON, CLEARANCE & COPYRIGHT 247 (2d ed. 2003) ("Unless you only show your film in a classroom, clearing the music you are going to use in your film is an absolute necessity. *No exceptions*.") (emphasis added). The underlying composition and the recording of it are subject to separate copyrights and require separate licenses. *See id*. at 248-49 ("Actual ownership of music rights can be a very complex question, since . . . a copyright can be divided into separate parts with each owned individually or by several parties. Generally, a writer sells or assigns the copyright in his song to a music publisher. A music publisher manages the right to reproduce the music . . . .) The screening of a video containing a copyrighted recording would be considered a public performance because it occurs in a place that is open to the public or "where a substantial number of persons outside of a normal circle of a family and its social acquaintances" is present. 17 U.S.C. § 101 (2006). The fact that there is no expectation that the recording artists will be paid and that viewers will not be charged admission does not exempt the screening from the purview of the copyright laws. 17 U.S.C. § 110(4) (2006).

[77] Ben Sheffner, *Expect to See Greater Clarity on the Legality of Fan-Created Music Videos*, BILLBOARD, Jan. 23, 2010, at 26 (summarizing pending infringement litigation against video-sharing sites that post online, fan-created videos that contain recorded music but do not have agreements with copyright holders).

[78] CENTER FOR SOCIAL MEDIA, SCHOOL OF COMMUNICATION, AMERICAN UNIVERSITY, DOCUMENTARY FILMMAKERS' STATEMENT OF BEST PRACTICES IN FAIR USE 4-5 (2005) (asserting that fair use is available when "quoting copyrighted works of popular culture to illustrate an argument or a point"). Fair use is based on four criteria: the purpose and transformative nature of the use of the copyrighted work, including "whether such use is of a commercial nature or for nonprofit educational purposes"; "the nature of the copyrighted work"; the "amount and substantiality" of the portion of the work used in relation to the whole; and "the effect of the use on the potential market for or value of the copyrighted work." 17 U.S.C. § 107 (2006).

the victim's individuality and contributions to the lives of others; the music is ancillary to the point being made by the video. Despite the music's limited purpose, though, use of entire songs in the video's soundtrack would likely not qualify as fair use. The source of the musical material should probably also be identified.

E. *Limited Comparison with Mitigation Videos*

Impact evidence is intended to show that the victim was a unique individual, much like mitigation evidence is introduced to humanize and individualize the defendant who is about to be sentenced. Indeed, offsetting the effect of the defense's humanizing mitigation evidence is one justification offered for the admission of victim impact evidence.[79] Because there are few mitigation videos to compare with victim impact videos for the purpose of evaluating this rationale, this Article will consider clemency videos. Although they are produced after sentencing, clemency videos make similar arguments.[80]

Of course, the incentives for a victim's loved ones to reveal family secrets and expose unsavory truths are directly opposed to those motivating a defendant's relatives with regard to mitigation. The defense offers mitigation evidence to contextualize the defendant's behavior and to convince the trier of fact to mete out a reduced or less severe verdict than the one sought by the prosecution. Mitigation evidence is intended to show that the defendant is worthy of a less severe sentence because of who she or he is and what she or he has endured. The intent is not to justify the crime, but to attribute it to biological, psychological, social, or economic influences that were beyond the defendant's control and which severely reduced her or his life choices.[81] Mental retardation, mental or physical illness, youth, neglect, and sexual or emotional abuse are common bases for mitigation claims. In contrast with victim impact evidence, a mitigation defense demands disclosure of a family's most private information and self-criticism on the part of relatives who witnessed, experienced, or

[79] *See* Payne v. Tennessee, 501 U.S. 808, 825-26 (1991) (arguing that it is not unfair to remind the jury about the victim's uniqueness when it is considering mitigating evidence that presents the defendant as a individual). 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. *See* Bandes, *supra* note 23, at 409-10.

[80] The Penn Program on Documentaries and the Law maintains a national archive of clemency videos made on behalf of capital defendants, lifers, and others. *See* Penn Law—A National Archive of Clemency Videos, http://www.law.upenn.edu/academics/institutes/documentaries/clemencyVideosNationalArchive.html.

[81] Russell Stetler, Mitigation Evidence in Capital Cases 12 (unpublished manuscript, on file with the Cardozo Law Review).

contributed to the ill-treatment, abandonment, or physical or psychological deterioration that the defendant suffered prior to the crime. Moreover, mitigation demands "concreteness" and detail, not "conclusory labels" or generalities.[82] Naturally, the defendant's family and acquaintances might be tempted to obfuscate or color the truth, but there is a danger for the defendant if they pursue that course.[83]

Victims' survivors are also anxious for the actors in the criminal justice process to know who their loved ones were, but within limits. Survivors might experience obstacles if the courts required victim impact videos to recount memories or tell specific stories (comparable to those offered by mitigation witnesses) as opposed to merely invoking idealized visual and musical representations of the victim, or clichés and stereotypes that are part and parcel of culturally acceptable depictions of the dead.[84] To dig deep and come up with a richly textured narrative and to support it with visual evidence may require more reflexivity and creative effort than is warranted by the ultimate effect of a victim impact video. Such exertion may take the survivors into territory fraught with emotion or yield testimony that would be considered unduly prejudicial. Alternatively, the quest for reflexivity might cause the video to stray into a minefield that would undermine the positive impression of the victim and work against the prosecution's goal of establishing the basis for a stiffer sentence. Strategically speaking, it probably makes sense for the state to limit victim impact videos to the realm of the ideal that is inhabited by home videos and family photo albums. But this means that compared to mitigation videos, victim impact videos will have very limited, if any, probative value with which to offset a significant prejudicial impact.

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[82] *Id.* at 20.

[83] Compare the clemency video of Vernon Evans, Jr. of Maryland (whose father refused to admit that he had severely disciplined his son) with that of Kevin Stanford (whose mother describes her pattern of neglect that allowed her son to become the victim of sexual abuse by multiple perpetrators). Both videos are included in the clemency video archive of the Penn Program on Documentaries and the Law. *See* Penn Law—A National Archive of Clemency Videos, http://www.law.upenn.edu/academics/institutes/documentaries/clemencyVideosNationalArchive.html.

[84] Not everyone can compose a coherent impact or mitigation statement or cobble together a slide show or video that does a crime victim or defendant justice. The survivors and relatives may lack the verbal skills or memories to describe challenges that the victim or defendant has overcome, strengths of character, acts of kindness to family and friends, good deeds done for strangers, etc. Not every family will have kept the visual evidence of a life well-lived: report cards, certificates of achievement, diplomas, badges of merit, drawings, homemade gifts, trophies, plaques, work uniforms, and images of scout outings, church choirs, school plays, athletic competitions, etc. Of course, prosecutors could supply technical assistance to help survivors produce a victim impact video. The defense may not be as well financed.

