

# **EMOTION, PROOF AND PREJUDICE: The Cognitive Science of Gruesome Photos and Victim Impact Statements**

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## ABSTRACT

The current framework for sorting the probative from the prejudicial considers emotion to be the hallmark of unfair prejudice. Emotions elicited by evidence are thought to “inflame” the jury and “cause them to abandon their mental processes.” This inaccurate view of emotion as the enemy of rationality is problematic for evidence law. We argue for a more sophisticated and nuanced view of emotion’s role in evaluating proof and prejudice. We use two types of evidence to illustrate our argument: gruesome photos and victim impact statements.

As some scholars have noted, emotional responses to evidence are not necessarily prejudicial responses. But this observation captures only a small part of the problem with the current evidentiary framework. Emotions do not always lead to prejudice, but they can lead to prejudice in more complex and subtle ways than previously recognized. The emotions elicited by evidence affect not only the decision maker’s appraisal of the evidence, but also the *process* of deliberation. For example, anger toward the defendant elicited by victim impact statements may result in an inability to remain open to evidence favoring the defense, to greater certainty about the verdict, and to a desire to punish. Other emotions, such as sadness or sympathy, have other effects on the deliberative process.

Conversely, emotional responses to evidence can play a role in assessing probative value, and this function of emotion receives little or no recognition in evidentiary discourse. For example, to determine whether a gruesome photo is unduly prejudicial, it is also necessary to consider whether the photo contributes any additional value to the deliberative process beyond the medical examiner’s testimony. Without accounting for the role of emotion in the reasoning process, it is difficult to examine how the medium affects the message. The value added lies in the photo’s additional persuasive power, which is closely tied to its emotional impact.

Whether the emotions evoked by evidence interfere with deliberation depends on what emotions the evidence evokes, how they affect the deliberative process, and what the deliberative process is meant to accomplish. We argue that the cognitive sciences, including psychology and neuroscience, can shed substantial light on the first and second of these questions. The third is a legal question, but one that should be informed by a more informed and realistic understanding of decisional dynamics.

## I. INTRODUCTION: EMOTION, PROOF AND PREJUDICE

The term “emotion” crops up frequently in the law of evidence, and its appearance never bodes well for the party seeking to introduce the contested evidence.<sup>1</sup> Indeed, the current framework for sorting the probative from the prejudicial “considers ‘emotion’ the hallmark of unfair prejudice.”<sup>2</sup> The advisory notes to Rule 403 of the Federal Rules of Evidence explain that: “unfair prejudice . . . means an undue tendency to suggest a decision on an improper basis, commonly, though not necessarily, an emotional one.”<sup>3</sup> Evidence is excluded on the grounds that it “appeals to”<sup>4</sup> or “stirs”<sup>5</sup> or “inflames”<sup>6</sup> the jury’s emotions, “cause[s] them to abandon their mental processes and give expression to their emotions,”<sup>7</sup> or “results in convictions based upon inflamed emotions, rather than deliberate consideration of the evidence.”<sup>8</sup> In short, in the folk knowledge conception employed by evidence doctrine, emotion is a chaotic and ungovernable force that interferes with—or entirely derails—rational deliberation. This view is contradicted by the emerging consensus across disciplines that emotion plays an integral role in the decision-making process.

Evidence law is hampered by its misconceptions about emotion in broader ways than are currently recognized. As some scholars have noted, emotional responses to evidence are not necessarily prejudicial responses.<sup>9</sup> But this observation, while important, only captures a small part of the problem.

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1. See, e.g., Lisa Kern Griffin, *Narrative, Truth and Trial*, 101 GEO. L.J. 281, 314 n.181 (2012) (“Overwhelmingly emotional evidence faces exclusion under the rules.”).

2. Victor J. Gold, *Federal Rule of Evidence 403: Observations on the Nature of Unfairly Prejudicial Evidence*, 58 WASH. L. REV. 497, 503 (1983).

3. FED. R. EVID. 403 advisory committee’s notes.

4. State v. Phillips, 156 P.3d 583, 587–88 (Idaho Ct. App. 2007) (“Appeals to emotion, passion or prejudice of the jury through use of inflammatory tactics are impermissible.”).

5. Sumner v. Lambert, 121 N.E.2d 189, 194 (Ohio Ct. App. 1953) (“We agree with the trial court that the photographs would have had a tendency to stir the emotions of the jury to the prejudice of the defendants.”).

6. State v. Maxwell, 384 S.E.2d 553, 557 (N.C. Ct. App. 1989) (“The court’s admission of evidence which could inflame the jury and cause a verdict to be entered on an improper basis, such as emotion, was prejudicial.”).

7. Archina v. People, 307 P.2d 1083, 1095 (Colo. 1957) (“These pictures do not serve to stimulate the mental processes of the jurors, but only to arouse their passions and prejudices—and to cause them to abandon their mental processes and give expression to their emotions.”).

8. People v. Walton, Nos. A117488, A117489, 2008 WL 4457846 (Cal. Ct. App. Oct. 6, 2008); see also United States v. Queen, 132 F.3d 991, 997 (4th Cir. 1997) (“[T]he evidence’s probative value must not be substantially outweighed by confusion or unfair prejudice in the sense that it tends to subordinate reason to emotion in the fact finding process.”); United States v. Bailey, 990 F.2d 119, 123 (4th Cir. 1993) (“[E]vidence should be excluded where it creates a genuine risk “that the emotions of a jury will be excited to irrational behavior.”).

9. E.g., Gold, *supra* note 2, at 504.

Emotions do not always lead to prejudice, but they can lead to prejudice in more complex and subtle ways than previously recognized, impacting not only the decision maker's reactions to evidence but also the decision-making process itself. Conversely, emotional responses to evidence also play a role in assessing probative value, and this function of emotion receives little or no recognition in evidentiary discourse.<sup>10</sup> For example, to determine whether a gruesome photo is unduly prejudicial, it is also necessary to consider whether the photo contributes any additional value to the deliberative process once a medical examiner has testified to the condition of the body.<sup>11</sup> The photo's persuasive power is closely intertwined with the question of the emotion it elicits.

We argue that without a more sophisticated framework for discussing and evaluating emotion's role in perception and judgment, evidentiary discourse will struggle to articulate and evaluate the legally significant differences between different types of evidence. Currently the category "emotion" functions as a blunt instrument for identifying improper evidence. Yet different emotions have different effects on decision-making. In addition, emotions affect decision-making via several pathways. Here is a brief summary of these pathways, followed by a more in-depth discussion in Part III.

- Emotions convey information. For example, the fear elicited by a snake signals danger. Moral emotions like outrage or disgust also convey information that may assist in appraising a situation.<sup>12</sup> A crime scene photo or testimony from a murder victim's parent might evoke anger or outrage toward the defendant, and thus function as an appraisal of the defendant's conduct.<sup>13</sup>

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10. However, for a notable example of an excellent article that does consider emotion in relation to probative value as well as prejudicial effect, see Teneille R. Brown, *The Affective Blindness of Evidence Law*, 89 DENV. U. L. REV. 47 (2011).