F. *Rehabilitating Less Than Ideal Victims*

In addition to clichés about ideal family life, there are other stereotypes and biases that inhere in the family photos and footage used in victim impact videos that are likely to go unrecognized or unacknowledged by the courtroom audience. The mere fact that photos were taken or that home movies or videos were shot is taken to be a sign of affection and familial closeness, though such behavior may be more indicative of class status and income than actual regard. Middle-class victims are more likely to have visual evidence to present than poor and working-class victims or defendants for whom cameras are a luxury.

Furthermore, inequalities associated with age and kinship may affect the content of the homemade visuals used in victim impact videos. Much of the forgoing discussion has been premised on the assumption that the home photographer, cameraperson, or editor is an adult who occupies a superior status in the family hierarchy and has an interest in assuring that the family unit is portrayed in the most favorable light. Digital video technology has changed this assumption. Cheaper, easy-to-operate cameras, reusable tapes, and computerized editing have made it possible even for children and adolescents to capture moving images of family life—images that are potentially more complex, contradictory, and critical than those traditionally sought by adult family members.[85] Home video footage and photographs, shot by children and revealing pathological aspects of family life, have found their way into feature-length documentaries like *Capturing the Friedmans*[86] and *Tarnation*.[87] Similar material is unlikely to wind up in victim impact videos except in cases of intra-familial crime, where the perpetrator is also a relative.[88]

Most importantly, visual images may focus attention on matters that either cannot be spoken about in court because they are irrelevant, or are not spoken about despite being highly relevant. The most important of these matters is race, which is especially significant in cases where the victim is a white female and the defendant is a black or

[85] Marsha Orgeron & Devin Orgeron, *Familial Pursuits, Editorial Acts: Documentaries After the Age of Home Video*, 60 VELVET LIGHT TRAP 47, 48-51 (2007).

[86] CAPTURING THE FRIEDMANS (Magnolia Pictures 2003) (recounting the disintegration of a Long Island family in the wake of the prosecution of the father and youngest brother for molestation of students in their after-school computer class).

[87] TARNATION (Wellspring Media 2003) (using Super 8 footage, VHS videotapes, photographs, and mobile phone footage to recount a childhood marked by the mental illness of the director Jonathan Caouette's mother); *see also* Orgeron & Orgeron, *supra* note 85, at 51-56 (arguing that David Friedman used his video camera to foment chaos in his disintegrating family while Jonathan Caouette used his camera to figure out where he belonged).

[88] *See, e.g.*, *infra* Part III (discussing the video submitted in *State v. Leon*, a case involving domestic violence).

Hispanic male. 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.[89] 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.[90] Of course, the defense has to deal with the possibility that bigotry will taint the verdict whether or not visual evidence is introduced. However, the potential prejudice associated with a victim impact video may be sufficient to overcome its probative value.

Conversely, there are people who are excluded from our collective notion of the "genuine" or "worthy" victim. These are victims who might be considered deserving of their fates. Empirical research on the effect of victim impact evidence has shown that jurors view negatively individuals who have refused to fulfill traditional bourgeois, patriarchal status roles or who have chosen to engage in violent, risky, antisocial, or illegal behavior. For example, interviews of California jurors who decided capital cases revealed that jurors who sat on panels that sentenced a defendant to life in prison (as opposed to death) were more likely to view the victim as having played a role in or being responsible for the crime, not being innocent or helpless, having an unstable or disturbed personality or "a problem with drugs or alcohol," being a loner with few friends, not being admired or respected in the community, or being too careless or reckless.[91] These factors, which relate to the randomness of the crime and whether the victim was engaged in mundane, everyday activities (as opposed to risky behavior) at the time, impacted the jurors' identification with and empathy for the victim; the less random the crime or the less mundane the victim's activities, the less the jurors identified with the victim and the less likely they were to render the harshest sentence.[92]

There is some overlap between conduct cited by jurors as evidence of a victim's responsibility for her or his demise and activities

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[89] *See* Carey v. Musladin, 549 U.S. 70 (2006). It has been argued that performances by courtroom spectators may be so prejudicial and misleading that the opposing side should be allowed to offer testimony to counter it. Pamela H. Bucy, *Courtroom Conduct by Spectators*, 27-35 (University of Alabama Public Law Research Paper No. 1271765, 2009), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1371765.

[90] Kennedy, *supra* note 21, at 1096-98.

[91] Scott E. Sundby, *The Capital Jury and Empathy: The Problem of Worthy and Unworthy Victims*, 88 CORNELL L. REV. 343, 378-81 (2003) (summarizing interview results with jurors who sat on both death and life juries).

[92] *Id.* at 367-69.

associated with membership in low-status or "deviant" groups.[93] Although social stratification is dynamic, fluctuates with the context, and may be marked by ambiguous implications, currently the categories of victims of homicide and other crimes who might *not* be considered bona fide or blameless include: intimate partners and family members of the accused; female victims of sexual violence; blacks and Latinos, especially urban males who are young and poor; prostitutes and other sex workers; people who are lesbian, gay, bisexual, or transgendered; the homeless; drug addicts and alcoholics; and intellectually disabled or mentally ill adults.[94] Assessments of deviance are usually accompanied by stereotypes or inaccurate estimations of the risks that those labeled "deviant" pose to society. Victim impact evidence might increase the admirability and respectability of victims who fall into one of these categories in the assessments of jurors.[95] Victim impact videos that tend to revolve around family life might be very effective at humanizing and legitimizing victims whose negative images result from their falling outside of the protective umbrella of conventional family relations

[93] *See generally* Wood, *supra* note 57, at 163-65 (arguing that the Supreme Court's emphasis on innocent victims which is race- and gender-based ignores the majority of those affected by violence and entrenches majority group power).

[94] *See* Myrna Dawson, *Rethinking the Boundaries of Intimacy at the End of the Century: The Role of Victim-Defendant Relationship in Criminal Justice Decisionmaking over Time*, 38 LAW & SOC'Y REV. 105 (2004) (reporting findings of an empirical study of murders in Toronto over a twenty-three-year period that showed that defendants' treatment at various stages of the criminal justice process varied with their relationship to the victim; those who killed intimate partners, family members, and friends received more lenient treatment than those who killed acquaintances and strangers, while unemployed victims were less likely to be associated with a first-degree murder charge); David R. Karp & Jarrett B. Warshaw, *Their Day in Court: The Role of Murder Victims' Families in Capital Juror Decision Making*, *in* WOUNDS THAT DO NOT BIND: VICTIM-BASED PERSPECTIVES ON THE DEATH PENALTY 275, 287, 287-88 (James R. Acker & David R. Karp eds., 2006) [hereinafter WOUNDS THAT DO NOT BIND] (reporting the results of an empirical study using the entire database of the Capital Jury Project that showed that jurors paid attention to the suffering of the families of white victims during deliberations while discounting the suffering of the co-victims of nonwhites); Christopher J. Lyons, *Stigma or Sympathy? Attributions of Fault to Hate Crime Victims and Offenders*, 69 SOC. PSYCHOL. Q. 39, 48-50 (2006) (whereas college student survey respondents exhibited sympathy toward black victims of hate crimes perpetrated by whites, gays and lesbians were assessed as being more responsible for their victimization than heterosexuals depending on how negative the respondent's attitudes towards homosexuals were); Cassia Spohn, Dawn Beichner & Erika Davis-Frenzel, *Prosecutorial Justification for Sexual Assault Case Rejection: Guarding the "Gateway to Justice,"* 48 SOC. PROBS. 206 (2001) (prosecutors anticipating adverse jury responses rejected cases where there was evidence of risk-taking by the victim, while victims withdrew cooperation where the defendant who was a stranger claimed consensual conduct); *see also* Tania Tetlow, *Discriminatory Acquittal*, 18 WM. & MARY BILL RTS. J. 75, 84-95 (2009) (analyzing evidence of discriminatory jury acquittals in cases involving racial and/or gender-based violence in the context of an examination of governmental under-enforcement of the criminal laws which the author argues should be held unconstitutional).