11. Or once the opposing party has offered to stipulate to the condition of the body or other contested facts.

12. How these responses impact judgment is a complicated question. For example, emotion researchers debate whether emotions follow cognitive appraisals (e.g., fear of a snake follows knowledge that a snake is dangerous), see, for example, J.E. LEDOUX, THE EMOTIONAL BRAIN: THE MYSTERIOUS UNDERPINNINGS OF EMOTIONAL LIFE (1996), or trigger emotional responses unaccompanied by appraisals or cognitive inferences, see, for example, Robert B. Zajone, *Feeling and Thinking: Preferences Need No Inferences*, 35 AM. PSYCHOL. 151 (1980).

13. Whether the appraisal is legally relevant or useful is a separate question. See, for example, the debate between Martha Nussbaum and Dan Kahan on whether reactions of disgust function as useful moral appraisals. Dan Kahan, *The Progressive Appropriation of Disgust*, in THE PASSIONS OF LAW (Susan Bandes ed., 2000); Martha Nussbaum, "Secret Sewers of Vice": *Disgust, Bodies, and the Law*, in THE PASSIONS OF LAW (Susan Bandes ed., 2000).

- Emotions affect *how* information is processed.<sup>14</sup> For example, anger is tied to shallow information processing. Angry jurors may be less likely to carefully and thoroughly evaluate a photo or a statement or the credibility of a witness, instead relying solely on their anger, or on heuristics and stereotypes. Other emotions have different effects on information processing. Sadness, for example, has been associated with careful information processing.
- Emotions elicited by evidence affect how decision makers evaluate *other evidence* in the case. Jurors who are angry with the defendant, for example, may be motivated to seek out other evidence that validates their anger and to minimize or dismiss evidence that does not.
- Emotions affect how confident decision makers are of their judgments. Here again, anger is problematic. It is associated with a high degree of certainty, which is coupled with the shallower information processing mentioned above. Sadness, on the other hand, is associated with uncertainty.
- Different emotions are associated with different action tendencies. Anger is associated with a desire to act—specifically a desire to blame and punish. Sympathy may lead to a desire to assist the object of the sympathy. In a criminal case this might lead to a desire to punish the offender in order to help the victim. Sadness, on the other hand, is linked to a sense of helplessness that is not conducive to action.

The current broad-brush attitude toward emotion ought to shift to a more nuanced set of questions designed to determine which emotions, under which circumstances, enhance legal decision-making. Whether the emotions evoked by evidence interfere with deliberation depends on what emotions the evidence evokes, how they affect the deliberative process, and what the deliberative process is meant to accomplish. The cognitive sciences, including psychology and neuroscience, can shed substantial light on the first and second of these questions. The third is a legal question, but one that should be informed by a more informed and realistic understanding of decisional dynamics.

In order to explore what role the term “emotion” plays and ought to play in evidentiary discourse, we consider two types of evidence. First, we discuss gruesome crime scene and autopsy photographs. Second, we discuss victim

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14. JOSEPH P. FORGAS, FEELING AND THINKING: THE ROLE OF AFFECT IN SOCIAL COGNITION xiv (2001); Susan A. Bandes & Jeremy A. Blumenthal, *Emotion and the Law*, 8 ANN. REV. L. & SOC. SCI. 161, 166 (2012).

impact statements. Experimental research in law, psychology and neuroscience establishes that both gruesome photographs and victim impact statements elicit emotions that affect juror and mock juror judgments. As to each type of evidence, we first set forth the legal evidentiary framework. We then discuss the research establishing that each type of evidence affects emotions and case outcomes. We explore possible psychological and neuroscientific<sup>15</sup> explanations for these effects, and identify further areas of study. Finally, we return to the question of how the law of evidence, and the legal system more generally, ought to respond to these findings.

What is the probative value, or the risk of prejudice, of a photograph of a murder victim as compared to a medical examiner's testimony? Of a color as compared to a black and white photo? Of victim impact testimony in the courtroom as compared to a transcript? Of a photo montage or a video victim impact statement as compared to a still photo? Of a silent video montage as compared to one with a soundtrack by Enya or Celine Dion? We argue that the current evidentiary framework is poorly suited for such comparisons. A framework that overlooks affective influences is likely to be particularly poorly equipped to evaluate the probative value or prejudicial effects of modern forms of evidence, such as video victim impact statements, crime scene 'virtual tours,' 360 degree Panoscan crime scene images, crime scene or accident simulations,<sup>16</sup> day-in-the-life videos, capital defense mitigation videos, the use of videoconferencing to replace in-court appearances by witnesses or parties,<sup>17</sup> and others that remain to be implemented . . . or imagined.

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15. As Bandes and Blumenthal summarize, "the implications of powerful neuroimaging techniques such as fMRI and PET scans and other cognitive psychology and neuroscience findings for law are the subject of lively debate." Bandes & Blumenthal, *supra* note 14, at 169. Stephen Morse has been an influential voice cautioning against "overclaiming" regarding the implications of neuroscience for law. See, e.g., Stephen Morse, *Brain Overclaim Syndrome and Criminal Responsibility: A Diagnostic Note*, 3 OHIO ST. J. CRIM. L. 397–412 (2005); see also Susan Bandes, *The Promise and Pitfalls of Neuroscience for Criminal Law and Procedure*, 8 OHIO ST. J. CRIM. L. 119 (2010); see *infra* text accompanying notes 248–63 (discussing the limitations of current studies).

16. One high profile use of a crime scene simulation occurred in the trial of George Zimmerman for the murder of Trayvon Martin, in which the judge permitted use of a simulation in closing arguments but not as evidence at trial. See Brett Snider, *Zimmerman Judge Rules on Texts, Fight Animation*, FINDLAW BLOTTER (July 10, 2013, 10:54 A.M.), <http://blogs.findlaw.com/blotter/2013/07/zimmerman-judge-rules-on-texts-fight-animation.html>.

17. See generally Anne Bowen Poulin, *Criminal Justice and Videoconferencing Technology: The Remote Defendant*, 78 TUL. L. REV. 289 (2004).

## II. PROBATIVE EVIDENCE, EMOTIONAL EVIDENCE

The current framework for sorting the probative from the prejudicial often invokes the talismanic power of the category “emotional.” Rule 403 of the Federal Rules of Evidence provides that relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. The advisory notes explain that: “unfair prejudice . . . means an undue tendency to suggest a decision on an improper basis, commonly, though not necessarily, an emotional one.”<sup>18</sup>

As one court summarized:

[E]vidence should be excluded as unduly prejudicial when it is of such nature as to inflame the emotions of the jury, motivating them to use the information, not to logically evaluate the point upon which it is relevant, but to reward or punish one side because of the jurors’ emotional reaction. In such a circumstance, the evidence is unduly prejudicial because of the substantial likelihood the jury will use it for an illegitimate purpose.<sup>19</sup>

In other words, evidence is unduly prejudicial where it has very little effect on the issues but uniquely tends to evoke an emotional bias against one party and thus poses an intolerable risk to the fairness of the proceedings.