[95] *See generally* Theodore Eisenberg, Stephen P. Garvey & Martin T. Wells, *Victim Characteristics and Victim Impact Evidence in South Carolina Capital Cases*, 88 CORNELL L. REV. 306, 306-11, 322-35 (2003) (reporting on an empirical analysis of a survey of capital case jurors that found no evidence that victim impact evidence increased death sentence rates).

believed to make life valuable and death an enormous loss.[96]

The stigmatization that supports a juror's negative assessment of the victim's character and conduct is bound up with and reinforced by visual images that accompany reports of the victim's murder in the news media. The images of unsympathetic victims almost never situate them in a traditional family setting; indeed, an inability to sustain a "normal" family life is an integral part of their derogatory labeling. For instance, the media depicts dead, young male minority victims and dead, young male minority law offenders in nearly indistinguishable ways.[97] Relatives and friends of both cohorts resist media characterizations of their loved ones as "guilty at birth" by wearing tee-shirts bearing the likenesses of the deceased, holding candlelight vigils, and erecting curbside memorials that attest to their loved ones' living on in the memories of those who survive them.[98]

However, the strategic shaping of a victim impact video to rehabilitate a victim is not limitless, as *Salazar v. State*[99] illustrates. At the time of his death, the victim in *Salazar* was a drug dealer and burglar who participated in a drug transaction with the man who hired the defendant, a sixteen-year-old special education student, to commit the murder. The victim was beaten with a baseball bat and choked.[100] The victim's family members had every reason to try to paint their loved one in the most positive light, as the right to grieve the death of a child whose life is devalued because of criminal behavior will often be discounted.[101] A favorable assessment of their loss depended upon rehabilitating their child in the eyes of the judge or jury.

The prosecution introduced a seventeen-minute video consisting of a "chronological montage" of 140 still photographs that depicted the life of the victim; in more than half of the photos the victim was a baby or little boy.[102] The prosecutor invoked the video while referring to the

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[96] *See* JERMYN, *supra* note 41, at 82-83, 92-93 (commenting on the practice of a British reality crime show to situate all victims, but particularly female victims of sexual assaults, within the context of conventional family life); *see also* Odin, *supra* note 40, at 262 (noting that a home movie's significance changes when it is read in different spatial, cultural, ethnic, or social contexts).

[97] *See* Deborah E. McDowell, *Viewing the Remains: A Polemic on Death, Spectacle, and the [Black] Family*, *in* THE FAMILIAL GAZE 153, 157-60, 162-63 (Marianne Hirsch ed., 1999) (describing how victims are photographed sprawled on the pavement, covered by a sheet with their sneakers sticking out, or lying in a coffin with their mothers [and not their fathers] crying close by).

[98] *Id.* at 170; *see also* CARLA F. C. HOLLOWAY, PASSED ON: AFRICAN AMERICAN MOURNING STORIES 144-45 (2002) (describing the mourning rituals of young urban blacks, particularly gang members).

[99] *Salazar I*, 90 S.W.3d 330 (Tex. Crim. App. 2002).

[100] *Salazar II*, 118 S.W.3d 880, 883 (Tex. App. 2003).

[101] Martha R. Fowlkes, *The Social Regulation of Grief*, 5 SOCIOLOGICAL FORUM 635, 644-45 (1990).

[102] *Salazar I*, 90 S.W.3d at 333.

deceased as "a good kid."[103] The court pronounced it appropriate for a memorial service. It was not very probative evidence, however, since the victim was an adult at the time of his murder. Though, as one commentator has suggested, the childhood photos of the victim might have arguably "show[n] the uniqueness of the victim—that he did not spring full-grown into life, but had a childhood during which his parents and siblings, friends and relatives, knew and loved him[,]"[104] they were hardly evidence that his family's early love for him had survived to the time of his death and had brought heartache and sorrow. The court was concerned that the sheer length of the video and its emphasis on the victim's formative years might "unconsciously mislead the jury" into thinking that the defendant had "murdered an angelic infant," a "laughing, light-hearted child," or "the young boy hugging his blond puppy dog."[105]

It appears that the video's chronology did not make the crucial points necessary to turn the subject into a tragic figure and a deserving victim.[106] Given his involvement in drug dealing, the victim's life seemingly took a turn that the video should have explained. His status as victim would have been more assured if his deviation from the moral values inculcated during a conventional upbringing had been shown to be somehow beyond his control. Evidence that the subject was a good person despite being a drug dealer would also have legitimated the claim of victimization. Indeed, both sides were seeking empathy. The defense offered mitigation evidence that portrayed the defendant as no gang member or drug user, but rather a "slow" student "who was easily influenced, but much loved by his family."[107]

Admitting victim impact videos to rehabilitate individual victims or groups of victims who are unjustly stigmatized might be challenged on the ground that it will result in more sentences of death and life in prison without the possibility of parole (LWOP). For example, empirical research has indicated that racial disparities in sentencing

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[103] *Id.* at 334 ("In sum, [the video] is a masterful portrait of a baby becoming a young man. It is also extraordinarily emotional.").

[104] Kennedy, *supra* note 21, at 1090.

[105] *Salazar I*, 90 S.W.3d at 337.