The evidentiary lexicon reflects well-entrenched folk knowledge about emotion. The folk knowledge view is that when jurors use emotion, it is as a substitute for logic. (The folk knowledge view does not even entertain the notion that judges use emotion in evaluating evidence.)<sup>20</sup> In the folk conception, emotional evidence excites, stirs, and inflames the juror’s deliberative faculties, making cool, thoughtful processing of information difficult or impossible. In this view, emotion makes no useful contribution to the deliberative process. Instead it interferes with or overwhelms reason, deflecting the jury from its assigned task. It is accurate that emotion may motivate jurors to use information for illegitimate purposes. But this is a problematic oversimplification on two counts. First, emotion may also motivate jurors to use information legitimately, or may even act as a source of information. Second, when emotion does lead to prejudice, the pathways from emotion to prejudice are much more complex than this formulation reflects.

Although there is much debate about exactly what role emotion plays in the cognitive process, there is widespread agreement that emotion and

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18. FED. R. EVID. 403 advisory committee’s notes.

19. Vorse v. Sarasy, 53 Cal. App. 4th 998, 1009 (1997).

20. See generally Terry Maroney, *The Persistent Cultural Script of Judicial Dispassion*, 99 CALIF. L. REV. 629 (2011).

cognition are intertwined.<sup>21</sup> Emotion helps us screen, organize and prioritize the information that bombards us. It influences what information we find salient, relevant, convincing or memorable. It helps us decide whether we care about what we are hearing, and it motivates us to act or refrain from acting. It helps us understand and evaluate the intentions and motives of others and predict their future behavior.

Antonio Damasio and other cognitive scientists, working with brain-damaged subjects with access to all their mental faculties except their emotions, have demonstrated the integral role emotion plays in decision-making. The subjects either made decisions detrimental to their well-being or the well-being of others, or were unable to reach any decisions at all.<sup>22</sup>

Current research in the cognitive sciences draws on powerful neuro-imaging tools and other sources to investigate emotion's role in the cognitive process. A growing group of cognitive scientists believes that "one cannot sensibly talk about emotion affecting cognition because 'cognition' refers to a language for describing all of the brain's operations, including emotions and reasoning . . . and not to any particular subset of operations."<sup>23</sup> In short, there is a lively debate about how emotion and cognition interact, and even about whether they are usefully considered as separate concepts. What is not debatable is that the dichotomous folk knowledge conception of emotion and cognition is inaccurate.

On one level, the importance of emotion to legal persuasion is old news. Every trial lawyer—or connoisseur of courtroom dramas—understands that dry recitations of fact and appeals to deductive logic are rarely sufficient to persuade. Persuasive argument draws on vivid and emotional stories. Such

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21. Jaak Panksepp, *At the Interface of the Affective, Behavioral, and Cognitive Neurosciences: Decoding the Emotional Feelings of the Brain*, 52 BRAIN & COGNITION 1 (2003).

22. ANTONIO R. DAMASIO, DESCARTES' ERROR: EMOTION, REASON, AND THE HUMAN BRAIN 127–65 (1994) (discussing these studies and their findings).

23. Suzanne Keen, *A Theory of Narrative Empathy*, 14 NARRATIVE 207, 213 (2006) (citing Leda Cosmides & John Tooby, *Evolutionary Psychology*, in HANDBOOK OF EMOTIONS 91, 98 (Michael Lewis & Jeanette M. Haviland-Jones eds., 2d ed. 2000)). As psychologists William A. Cunningham and Tabitha Kirkland explain: "Cognition can simply be defined as information processing. On such a view, just as memory or attention have multiple operations . . . so does emotion . . . [E]motional responses may arise from the same processes that give rise to memory and attention." William A. Cunningham & Tabitha Kirkland, *Emotion, Cognition, and the Classical Elements of Mind*, 4 EMOTION REV. 369, 369–70 (2012). But see Jaak Panksepp, *supra* note 21, at 6. Panksepp, one of the founders of the field of affective neuroscience, argues that the distinction continues to be useful: that "affective feelings are, to a substantial degree, distinct neurobiological processes . . . distinct from those that mediate cognitive deliberation." See also Brown, *supra* note 10, at 104–12 (discussing the anatomical interconnectedness between emotion and reason).

stories command attention and stay in memory.<sup>24</sup> They enable empathy: the ability to see things from the viewpoint of another. They evoke anger or sympathy; they move the decision maker to punish or forgive a perpetrator, or to assist or avenge a victim. But emotional persuasion is often portrayed as a kind of dirty secret: a form of manipulation and pandering that is reserved for slightly disreputable showboating lawyers performing for amateurs<sup>25</sup> and not the sort of thing that should occur in a venue where more formal legal deliberation occurs. This view mistakes the nature of persuasion and the nature of deliberation.

As the Supreme Court recognized explicitly in *United States v. Old Chief*,<sup>26</sup> the leading case interpreting Rule 403, it is difficult to separate the question of the probative value of evidence from the question of its persuasive power. As the Court observed,

the persuasive power of the concrete and particular is often essential to the capacity of jurors to satisfy the obligations that the law places on them; the evidentiary account of what a defendant has thought and done can accomplish what no set of abstract statements ever could, not just to prove a fact but to establish its human significance; and evidence must ‘in all its particularity . . . satisfy the jurors’ expectations about what proper proof should be.’<sup>27</sup>

As one scholar handily summarizes, “[i]n this passage the Court nearly celebrates the emotional aspect inherent in any type of evidence.”<sup>28</sup> But more than that, the Court recognizes that the persuasive power of evidence arises not from linear exposition, syllogisms, and naked admissions, but from convincing and compelling stories.<sup>29</sup> As one leading evidence casebook

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24. See Elizabeth Phelps, *Emotion’s Impact on Memory*, in MEMORY AND LAW 7 (Lynn Nadel & Walter P. Sinnott-Armstrong eds., 2012); see also Brad E. Bell & Elizabeth F. Loftus, *Vivid Persuasion in the Courtroom*, 49 J. PERSONALITY ASSESSMENT 659 (1985) (offering a review of various psychological explanations for why vivid testimony in court is more persuasive to mock jurors than more pallid versions of the same testimony); Robert M. Reyes, William C. Thompson & Gordon H. Bower, *Judgmental Biases Resulting From Differing Availabilities of Arguments*, 39 J. PERSONALITY & SOC. PSYCHOL. 2 (1980).