[106] The portrayal of Emma Caldwell, a prostitute who was murdered in Glasgow, by the British reality television program "Crimewatch UK" illustrates how a victim impact video might deal with a person who belonged to a stigmatized group. JERMYN, *supra* note 41, at 96-97. "Crimewatch," like "America's Most Wanted," is directed at assisting the police to apprehend the perpetrators of unsolved crimes. "Crimewatch" started its 2005 segment on Caldwell with home photos of her childhood in a respectable family. Her life took a turn for the worse when her sister died of cancer and her boyfriend gave her heroin to cope with her loss. Emma's downward spiral is reflected in a sequence of portraits. A subsequent report played audio of a 999 call made by Emma to the authorities to report an environmental condition that was dangerous to children in the community; this confirmed that, despite her status as a drug addict and prostitute, Emma was a good person. *Id.*

[107] *Salazar I*, 90 S.W.3d at 334.

depend less on the race of the perpetrator than on the race of the victim.[108] Victim impact videos, like victim impact evidence in general, could reduce race-based sentencing disparities by leveling up—i.e., putting victims from valued and devalued groups on the same plane.[109] The use of victim impact videos would be much less suspect on due process or equal protection grounds if death and LWOP sentences were off the table. Of course, the capacity of members of devalued groups actually to produce videos may be limited because of a lack of funding or the absence of material with which to create a visual impact statement.[110]

G. *Summary*

Victim impact videos, particularly those that originated as memorial tributes, have a number of features that negate or limit their probative value in sentencing hearings. Rather than presenting evidence of the victims' individuality and the impact of their death on survivors, the videos fulfill the obligations of those survivors to remember and honor their loved ones. They tend to be idealistic in their treatment of the victim and idyllic in their treatment of family life. The narration tends to convey the optimism that accompanies the sharing of photographs, movies, and videos in the home setting. Moreover, victim impact videos tend to have musical soundtracks that are appropriate for memorial tributes, but not for evidence in a capital proceeding; the music is sentimental and may have little to do with the tastes or behavior of the victim. Although victim impact videos are intended to offset the impact of mitigation evidence introduced by the defendant, the comparison is misguided. Unlike the prosecution and the proponents of victim impact videos, the defense has little or no incentive to idealize family life or to hide family secrets. The only exception to these criticisms may be video evidence about victims who come from denigrated groups.

Another important objection to victim impact videos is the difficulty defendants encounter in challenging or defending against them. This is a source of prejudice that has constitutional implications. The problem would be lessened if the videos were more specific and relevant.

The next Part of this Article discusses a concrete case in which a

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[108] *See* McCleskey v. Kemp, 481 U.S. 279, 286-89 (1987) (describing the results of an empirical study undertaken by Professor David C. Baldus which concluded that the race of the victim was a powerful predictor of the imposition of the death penalty); *see also* RANDALL KENNEDY, RACE, CRIME, AND THE LAW 327-43 (1997) (analyzing the *McCleskey* decision's discussion of the Baldus study).

[109] KENNEDY, *supra* note 108, at 341, 344-45.

[110] *See supra* note 84.

prosecutor introduced an impact video of a victim of domestic violence during the sentencing hearing, only to have the defendant attack the victim's character. At the same time, the defense failed to respond to the video in a way that might have strengthened the case for mitigation.

III. "ANGIE" AND THE DEFENDANT'S RESPONSE TO VICTIM IMPACT VIDEOS

On the morning of May 19, 2003, Abel Leon, just released from prison after reaching a plea bargain with a district attorney who should have known better, went to the apartment where his estranged wife was living with their three young children.[111] Leon had been in jail awaiting sentencing for domestic violence charges and was subject to a no-contact order. Maria Evangelina Castellanoz Leon, who was called Angie, had asked that he not be released. When her mother came to pick her and the kids up for their morning commute, Angie rushed to get herself and the kids in the car. Leon struck Angie, grabbed her by the hair, and dragged her out of the vehicle. When his mother-in-law attempted to intervene, he pulled a gun on her and then turned it on Angie. The children were screaming. At Angie's insistence, her mother drove off and called the police. Back inside of the apartment, Leon took Angie to the children's bedroom and shot her three times at close range on their daughter's bed—twice in the head and once in the chest. Leon was charged with first degree murder and entered an Alford plea, whereby he admitted that the state had enough evidence to convict him and nothing more. He told a pre-sentence investigator that he was innocent of the crime.

Angie's mother, Sylvia Flores, testified at the sentencing hearing. She described the events surrounding the murder and the impact it had

[111] Angie Leon's mother, Sylvia Flores, brought an equal protection lawsuit against the prosecutors who released Leon on a plea agreement. *See* Flores v. Young, No. CV05110SBLW, 2005 WL 3271841, at *1 (D. Idaho Dec. 1, 2005) (upholding equal protection and state law claims based on allegations that the "defendants treated domestic violence cases less seriously than other types of cases" and failed in their obligations to control Abel Leon). The local county prosecutor had promised to make changes in the way his office handled domestic violence matters. When it became clear from his deposition testimony that he had not, a citizens group composed of volunteers investigated Angie's murder and issued a negative report. Sylvia Flores won a $925,000 settlement for Angie's children. Sandra Forester, *Insurer: Settlement in Leon Slaying Is High*, IDAHO STATESMAN, Aug. 17, 2006, at 7. The district attorney was defeated in the next election. Kristin Rodine, *Despite Controversies, Outgoing Canyon Prosecutor Says He's Proud of His Tenure*, IDAHO STATESMAN, Jan. 9, 2009, at 1 (describing the Leon case as the "major turning point" in the prosecutor's "popularity and political future").

Latinas are said to encounter distinct difficulties in seeking to deal with and escape domestic violence at the hands of Latino men. *See* Jenny Rivera, *Domestic Violence Against Latinas by Latino Males; An Analysis of Race, National Origin, and Gender Differentials*, 14 B.C. THIRD WORLD L.J. 231, 240-42 , 250-51 (1994).

on herself, her sons, and her grandchildren, who were seeing a trauma counselor. The children's drawings were used to support the counselor's testimony. Angie's father took the stand, as did the coroner. Five written victim impact statements were also submitted. In the course of her testimony, Sylvia Flores offered for the judge's consideration a four-and-a-half minute video about Angie. The first part of the video consisted of clips of Angie with her children and other family members. Angie is shown cutting a birthday cake, watching her children open Christmas presents, and bouncing her baby. One of the sequences includes an individual whom the viewer surmises is the defendant. He is holding his older daughter and his son, who is wearing a shirt of a nearly identical color to his. Angie refers to father and son as "her boys." The defendant abruptly ends the scene; it is not clear whether the precipitous conclusion of this sequence is due to editing or the defendant's behavior. The latter part of the video consists of a still photo montage set to Tori Amos's cover of the Rolling Stones ballad "Angie."[112] The montage ends with a photo of the three children, bundled up, smiling, and sitting on their mother's grave.

Abel Leon responded with mitigation evidence that was unfortunately ineffective in humanizing him or convincing the judge that he deserved a more lenient sentence. The defense presented expert testimony from a psychologist whose specialty was Latino and Hispanic mental health. He explained that the defendant's life history and background included extenuating or mitigating circumstances that influenced his conduct and should be taken into consideration in sentencing him. Ideally, such evidence would have shown that the defendant was not a stereotype, but rather a unique individual deserving of leniency.[113] As an undocumented, predominately Spanish-speaking immigrant from Mexico, Abel Leon assertedly suffered from various forms of stress associated with the acculturation or assimilation process, which the psychologist described in detail.[114] In Leon's case, these stresses were manifested by poor performance in school and early substance abuse. The psychologist reported that cultural conflict was evident in Leon's relationship with Angie, who was born and educated in the United States and spoke English proficiently. Leon said that

[112] TORI AMOS, *Angie*, *on* CRUCIFY (Atlantic Records 1992); *see also* The ROLLING STONES, *Angie*, on GOATS HEAD SOUP (Atlantic Records 1973).