25. See, for example, the 1966 Harvard Law School Dean’s Report, referring to the jury trial as “the apotheosis of the amateur[,]” quoted in SUNWOLF, PRACTICAL JURY DYNAMICS: FROM ONE JUROR’S TRIAL PERCEPTIONS TO THE GROUP’S DECISION-MAKING PROCESSES 5 (2004).

26. 519 U.S. 172 (1997); see also D. Michael Risinger, *John Henry Wigmore, Johnny Lynn Old Chief, and “Legitimate Moral Force”: Keeping the Courtroom Safe for Heartstrings and Gore*, 49 HASTINGS L.J. 403 (1998), for an in-depth discussion of *Old Chief*.

27. Louis A. Jacobs, *Evidence Rule 403 After United States v. Old Chief*, 20 AM. J. TRIAL ADVOC. 563, 578 (1997) (quoting *Old Chief*, 519 U.S. at 187–88) (footnotes omitted) (internal quotation marks omitted).

28. *Id.*

29. 519 U.S. at 189. The story model of juror decision-making, which has emerged as the leading model in the juror decision-making literature, argues that jurors make sense of the

notes, the Court seems to be recognizing a “new kind of relevance” that might be called “narrative relevance.”<sup>30</sup>

Emotion is deeply implicated in the process of making and recalling stories.<sup>31</sup> It affects our perception of events and of the causal connections between them, the importance we ascribe to events, our ability to recall past events,<sup>32</sup> and our confidence in the accuracy of recall.<sup>33</sup> Studies of subjects with brain injuries causing “narrative impairment” provide a fascinating window into the connection between emotion and storytelling. Two of the subjects famously described by Damasio as emotionally impaired fit into the narrative impairment category as well. Phineas Gage, who became “impulsive, vacillating and irreverent” after a brain injury, had lost the ability to construct and explore counterfactual scenarios and their likely consequences, and thus began engaging in risky and deleterious behavior.<sup>34</sup> The subject known as Elliot, on the other hand, constructed abundant narratives “but fail[ed] to invest the resulting scenarios with affective tone.”<sup>35</sup> For those in Elliot’s state as well, “their over-reasoned but emotionally undernarrated choices are frequently self-deleterious.”<sup>36</sup>

In short, emotions are imbedded in our cognitive processes. They may steer us wrong, but we cannot navigate life without them. The question is not how to excise them from the legal process, but how to determine which emotions, under which circumstances, enhance legal decision-making. The current evidentiary framework, with its reliance on emotion as a term of opprobrium, is hindered in its ability to sort the probative from the prejudicial. We propose a framework that considers three questions. What sort of probative information is the evidence in question meant to convey?

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evidence at trial by organizing it into a coherent and believable story. See W. LANCE BENNETT & MARTHA S. FELDMAN, RECONSTRUCTING REALITY IN THE COURTROOM: JUSTICE AND JUDGMENT IN AMERICAN CULTURE (1981); Nancy Pennington & Reid Hastie, *A Cognitive Theory of Juror Decision Making: The Story Model*, 13 CARDozo L. REV. 519, 519 (1991); see also DENNIS J. DEVINE, JURY DECISION MAKING: THE STATE OF THE SCIENCE 26–29 (Brian Bornstein & Monica Miller eds., 2012).

30. RICHARD O. LEMPERT ET AL., A MODERN APPROACH TO EVIDENCE: TEXT, PROBLEMS TRANSCRIPTS AND CASES 224 (Am. Casebook Series, 3d ed. 2000).

31. Kay Young & Jeffrey L. Saver, *The Neurology of Narrative*, 30 SUBSTANCE 72, 79 (2001); see also Raymond A. Mar, *The Neuropsychology of Narrative: Story Comprehension, Story Production and Their Interrelation*, 42 NEUROPSYCHOLOGIA 1414, 1416 (2004).

32. See Kelly Lambert, Op-Ed., *Santa on the Brain*, N.Y. TIMES, Dec. 22, 2013, at SR8. (“[N]euroimaging evidence indicates that, when certain events are recalled—presumably after being triggered by familiar sights, smells or sounds—emotional brain areas are activated as well as visceral responses. You relive the memories you experienced in the past.”).

33. Phelps, *supra* note 24, at 10–11.

34. Young & Saver, *supra* note 31, at 77–78.

35. *Id.* at 77.

36. *Id.* at 78.

How do emotions affect the process of communicating that information? Does the influence of emotion advance or impede the goals of the proceeding? Two examples illustrate how this inquiry might proceed. The first is the admissibility of gruesome crime scene and autopsy photos. The second is the admissibility of victim impact testimony at the penalty phase of capital trials.

Both gruesome photos and victim impact statements have been found to elicit emotions that increase punitiveness in jurors or mock jurors.<sup>37</sup> Whether this punitive effect is probative, and whether it is unfairly prejudicial, depends first of all on what the evidence is meant to establish. For gruesome photos, the issue of relevance is fairly straightforward. The photos are meant to establish issues of fact such as the condition of the body or the trajectory of a bullet. But because viewing such photos may unfairly bias the jury, their probative value must be weighed against the danger of unfair prejudice. The question of probative value turns on what the photo adds to the medical examiner's testimony on the subject.<sup>38</sup> It also turns on the goals of the legal proceeding. Perhaps the photos elicit moral outrage that helps a capital jury appraise heinousness as part of its "reasoned moral decision"<sup>39</sup> on whether to impose the death penalty, for example. The emotion in that context provides relevant and probative information. But perhaps the photos elicit moral outrage that influences the jury's decision on the question of guilt or innocence, a question on which the photos should have no bearing. Or perhaps the photos engender strong anger toward the defendant that interferes with the jury's ability to evaluate other relevant evidence in the case—and makes the jury overconfident as well. This latter effect is unfairly prejudicial—it deflects the jury from its deliberative task.

In the context of victim impact statements, the question of whether a punitiveness effect is a prejudicial effect is complicated by ambiguity about what fact or proposition the statements are offered to establish. The Supreme Court has held that the statements are meant to convey information about the "victim's uniqueness as an individual human being"<sup>40</sup> and about the impact of the loss to the family and society, but are not meant to encourage comparisons among victims. Whether this information should be regarded as rendering the defendant more deserving of a death sentence remains ambiguous. Studies show that the statements increase empathy for victims and their families, as well as anger toward the defendant, and that these emotions motivate juries to seek to help the bereaved families by voting for

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37. See *infra* Part III.B and Part IV.B.2.

38. Or to the opposing party's proposed stipulation to the facts in question.

39. *Morgan v. Illinois*, 504 U.S. 719, 745 (1992).