[113] *See* Scharlette Holdman & Christopher Seeds, *Cultural Competency in Capital Mitigation*, 36 HOFSTRA L. REV. 883, 887, 922 (arguing that mitigation requires a culturally competent, detailed examination of the social history of the individual defendant that will eliminate stereotyping).

[114] The stresses experienced by Abel Leon resulted from extended periods of family separation due to staggered migration to the United States, a low level of acculturation and strict adherence to traditional values, a high incidence of cultural conflict, limited English proficiency, employment difficulties, and an uncertain immigration status.

Angie referred to him as "a wetback"[115] and that his mother-in-law did not like him because of his immigrant status. Moreover, Abel resented the insinuation that the only reason he and Angie were married was to allow him to obtain legal status. Finally, the psychologist attributed Abel's claim that he was somewhere else when Angie was murdered to "machismo" and "berguenca,"[116] a cultural mechanism that dictates silence and secrecy in circumstances where disclosure of the truth would bring guilt and shame upon oneself and one's family.

In addition, the defense put the victim's character and mental stability at issue. The psychologist discussed Angie's mental health; Abel Leon's mental health had apparently been taken off the table. The witness suggested that the intensity of Angie's relationship with Abel, her first pregnancy at sixteen, and her marriage at seventeen—not long before the birth of her second child—suggested that her self-worth was tied up with her ability to procreate rather than pursue a career or continue her education. In the psychologist's view, her pursuit of marriage and motherhood represented a form of mental illness. Over the prosecution's objections, the psychologist further testified that Angie was taking "Vicodin for pain relief and Prozac for an apparent depression,"[117] which Abel claimed he hid to prevent Angie from overdosing. The psychologist concluded his testimony with the assessment that Abel and Angie, beset on the one side by acculturation problems and on the other by mental illness, were "not equipped to be getting married and having three children."[118]

The prosecution responded with a cross-examination of the psychologist that called into doubt Abel Leon's feelings of shame and guilt over the murder of his wife and his regard for his children who saw him assault their mother. The psychologist denied blaming Angie for her own murder. He further denied that he was offering an excuse for Abel's conduct. Sylvia Flores was recalled to the stand. She testified that Angie started taking Prozac after the birth of her son, around the time that Abel Leon's pattern of domestic violence began. It lasted for almost five years.

In his summation, the prosecutor attributed Abel Leon's elaborate denial of his involvement in the murder to a lack of remorse and guilt. He pointed out that Angie had kept the family going by working two jobs, going to school, and taking care of the children. Court records showed that Abel, on the other hand, had a history of sporadic employment and episodes of drug and alcohol abuse that were brought

[115] Transcript of Sentencing Hearing at 132, State v. Leon, 132 P.3d 462 (Idaho 2006) (on file with the Cardozo Law Review).

[116] *Id.* at 122, 129.

[117] *Id.* at 137.

[118] *Id.* at 141.

to the attention of the authorities. The prosecutor argued that a fixed life sentence would insure the safety and security of the children who were afraid of their father.

Defense counsel focused on the courtship and marriage of Abel and Angie, which he characterized as "a classic codependent relationship."[119] He went on to describe the murder as the product of both passion and rejection. The heart of his argument was that "[t]his tragic death was the result of just a terribly immature relationship that was burdened with the responsibility of children, lack of education, poor finances, inability to seek help and appropriate intervention, at least as far as marriage counseling earlier on, and certainly some cultural issues."[120] He asked that the court not give the defendant a fixed life sentence so that Abel would be able to obtain supervised release after maturing, educating himself, and "demonstrat[ing] that he can be a productive, law-abiding citizen."[121] The defendant spoke on his own behalf. He indicated that he took the plea in order to avoid a jury trial, which would inflict trauma and suffering on his children.

The judge would have none of Abel Leon's case for mitigation. The effort to foist all or part of the blame on Angie backfired. The judge concluded that Abel totally lacked any prospect of rehabilitation. He sentenced Abel Leon "to the custody of the State Board of Corrections for a period of [his] natural life, fixed and determinant with no indeterminate portion of that sentence."[122] That meant that Abel would "not be eligible for parole or discharge or credit or reduction of [his] sentence for good conduct."[123]

The Court of Appeals of Idaho affirmed both the introduction of the victim impact video and the sentence.[124] First, it said that "a victim's right to be heard is not limited to only verbal or written statements under oath."[125] Second, courts have "discretion . . . to consider a wide range of information at sentencing."[126] Third, the video, which "showed Angie interacting with her children and other family members,"

> conveyed information relating to Angie's personal characteristics and gave illustration to her mother's statements concerning the impact upon Angie's family. To an extent, the [video] served to convey the magnitude of the loss suffered by Angie's children, who were too young to present verbal or written statements to the

[119] *Id.* at 174.
[120] *Id.* at 176.
[121] *Id.* at 177.
[122] *Id.* at 189.
[123] *Id.*
[124] State v. Leon, 132 P.3d 462 (Idaho 2006).
[125] *Id.* at 466.
[126] *Id.*

court.[127]

The picture of the children—cheerful, smiling, and sitting on their mother's grave—"could not have inflamed the court's passion more than did the facts of the crime."[128] Though the music "arguably did not constitute a valid exercise of a victim's right to be heard," it was not "unduly inflammatory or manifestly unjust."[129]

Once again, the court found more information in the video than other viewers might discern. Though the video conveyed that Angie was a loving young mother (at least in the context of a home video), her character was in dispute—as was her uniqueness as an individual—in ways that the video did not address. The video might have contained more information about her intelligence, educational pursuits, and desire for early motherhood to counter the defense's effort to paint her as a stereotypical, unacculturated Latina. There was no narration in the video, though it is possible that the written victim impact statements submitted to the court might have illuminated the video's content. The choice of music was not totally extraneous to the subject given that the song was about a woman named "Angie." The victim might have actually identified with it, but so might have the sentencer, which would make for multiple interpretations of the music that had little to do with Leon's sentencing.

The most significant contribution of the video was that it showed the most vulnerable victims of the defendant's behavior—his children. At the time of trial, Angie's son was six years old, his older sister was five, and Angie's baby girl was two. For survivors as young as Angie's children, family photos and home movies and videos of the victim represent their loss in a direct, concrete way. The children were so young at the time of their mother's death that they will have few lasting memories of her; whatever impact she had on them may be buried in the deep recesses of their subconscious minds. The photos and videos of them with their mother are tangible mementos of her, just like her grave site. They are proof that she existed in their lives and actual demonstrative evidence of their loss.[130]

The effort to blame the young mother for her own brutal death to mitigate an LWOP sentence seems absurd. The victim impact video, along with the statements and the testimony of Angie's mother and father, represented a substantial hurdle to the defendant's effort to deflect his responsibility for the death. The defense should have made it

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127 *Id.* at 467.

128 *Id.*

129 *Id.*

130 *See* CHALFEN, *supra* note 34, at 77-78 (describing the impact of photos of babies with their grandparents; the photos tend to structure and maintain the memory of the event, the actual experience of which is forgotten).

clearer that its claim for mitigation was that Abel Leon's traditional, male-dominated culture set him up for a pervasive, thoroughgoing failure as a husband, father, and breadwinner—a failure that he could not possibly negotiate his way out of or overcome because of his personal weaknesses and immaturity.

Instead of attacking the video, the defense might have incorporated it into its case for mitigation. Defense counsel should think of the sentencing phase of the trial, during which victim impact evidence and mitigation evidence are introduced, as the first step in a long process of rehabilitation and restorative justice[131] rather than as a last step in the effort to keep vengeance at bay. There are several ways in which Abel Leon's lawyer might have used the "Angie" video to illustrate the circumstances that left Abel feeling so bereft of choices that he was driven by a blind and deadly passion to shoot his wife. The video represented what he feared he was losing (his lovely wife, his beautiful children) and why he was so furious. The video could have been used to explore the qualities of regard and strength that made such a lovely woman care about him. Counsel could have pointed to the strong physical resemblances or character traits that link Abel to his children, each of which are likely to grow over the years and might someday call for a father's guidance and support. If nothing else, the introduction of the video provided an opportunity for the defendant to express sorrow and remorse to Angie's relatives and friends for their loss in a way that the sentencing judge could assess. Acknowledging the uniqueness of the victim and recognizing the pain that her survivors have suffered (whether or not it is evident in the video) indicate maturity and the capacity for empathy on the part of the defendant. Of course, having seen the video for the first time only shortly before it was admitted into evidence, defense counsel had little time to arrive at a creative counterstrategy. Further, nothing in the sentencing hearing record suggests that Abel Leon had reached a point where he would have supported these arguments if his attorney had thought to make them.

But the point here is twofold. If the victim's character or actions are made an issue, the probative value of a video that addresses those concerns is likely to increase. Secondly, defense counsel should consider whether and how the victim impact video can be used to the defendant's advantage. At the very least, the prosecution's introduction of a victim impact video should make it easier for the defense to offer

[131] Restorative justice focuses on redressing the victim's injury. It allows the victim to speak, to get answers from offenders, and to receive compensation. For her or his part, the offender is encouraged to offer details about and explanations for her or his crimes, to admit responsibility for them, and to compensate for the damage done. The impact of the crime on the community is also considered, given that crime offends its values and represents a failure of communal solidarity. *See* Roslyn Myers, *Crime Victims as Subjects of Documentaries: Exploitation or Advocacy?*, 16 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 733, 752-53 & n.49.

slide shows and videos in support of a plea for mitigation. It may also present an opportunity for the defendant to express remorse and show that the process of rehabilitation has begun.

Evidentiary rulings are not the only mechanism by which the defense can affect the tone of a victim impact video. Because of the conservative politics of the victims' rights movement, some cases have openings for the defense to build a bridge between defendants and survivors. The victims' rights movement initially grew out of feminist activism around rape and domestic violence and concern for the victims of civil rights violations that went unprosecuted, but it is no longer identified as a response to systemic wrongs like racism, class exploitation, and male domination.[132] Rather, its focus has become the oppressive impact of sudden, unexpected violent crime on those who are otherwise among the more privileged—namely, middle-class whites. A narrowly focused victims' rights movement does not necessarily encompass the interests of victims and survivors who share the socioeconomic and political status of defendants and prisoners, let alone similar points of view about reforming the criminal justice system. Through defense-initiated victim outreach,[133] counsel and victim liaisons might play a role in shaping victim impact evidence. In addition, overtures to victims might create opportunities for defendants to act in ways that demonstrate rehabilitation and ultimately help to reduce sentences.

The more probative and pointed a victim impact video is, the fairer it is to expect the defendant to respond to it. Memorial videos are difficult to defend against because they are not made for the purpose of presenting victim impact evidence. The next Part will analyze a victim impact video that was made by the young adult son of a murder victim in connection with a parole hearing, not a sentencing. It satisfies some of the criteria that courts might demand to insure the probative value of visual victim impact statements.

IV. "GEORGE HENRY AULSON IV"

On July 7, 1991, when George Henry Aulson IV (hereinafter

[132] Tammy Krause, *Reaching Out to the Other Side: Defense-Based Victim Outreach in Capital Cases*, *in* WOUNDS THAT DO NOT BIND, *supra* note 94, at 379; Carrie A. Rentschler, *Victims' Rights and the Struggle over Crime in the Media*, 32 CAN. J. COMM. 219, 221 (2007).

[133] *See generally* Kristen F. Grunewald & Priya Nath, *Defense-Based Victim Outreach: Restorative Justice in Capital Cases*, 15 DEF. COUNS. J. 315 (2003); *see also* Richard Burr, *Litigating with Victim Impact Testimony: The Serendipity That Has Come from* Payne v. Tennessee, 88 CORNELL L. REV. 517, 526-29 (2003) (describing the "defense-team-based outreach to survivors" that occurred in the case of a defendant charged with murdering tourists in Yosemite National Park).

George IV) was five years old, his father was stabbed to death by Kevin Wood.[134] A jury rejected Wood's claim of self-defense. He was found guilty of second-degree murder and sentenced to life in prison. Fifteen years later, in February of 2007, Wood came up for parole. George IV, then twenty years old, appeared before the parole board and read a victim impact statement. George IV later turned his statement into the script for the narration of a nine-minute video that he posted on YouTube and My Space.[135] The images in the video are largely home movies from his childhood, including the years when his father was alive. George IV states that he looked at the videos when preparing to appear before the parole board. For the musical background, George IV used Samuel Barber's classical composition "Adagio for Strings, op. 11," which has been described as "one of the slowest, quietest and saddest pieces of music ever written."[136]

As many victims and survivors do, George IV begins his video by eschewing victimhood.[137] He says that he is not a victim because he appreciates every day that he is alive. He goes on to say that the purpose of the video is to relate his feelings and how his father's death

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[134] The facts of the murder are set forth in Wood's appeals of the verdict and sentence. *See* Commonwealth v. Wood, 638 N.E.2d 1372 (Mass. App. Ct. 1994) (affirming Wood's conviction), *appeal denied*, 642 N.E.2d 302 (Mass. 1994); Commonwealth v. Wood, 818 N.E.2d 641 (Mass. App. Ct. 2004) (affirming a denial of a motion for a new trial), *appeal denied*, 826 N.E.2d 202 (Mass. 2005); Wood v. Spencer, 487 F.3d 1 (lst Cir. 2007) (petition for habeas corpus dismissed as untimely).