40. *Payne v. Tennessee*, 501 U.S. 808, 809 (1991).

death.<sup>41</sup> Whether these emotions provide information relevant to the capital jury's reasoned moral decision, or deflect the jury from its task by blocking its ability to remain open to mitigating evidence, or encourage invidious comparisons among victims, can be answered in part by psychological and neuroscientific studies.<sup>42</sup> But the ambiguity about the statements' probative value will continue to be problematic as courts are presented with video victim impact statements and other new forms of evidence that bring the victim alive in the courtroom, in ways that increase the risk of prejudice.

### III. ILLUSTRATING THE PROBLEM: GRUESOME PHOTOS

#### A. *The Doctrinal Issues*

Under the Federal Rules of Evidence, crime scene and autopsy photos may be introduced by the prosecution in a murder trial, or by the attorneys in a civil wrongful death suit, if they are relevant<sup>43</sup> to the fact-finder's inquiry, unless their probative value is substantially outweighed by the danger of unfair prejudice.<sup>44</sup> There has been substantial litigation on the subject of post-mortem photos that are categorized as "gruesome." "Gruesome" in this context has been defined as "something much stronger than being offensive, embarrassing, or graphic."<sup>45</sup> One court compared the word gruesome to "grisly" and "hideous" and stated that "[s]omething is gruesome only if it 'inspir[es] horror or repulsion.'"<sup>46</sup> Thus, identifying the quality of gruesomeness is never entirely "fact-based," if "fact-based" means emotion-free. Determining the admissibility of gruesome photos is a task that involves the judge in assessing a photo's emotional impact or predicting its emotional impact on the jury. In the context of a death penalty trial, moreover, the photos may be offered to determine whether a murder was committed in an especially heinous, cruel, or depraved manner,<sup>47</sup> thus making the jury's

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41. See *infra* Part IV.B.2–3 and Part V.A.

42. See *infra* Part V.

43. Relevant evidence is evidence having the tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. FED. R. EVID. 401.

44. FED. R. EVID. 403. The Federal Death Penalty Act contains a somewhat different standard, requiring exclusion if the balance between probative value and unfair prejudice tips even slightly in favor of unfair prejudice. 18 U.S.C. § 3593(c) (2012).

45. *State v. Jiron*, 882 P.2d 685, 690 (Utah Ct. App. 1994).

46. *Id.* (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1005 (1986)); see also Amy S. Thomas, Note, *Utah Rule of Evidence 403 and Gruesome Photographs: Is a Picture Worth Anything in Utah?*, 1996 UTAH L. REV. 1131, 1132 (1996).

47. See, e.g., Revised Arizona Jury Instructions—Criminal, Capital Case 1.6 (3d ed. 2013).

emotional reaction to the photos directly relevant to the central issue of capital sentencing. In other words, whether the emotion evoked by the photos is relevant depends on what the decision maker is meant to decide, and whether the emotions evoked by the photos help or hinder that decisional process.

Even when they are adjudged gruesome, crime scene and autopsy photos are often held admissible. The prosecution is given wide latitude to present its case, and under the usual approach, only where a gruesome photo has no clear connection to the point it is offered to prove will the decision to admit it be deemed an abuse of discretion.<sup>48</sup> As evidence scholar Michael Graham notes:

Despite their gruesomeness and thus arguably prejudicial effect on the jury, relevant still photographs, motion pictures and videotapes generally will be admitted in the court's discretion where they tend to prove such things as the existence of a crime, the cause of death, the number and location of the wounds, the manner in which they were inflicted, the amount of force used, the wilfulness of the act in question, a person's identity,<sup>49</sup> or to corroborate evidence concerning an unusual cause of death.

If evidence is "unique and important . . . the need for information almost always outweighs associated detrimental effects."<sup>50</sup> Yet courts frequently permit the introduction of gruesome autopsy or crime scene photos that depict bodies whose condition has already been well established by medical testimony.<sup>51</sup> Indeed, as *Old Chief* holds, even the fact that the defense is willing to stipulate to the evidence is not necessarily a bar to the prosecution's ability to introduce it.<sup>52</sup> The evidence may be admitted even if it is cumulative, and even if the issue is uncontested, if the evidence has persuasive power. Advocates have leeway to persuade by making the abstract concrete, by rendering bloodless testimony vivid, by telling "a colorful story with descriptive richness."<sup>53</sup> The party seeking to introduce the evidence is entitled to show what Wigmore called the "legitimate moral force of the

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48. See, e.g., *Thornburg v. Mullin*, 422 F.3d 1113, 1128 (10th Cir. 2005).

49. 2 MICHAEL H. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE 576 (7th ed. 2012).

50. LEMPERT ET AL., *supra* note 30, at 221.

51. The Utah courts, relying on their own evidentiary rules, have adopted a contrasting approach; one that puts the burden on the moving party to demonstrate why gruesome photos should be admitted despite the risk of prejudice. This approach more explicitly acknowledges the emotional impact of the photos and confronts the question of what necessary information that photos contribute to the proceeding. *See also State v. Garcia*, 663 P.2d 60, 64 (Utah 1983).

52. *Old Chief v. United States*, 519 U.S. 172, 187–88 (1997).

53. *Id.* at 187.

evidence,”<sup>54</sup> or in other words “a complete and emotionally compelling narrative description of what happened.”<sup>55</sup>

In short, when evaluating probative value, the emotional power of evidence is an integral part of the calculus. In its refusal to acknowledge this emotional power, current evidentiary discourse is hampered in its ability to assess the probative value or prejudicial effect of photos *as photos*. It provides no metric, no vocabulary, for comparing the information value of various types of evidence (including documentary evidence, in-court verbal testimony, voice recordings, photographic evidence, and filmic evidence). The sharp division between *information* and *emotion* clouds the essential issue. The informational value of each medium is closely intertwined with its emotional impact.

The dominant approach to gruesome photo evaluation relies on two clashing assumptions without acknowledging the tension between them.<sup>56</sup> On the one hand courts frequently regard the gruesome nature of the photos as simply a function of the gruesome nature of the crimes they depict.<sup>57</sup> Or in evidentiary parlance, photos of this nature are simply demonstrative evidence: “not in themselves evidence at all,”<sup>58</sup> but merely a “*copy of reality*.”<sup>59</sup> Simultaneously, courts treat photos as substantive evidence with independent probative value.<sup>60</sup>

### 1. The Photo as a “Copy of Reality”

The treatment of the photo as nothing more than a direct representation of reality is a kind of “naïve realism,” as Neal Feigenson and Christina Speisel

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54. LEMPERT ET AL., *supra* note 30, at 1261 (quoting IX WIGMORE ON EVIDENCE § 2591, at 589 (3d ed. 1940)).

55. *Id.*

56. As Jennifer Mnookin writes, since the inception of photography there has been a tension between the view of photos as potentially misleading products of human agency and the countervailing—and very hardy—view that photos are “unmediated transcriptions of reality[.]” Jennifer L. Mnookin, *The Image of Truth: Photographic Evidence and the Power of Analogy*, 10 YALE J.L. & HUMAN. 1, 47 (1998); see also Jessica M. Silbey, *Judges as Film Critics: New Approaches to Filmic Evidence*, 37 U. MICH. J.L. REFORM 493, 502–07 (2004) (discussing the slippery category of demonstrative evidence).