Though the prosecution and defense differed on some of the details, the general outline of the events surrounding the murder were as follows: After the defendant told the police that the victim and his wife were growing marijuana, the victim's home was put under surveillance and a warrant was executed; the warrant produced evidence confirming the defendant's information. The victim threatened to get the defendant, who he believed had set him up. The next day, the victim and his wife drove to the trailer home of his brother which was located next door to the defendant's. The victim parked his van in front of the defendant's trailer; the prosecution's position was that there was no other space available. The defendant, on the other hand, concluded that the victim was ramming his girlfriend's car. The defendant came out of his home with an axe handle and proceeded to smash the windshield and driver's side window of the victim's van. As a result, the defendant was convicted of malicious destruction of property. A fight between the victim and the defendant ensued. The role of the victim's brother in the altercation is unclear. The defendant escaped the fray, ran into his trailer, came back with a knife, and fatally stabbed the victim once in the chest. *Wood*, 818 N.E.2d at 641.

[135] The video is available on YouTube at http://www.youtube.com/watch?v=uATxCVAAik0 and on MySpace at http://vids.myspace.com/index.cfm?fuseaction=vids.individual&videoid=2020639502.

[136] Richard Morrison, *No Encore Please for Last Night of Jingosim*, TIMES (UK), Sept. 15, 2001, at 17 (describing changes in the program for the BBC's annual "Last Night at the Proms" concert because of 9/11). George IV might have become acquainted with the piece following 9/11. Samuel Barber's "Adagio for Strings" was most notably played as a commemorative for the victims of the 9/11 terrorist attacks by the BBC Orchestra, American Leonard Slatkin conducting, on September 15, 2001. *Id.*

[137] Many victims eschew the label because of its association with perpetual helplessness and vulnerability, which are shameful and humiliating. *See* Sharon Lamb, *Constructing the Victim: Popular Images and Lasting Labels*, *in* NEW VERSIONS OF VICTIMS: FEMINISTS STRUGGLE WITH THE CONCEPT 108, 119-20 (Sharon Lamb ed., 1999).

impacted him. The bulk of George IV's narration draws on specific events that illustrate how sorely he misses his father and how sad he is because his father is no longer alive. He remembers being at his father's wake when his three-year-old brother asked why "daddy" was sleeping; he felt bad for his brother who did not understand that his father was dead. He remembers being fifteen years old when a friend made a joke about his father, and he was forced to say that his father was dead. His tears flowed as he realized that he had been bottling up his emotions. Being able to talk about his father changed his life.

Graduation from high school was traumatic, because his father should have been there. It was one of many milestones in his life that his father would miss. Reading from his diary he tells how he pinned a picture of his entire family, his dad included, to his mortarboard. On the way to the ceremony he listened to Josh Groban's "You Raise Me Up,"[138] a very emotional song that made him cry. On Christmas Eve 2005, he dreamed of his father, who told him that he had always been around and always would be. George IV interpreted this dream to mean that his father had simply wanted to wish him a Merry Christmas; this was, unfortunately, the best gift he had ever received.

In concluding, George IV spoke of his father's killer. He said that he was still angry at Kevin Wood, who had done nothing to show that he should be forgiven. (Indeed, Wood was still trying to overturn his conviction at the time he appeared before the parole board.) As far as George IV was concerned, the parole hearing was not about Wood or his father's murder; instead, it was an opportunity to remember his father's life.

In the Aulson video, the narration preceded the compilation of images. It is often the case with expository documentaries that words do most of the work, while very little of the forward momentum of the narrative or story is attributable to the visuals. That is not the case here. The images in the Aulson video are mainly home movies that were made when George IV was young. Some of them include scenes of his father playing with his children. There were also more contemporary photos, including a high school graduation portrait. In compiling the video, George IV paired footage from his childhood with descriptions of events of a similar nature that occurred later in his life. When speaking of the dream he had on Christmas Eve, when he would have been a teenager, the viewers see George IV as a sleeping youngster. When he describes his high school graduation, the viewers see an elementary school-aged young fellow receiving a certificate on stage. This juxtaposition is a reminder that for someone who lost his father at age five, the routines and rituals that are repeated over a childhood—and

[138] JOSH GROBAN, *You Raise Me Up*, *on* CLOSER (Reprise Records/Wea International 2003).

that cumulatively make for a secure, comfortable life for a child—may be irreparably disrupted. As he matures, the child goes back to the time when he was young and his father was alive (or at least when he was oblivious to his loss) to try to pick up the threads. The use of old home movies depicting a happier time in childhood explains why the descriptions of similar, more contemporary events are marked by sadness and longing. George IV makes use of the visual images from old home movies to convey a message that words alone could not. The viewer can see how the movies stimulated memories that aided him in expressing the impact of the loss of his father. The visuals add complexity and depth to his victim impact statement. Because he made the video himself, it also appears to have had a beneficial cathartic effect.

This is a video with more probative value than the other victim impact videos analyzed in this Article. It is not a memorial video. It was made specifically to provide victim impact evidence. It presents facts and details. It exhibits reflexivity in that the viewer can see the videomaker's creative process at work and experience his attempt at introspection.[139] Although Barber's "Adagio for Strings" does not appear to have any special significance for George IV as the son of George III and therefore should not have been used, a snippet from Josh Groban's "You Raise Me Up" might have been included in the video because George IV listened to it on the way to his high school graduation—a special occasion that amplified the effect of his father's absence. Still, the narration makes the point that the videomaker wants to get across; the viewer is not totally dependent on the evocative music or the idyllic home-style visuals. But at nine minutes, the video is much too long. George IV's commentary that Kevin Wood is undeserving of forgiveness is not appropriate for a sentencing hearing, though it may have been suitable for a parole hearing. Finally, there was enough concrete evidence of George IV's life without his father that Wood would have been able to express his condolences for George's loss without compromising his claim of self-defense.

V. RECOMMENDATIONS AND CONCLUSIONS

In his memorandum on the denials of certiorari in *Kelly v. California*, Justice Stevens called for the articulation of "reasonable

[139] Regina Austin, *The Next "New Wave": Law-Genre Documentaries, Lawyering in Support of the Creative Process, and Visual Legal Advocacy*, 16 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 809, 838-40 (arguing that reflexivity and not truth is the measure of the merits of a documentary).

limits" on the admission of victim impact videos.[140] I propose the following:

- Victim impact videos or photo montages should be short, no longer than three to five minutes. A little bit of video goes a long way. Exceptions might be allowed when the video deals with specific issues related to rehabilitating the victim's character or explaining the victim's involvement in the circumstances surrounding her or his death if the defense raises or is likely to raise such issues when arguing mitigating circumstances. Even then, a video not exceeding seven or eight minutes should be sufficient to provide a "quick glimpse of the [victim's] life."[141]

- The content should be probative of the issues pertinent to sentencing in the particular case. It should be directed at: (1) highlighting the victim's unique qualities (e.g., "good character," "talents, intelligence, spirituality, work ethic and educational background, [and] standing in the community")[142] as evidenced by specific acts, behavior, or events; and (2) describing the impact of the victim's death on survivors as evidenced by their history of interaction with the victim. "Victim impact statements were never intended to be—and should not be allowed to become—eulogies, which summarize the life history of the victim and describe all of his or her best qualities."[143] Rather, specific stories and vignettes should be the heart of the video.[144] Chronologies beginning at birth and ending at death may be germane for young children; they should not be considered probative for teenagers or adults.

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[140] Kelly v. California, 129 S. Ct. 564, 567 (2008) (Stevens, J., respecting the denial of the petitions for writs of certiorari).

[141] Payne v. Tennessee, 501 U.S. 808, 822 (1991) (Rehnquist, C.J., dissenting) (quoting Mills v. Maryland, 486 U.S. 367, 397 (1988)).

[142] John H. Blume, *Ten Years of* Payne: *Victim Impact Evidence in Capital Cases*, 88 CORNELL L. REV. 257, 269-70 (2003).

[143] Malone v. State, 168 P.3d 185, 210 (Okla. 2007) (finding error in the admission of victim impact statements that were "too long and overly emotional").

[144] For example, the California Supreme Court in *People v. Dykes* found no error in the admission of a "awkwardly shot home movie" of a nine-year-old murder victim and his family "preparing for and enjoying a trip to Disneyland." 209 P.3d 1, 47, 48 (Cal. 2009). The victim was seen up in a tree, smiling, and making amusing gestures for the camera. *Id.* at 47. The court gave the video the following review:

> The videotape does not constitute a memorial, tribute, or eulogy; it does not contain staged or contrived elements, music, visual techniques designed to generate emotion, or background narration; it does not convey any sense of outrage or call for vengeance, or sympathy; it lasts only eight minutes and is entirely devoid of drama; and it is factual and depicts real events.

Id. at 48. It should be noted though that the ambient audio was deleted from the video, and commentary was provided by the victim's sister under a mandate from the trial judge that it be unemotional. *Id.* at 48.

The proponent of the video should be reflexive about producing a valuable tool for third-party decisionmakers tasked with measuring the survivors' loss based on who the victim was and what the victim meant to them. It is irrelevant that the victim was a much better person than the defendant. Beyond that, the video should not be misleading, confusing, redundant of other evidence, or unnecessary.

- The categories of persons permitted to submit videos should be limited to individuals closely connected to the victim by blood and affinity. Special effort should be made to accommodate the limited capacities of children to testify in person.

- Music should be allowed only if it has a factual basis in the victim's tastes, preferences, activities, hobbies, or behavior, or in the relationship between the victim and her or his survivors. The music should not draw attention to itself or substitute for narration. Indeed, narration in the form of words written and/or spoken by the survivors may be required. The use of music should be consistent with copyright laws, including the standards respecting fair use.

- Courts have greater power to control the level of emotion in victim impact evidence through pre-admissibility hearings than through instantaneous rulings on live testimony. Although a few states require that the prosecution give notice of its intent to introduce victim impact evidence in every case,[145] defense counsel should certainly be given advance notice of and access to victim impact videos or photo slide shows. Defense counsel should be allowed to inquire as to whether the slide show or video was compiled by the victim's survivors or by a professional, and if a professional was involved, who directed or shaped the message.

- The relationship between victim impact evidence introduced by the prosecution and mitigation evidence proffered by the defense

[145] *See, e.g.*, Turner v. State, 486 S.E.2d 839 (Ga. 1997) (approving for future cases trial court's holding of a hearing on the admission of prepared statements by the victim's relatives to assure that the jury hears only what is allowable); State v. Muhammad, 678 A.2d 164, 179-80 (N.J. 1996) (requiring procedural safeguards such as notice of intent to introduce victim impact evidence, a preference for only a single adult witness, the requirement of written statements, and a preliminary hearing on admissibility in implementing victim impact statute). *See generally* Blume, *supra* note 142, at 274-78, 281 (summarizing and criticizing existing state and federal procedural protections); 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, 151-53, 177-80 (1999) (criticizing as insufficient the procedural controls on the admission of victim impact evidence).

should be explained. Jurors should be told that victim impact evidence is not introduced to compare the relative value of the victim's life and the life of the perpetrator; rather, the loss attributable to the victim's death should be considered in regard to evaluating the amount of harm that the perpetrator's conduct caused.

- Courts should understand that victim impact slide shows and videos with voiceovers and music are not objective, factual *documentation* of the victim's life that speaks for itself; rather, such displays are *documentaries*. This is to say that they are representations of reality as captured by the family photographer, filmmaker, or videographer; shaped by the editor who chose and arranged the material; and interpreted by the narrator—all of whom are operating under the influence of subjective points of view about the victim's life, history, and significance.

Acknowledging that victim impact videos are in fact documentaries or another form of visual, nonfiction storytelling is problematic because many people, including lawyers, assume that insofar as video is concerned, there is either truth or fiction—i.e., video either captures life as it is really lived or instead is the product of performance and manipulation. There are two forms of manipulation in which the videomaker might engage: digital manipulation and narrative manipulation. Digital manipulation is mechanical; it occurs when the editor cuts and pastes images to shape the video in a way that imperceptibly rearranges or distorts what really happened. Narrative or rhetorical manipulation, on the other hand, occurs when the videomaker shapes the material into a story, molds the facts, or colors or changes their import. The first kind of manipulation is subject to ethical constraints and can be curbed by permitting the opposing party to demand outtakes and unedited footage. The second kind of manipulation is subject to challenge, argument, and critical analysis through cross-examination of the videomaker, the authenticating witness, or the proponent of the video, through the introduction of opposing evidence, and through the opposing party's own visual advocacy.

Still, a survivor's subjective account of a victim's life that employs visual images, music, and narration should not immediately be dismissed as manipulation. Narratives of intersecting lives, whether they take a written, oral, or video form, are inevitably shaped by art.[146] A victim impact video provides survivors an opportunity to tell their

[146] Tony Kushner, *Holocaust Testimony, Ethics, and the Problem of Representation*, 27 POETICS TODAY 275, 286 (2006).

version of the victim's story as well as their own story of loss, and is made using tools that are increasingly accessible for ordinary people, particularly the computer-savvy young. But victim impact videos, just like other forms of victim impact evidence, carry an important caveat—namely, that the survivor's story is not the only story or the most objective story that can be told about the victim. To counter a survivor's story effectively, the defense must marshal its rhetorical tools—including the use of its own photographs, movies, and videos.