57. See, e.g., United States v. McRae, 593 F.2d 700, 707 (5th Cir. 1979).

58. LEMPERT ET AL., *supra* note 30, at 1190 (citations omitted).

59. *Id.* at 1191.

60. See *id.* at 1190–94 (explaining in detail the various evidentiary characterizations of photographic evidence). How the photograph is characterized may bear on a number of issues, including the need for authentication, the availability of discovery, and the admissibility of outtakes. *Id.* at 1207–11 (discussing day-in-the-life videos).

explain.<sup>61</sup> It assumes that “there’s an objective world out there and that anyone with open eyes can know it and see it.”<sup>62</sup> And it assumes that seeing a photograph is simply an extension of seeing with our own eyes:

People tend . . . to conflate representations with direct perceptions of reality, to “look through” the mediation at what is depicted. To see the picture is to see the real thing, unmediated . . . the naiveté comes from ignoring how . . . the medium affects the message—how the meanings a picture conveys are shaped by the tools, techniques, and social contexts of representation.<sup>63</sup>

As documentary filmmaker Errol Morris put it, we trust our vision and “place our confidence in it. Photography allows us to uncritically think. We imagine that photographs provide a magic path to truth.”<sup>64</sup>

The Fifth Circuit in *United States v. McRae*<sup>65</sup> considered two color photos that had been admitted in the defendant’s trial for the murder of his wife. One was a photo of a victim’s “corpse, clothed in her bloody garments, bent forward as to display an exit wound in the back of her skull produced by part of [Defendant’s] dum-dum bullet, which exploded in her brain.”<sup>66</sup> The other contained a front view of the victim, seated in the chair where she died. Her left eye was disfigured and her head broken by the force of the gunshot. The appellate court agreed with the trial court’s description of the photographs as “gross, distasteful and disturbing,” but noted that while the photographs “[were] not pretty even to the hardened eye,” neither was the crime.<sup>67</sup> This formulation ignores the emotional impact of the photos. It assumes that the photos are simply a means of conveying information, and that therefore their emotional impact can be ascribed entirely to the nature of the event they depict.<sup>68</sup>

Yet the court went on to hold that the photos aided in establishing elements of the crime, namely the position of the victim and the position of the rifle

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61. NEAL FEIGENSON & CHRISTINA SPIESEL, LAW ON DISPLAY: THE DIGITAL TRANSFORMATION OF LEGAL PERSUASION AND JUDGMENT 9 (Jack M. Balkin & Beth Simone Noveck eds., 2009).

62. *Id.*

63. *Id.* at 9–10.

64. ERROL MORRIS, BELIEVING IS SEEING: OBSERVATIONS ON THE MYSTERIES OF PHOTOGRAPHY 92 (2011).

65. 593 F.2d 700, 707 (5th Cir. 1979).

66. *Id.*

67. *Id.*

68. However, as one evidence casebook points out, the photograph may well be less emotionally disturbing than the “thing itself.” In a homicide case, “[i]t might be possible to preserve and present the relevant portion of the corpse—a dismembered head, for example—as evidence of how the deceased died, but the emotional impact of doing so would be so disruptive that courts insist on models or diagrams.” LEMPERT ET AL., *supra* note 30, at 1148.

when fired, despite the fact that the medical examiner had already testified on both these issues.<sup>69</sup> In doing so, the court elided the question of what unique information the photos provide that could not be conveyed by documentary evidence or testimony.<sup>70</sup> Thus the disturbing impact of the victim's photographic image is treated as an effect of the murder itself and not a byproduct of its depiction. Yet the very vividness of the photos—the fact that they *do* enable the trier of fact to picture the victim—is often identified as their information value—as a useful supplement to a medical examiner's testimony even where that testimony establishes the same facts—as in the case below.

## 2. The Photo as Information

Sometimes courts explicitly rely on the persuasive power of photos. For example in *United States v. Fields*,<sup>71</sup> the Court of Appeals for the Fifth Circuit upheld the admission of thirty-two photos of the murder victim's body at the crime scene and at the autopsy. It held that each photo had probative value.<sup>72</sup> Some photos showed the condition of the body at the time it was discovered.<sup>73</sup> Others, in which the victim's body was shown surrounded by brush and garbage, served to show how difficult it had been to find the body and thus why there was so little physical evidence linking the defendant to the crime.<sup>74</sup> In response to the defense argument that at least some of these points were not in dispute and that the admission of the photos was unduly cumulative, the court noted that cumulative evidence is not inadmissible per se.<sup>75</sup> It is here that the court addresses, albeit obliquely, the question of what unique information a photograph provides. Drawing on the language of *Old Chief*, the court notes that “the fact to which the evidence is directed need not be in

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69. 593 F.2d at 708. The reviewing court noted with approval that the trial court had excluded a photograph of a child's bloody handprint on the wall of the marital home because it had no probative value—it had no relevance to the contested issues. *Id.*

70. Mnookin discusses the tension between viewing the photo as a “privileged kind of evidence” and as “a potentially misleading form of proof,” leading to the effort of judges to “domesticate” photographic evidence by treating it as representational. Mnookin, *supra* note 56, at 4–6. As she recounts, the effort was only partially successful. *Id.* at 71. Photos continued to operate as proof as well as illustration. *Id.*

71. 483 F.3d 313, 356 (5th Cir. 2007).

72. *Id.* at 355.

73. *Id.*

74. *Id.* As to why the prosecution had to explain the lack of physical evidence, the court referred to the CSI effect, which creates a certain narrative expectation in the jury which the prosecution may wish to satisfy: the expectation of a significant amount of physical evidence. It referred to the CSI effect as plausible though empirically unproven. *Id.* at 355 n.39.

75. *Id.* at 356.

dispute.”<sup>76</sup> As to the autopsy photos, the court held that they “helped the jury understand the medical examiner’s testimony.”<sup>77</sup> As to the photos of the victim’s badly decomposed body, surrounded by brush, the court again drew from the language of *Old Chief* as it noted:

The reason that a criminal defendant cannot typically avoid the introduction of other evidence of a particular element of the offense by stipulation is that the government must be given the opportunity “to present to the jury a picture of the events relied upon. To substitute for such a picture a naked admission might have the effect to rob the evidence of much of its fair and legitimate weight.” Here, the Government’s point that the body had decomposed too much for any physical evidence to be found was made more effectively with images than it would have been with vague generalizations about the difficulty in processing weeks-old crime scenes.<sup>78</sup>

Here the photographic images are simultaneously treated as simply accurate transcriptions of the thing or the event itself and as representations with a more powerful impact than a simple description or “a naked admission.” The source of the additional power of photographic evidence is not examined.

In contrast, the case of *State v. Collins*<sup>79</sup> provides a fascinating glimpse of a judge struggling to examine this question. The case concerned a nineteen-year-old college student charged with second-degree murder (defined as the knowing killing of another) when she delivered a full-term baby in her bathroom.<sup>80</sup> The baby was found in the toilet, and the factual issue was whether the defendant had knowingly drowned a full term baby. The evidentiary issue was whether to admit photos of the dead baby. The trial judge first opined:

This jury has heard evidence, ample evidence describing this baby [and] . . . there is no question, at least at this time there should be no question in the jury’s mind that this was a baby . . . [A]t this point in time, the court has heard . . . nothing to indicate that the defendant did not know that she had a baby . . . [I]f they help illustrate a point that [the medical examiner] has testified to and illustrative of the testimony or clarify that testimony, then I will allow one or some of these photographs.<sup>81</sup>

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76. *Id.* (quoting *Old Chief v. United States*, 519 U.S. 172, 179 (1997)).

77. *Id.* at 355.

78. *Id.* (quoting *Old Chief*, 519 U.S. at 187).

79. 986 S.W.2d 13 (Tenn. Crim. App. 1998).

80. *Id.* at 15.

81. *Id.* at 20.

After a recess, the judge reversed course and ruled the photos admissible:

I think it's important for the jury to see the size of this baby in the consideration of whether or not . . . the defendant knew that she delivered and that this child died . . . You can talk about seven pounds and six ounces, I don't have any concept what seven pounds and six ounces is as opposed to eight pounds and three ounces, I can't picture that in my mind, but when I look at these photographs and I see this is a seven pound, six ounce baby, I can tell more what a seven pound, six ounce baby . . . is.<sup>82</sup>

The appellate court reversed, holding that “the inherent prejudice of admitting color photographs of a bruised, bloodied, nude, infant victim is apparent.”<sup>83</sup> Because the photos did not add to the medical testimony on any contested issue, their prejudicial effect outweighed their probative value.<sup>84</sup>

The trial judge was correct that a photo of a dead baby is different from a verbal description. It helped him picture the baby in his mind, making the baby—and the death of the baby—more vivid and less abstract. It would not be surprising to learn that this visual image remained in memory well after the medical examiner’s testimony faded.<sup>85</sup> There is ample language in cases like *Old Chief* supporting the view that depicting the defendant’s acts concretely and vividly helps “not just to prove a fact but to establish its human significance.”<sup>86</sup>

### 3. Photos: Persuasion and Manipulation

As compared to witness testimony, photos convey information differently—or convey different information. The difference between the information value and emotional impact of these two types of evidence is rarely examined. Many of the questions raised by photographic evidence are amenable to empirical study. For example: what is the impact of black and white versus color photos, or of cumulative photos of the same disturbing subject matter, or of the size of the displayed photos, or of handling the photos physically versus viewing them on a screen? The legal system too often approaches these questions armed only with instinct and folk knowledge.

As Feigenson and Speisel observe, both words and pictures promote emotional associations, but pictures do so more rapidly. “[B]ecause visual information acquires emotional valence before that information ever gets to

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82. *Id.* at 20–21.

83. *Id.* at 21.

84. *Id.*

85. See Phelps, *supra* note 24.

86. *Old Chief v. United States*, 519 U.S. 172, 187–88 (1997).

the cortex, the whole picture passes along its emotional colors even as we begin to decode its parts.”<sup>87</sup> The powerful emotional impact of the first encounter with the photo may exert a strong influence on subsequent viewing. Moreover, because we think we understand the picture immediately we tend to stop studying it before we identify or scrutinize its other possible meanings or associations.<sup>88</sup> Thus much of the effect of the photo remains unarticulated and unexamined.

Decision makers are aware, at least to some degree, that witness testimony is a construction—that it involves choices of wording, intonation and emphasis. Cross examination, dueling experts, jury instructions and other features of the trial process both underscore this point and provide a means of identifying and evaluating those choices. Photographs reflect a similar array of choices, and one feature of the medium is the way it masks these choices. In his fascinating meditation on the notion of “posed” photographs and manipulation, Morris muses:

Couldn’t you argue that every photograph is posed because every photograph excludes something? Even in framing and cropping? Someone has made a decision about what time-slice to expose on the emulsion, what space-slice (i.e., the frame) to expose on the emulsion.<sup>89</sup>

Photos are the product of choices about framing and vantage point. They reflect choices about whether to show close-ups of wounds, blood or facial expression. They reflect choices about whether to include wide-angle views of the area surrounding the body, and thus whether to include or exclude other objects. These seemingly inconsequential decisions have been found to influence jurors’ evaluations of evidence and testimony,<sup>90</sup> often in ways that are difficult to correct once the evidence has been viewed.<sup>91</sup> Photos may be

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87. FEIGENSON & SPEISEL, *supra* note 61, at 7–8.

88. *Id.*

89. MORRIS, *supra* note 64, at 65.

90. For example, Lassiter and colleagues have accumulated over twenty-five years of research demonstrating a camera perspective bias in the context of videotaped interrogations of criminal suspects. When observers view the interrogation with the camera focused on the suspect, as opposed to the interrogator or both the suspect and interrogator, observers judge confessions to be more voluntary, suspects to be more obviously guilty, and severe punishment to be more appropriate. G. Daniel Lassiter, *Psychological Science and Sound Public Policy: Video Recording of Custodial Interrogations*, 65 AM. PSYCHOLOGIST 768, 770 (2010). Camera perspective effects have been demonstrated in other legal domains, such as judging the veracity of children’s testimony. Sara Landström & Pär Anders Granhag, *Children’s Truthful and Deceptive Testimonies: How Camera Perspective Affects Adult Observers’ Perception and Assessment*, 14 PSYCHOL. CRIME & L. 381 (2008).

91. See, e.g., G. Daniel Lassiter et al., *Accountability and the Camera Perspective Bias in Videotaped Confessions*, 1 ANALYSES SOC. ISSUES & PUB. POL’Y 53 (2001).

in black and white or color, and as we will discuss, this choice too has consequences for their emotional impact.

When courts treat photos as unmediated records of “the real thing,”<sup>92</sup> these choices go unnoticed and unevaluated. Yet the effects of these photographic choices bear directly on the central evidentiary questions at hand—what information the photos offer (probative value) and whether that information hinders the decisional process (prejudicial effect). As discussed earlier, the treatment of photos as “real” exists in tension with the implicit (or sometimes explicit) rationale for permitting gruesome photos that recapitulate medical testimony: that visual depictions have certain properties that differentiate them from oral and documentary testimony.<sup>93</sup>

For example, the appellate court in *State v. Collins* held that “the inherent prejudice of admitting color photographs of a bruised, bloodied, nude, infant victim is apparent.”<sup>94</sup> Yet the court never identifies what made these photographs so objectionable. Was it that they were in color rather than black and white? That they showed a bloody victim? That they depicted a particularly vulnerable and sympathetic victim?<sup>95</sup> The court does not say, and the evidentiary discourse generally elides these important questions.

Conversely, in the *Fields* case discussed above, the court rather offhandedly dismisses the defendant’s argument that the accumulation of photos will have an emotional impact on the jury, seemingly based on its own instincts about the psychology of visual impact. The judge opines: “It is difficult to see how additional photos showing the same thing significantly harmed Fields. Indeed, Fields himself speculates that showing an inflammatory scene repeatedly may actually *diminish* its emotional impact.”<sup>96</sup>

The emotional impact of repeated exposure to horrific images is in fact an interesting question, one that is susceptible to empirical investigation.<sup>97</sup> Susan

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92. See FEIGENSON & SPEISEL, *supra* note 61, at 9.

93. And from video evidence. See *infra* text accompanying notes 178–207.

94. 986 S.W.2d 13 (Tenn. Crim. App. 1998).

95. We suspect that the appellate court’s ruling reflects an entirely separate weighing process not well correlated with the issue of the probative or prejudicial effect of the photos. Rather, it likely reflected the court’s extreme discomfort at the nature of the prosecution. As the appellate court noted, the trial judge described the case as among “the most tragic . . . I’ve ever seen,” but nonetheless confirmed the presence of all elements necessary for a second-degree murder conviction. *Id.* at 20.

96. *Fields*, 483 F.3d at 356.

97. See, e.g., Norbert L. Kerr, *Explorations in Juror Emotion and Juror Judgment*, in EMOTION AND THE LAW 97, 124 (Brian H. Bornstein & Richard L. Wiener eds., 2010) (noting that some research suggests that frequent exposure to violent images can result in desensitization (citing N.L. Carnagey et al., *The Effect of Video Game Violence on Physiological Desensitization to Real-life Violence*, 43 J. EXPERIMENTAL SOC. PSYCHOL. 489 (2007)), but raising the possibility that this desensitization might be medium specific, i.e., “images to which one has become

Sontag, in her influential explorations of photography and of the ethical quandaries posed by regarding the pain of others, struggled with this question over the span of her career. In one of her early essays about the effects of photographs depicting atrocities, Sontag argued that “the quality of feeling, including moral outrage, that people can muster in response to [such] photographs . . . depends on the degree of their familiarity with these images.” “[P]hotographs shock insofar as they show something novel. Unfortunately, the ante keeps getting raised . . .” A “saturation point” may be reached in which photography may do “at least as much to deaden conscience as to arouse it.”<sup>98</sup> More than thirty years later, Sontag referred back to this essay, observing:

I argued that while an event known through photographs certainly becomes more real than it would have been had one never seen the photographs, after repeated exposure it also becomes less real. As much as they create sympathy, I wrote, photographs shrivel sympathy. Is this true? I thought it was when I wrote it. I’m not so sure now. What is the evidence that photographs have a diminishing impact . . . ?<sup>99</sup>

For law, this question of the impact of cumulative photographic evidence on the jury is a subset of a much wider set of questions. What emotions does exposure to this particular medium evoke, as compared to other media? What effects do these emotions have on the decision maker’s ability to process the other evidence in the case? What effect do they have on the ultimate verdict? What causes these images to stay in memory, either over the course of a trial or for a longer period? How do these effects differ depending on repeated exposure to images, both in an individual trial, and over the course of a career? That is, do judges gradually become inured to these images? These are rich topics for both empirical and theoretical analysis, once the role of emotion in evaluating evidence is acknowledged. The dominant approach, by simply denying the emotional impact of the medium, tends to foreclose such inquiries.

As we will discuss further below, the current approach is certainly ill-suited to grapple with the basic question of how the medium affects the message. It is necessary to investigate how photos persuade, or we will be poorly equipped to evaluate the brave new world of video evidence, including day-in-the-life videos, surveillance videos, defendant mitigation videos, 360

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desensitized in one presentation medium . . . might still produce strong reactions when presented in a different medium.”).

98. SUSAN SONTAG, ON PHOTOGRAPHY 19–21 (1971).

99. SUSAN SONTAG, REGARDING THE PAIN OF OTHERS 105 (2003).

degree “Panoscan” crime scene images,<sup>100</sup> and crime scene “virtual tours.”<sup>101</sup> As Feigenson and Speisel counsel, we need “a more intelligent and nuanced inquiry into the cognitive, emotional, and rhetorical effects of the pictures and multimedia displays shown in court.”<sup>102</sup> This inquiry must include exploration not only of *what* information photos convey but also of *how* they convey it. This requires recognition that their information value is intimately related to their affective impact, and that neither their probative value nor their prejudicial effect can be evaluated without a better understanding of that relation.

#### B. *Gruesome Photos from Another Angle: Psychological Studies*

The conventional wisdom, as reflected in the advisory notes to Rule 403 and in much of the judicial discourse, is that emotion interferes with deliberation—and that evidence that evokes emotion is prejudicial. This assumption, as discussed above, is based on outdated and simplistic views about the nature of emotion and deliberation. The actual dynamics are more complicated. What emotions do gruesome photos elicit? The question is not only what emotions the trier of fact comes to feel toward the parties or the

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100. See, e.g., Michael Wilson, *Crime Scene Investigation: 360 Degrees*, N.Y. TIMES (Nov. 18, 2011), <http://lens.blogs.nytimes.com/2011/11/18/crime-scene-investigation-360-degrees>.

101. Here are some of the descriptions, taken verbatim from the website for CRIME SCENE VIRTUAL TOUR, <http://www.crime-scene-vr.com/Product.html> (last visited Nov. 11, 2014):

Crime Scene Virtual Tour (CSVT) 3.00 provides a distinctive virtual reality solution for crime scene reconstruction and crime scene investigation, which is used to document and observe and even measure the complete information for crime scene investigation and forensic analysis. Based on 360 degree panoramic images, Crime Scene Virtual Tour is a multi-media tool which integrates original crime scenes, interactive map with radar effect, detailed images, slideshow movie, texts, audios, links, thumbnails, etc.

3D Reconstruction: Compared with conventional photograph, the field of view of the images in crime scene virtual tour reaches 360 degree, far wider than the former. Crime scene investigators will have an overall idea on the place and never lose any suspicious clew. However, it is not just an album of photographs with 360 degree field of view, but is kind of crime scene reconstruction integrating many elements, which brings you back to the actual place where crime happens, and offers you the opportunity to find the reality in a virtual environment. Compared with flat photography, crime scene virtual tour gives you the possibility to zoom and navigate the images, add interactive map, texts, links, etc. You can integrate normal photographs into it as well. It is a relatively more objective way to reflect all information in crime scene.

102. FEIGENSON & SPEISEL, *supra* note 61, at 31.

crime in light of the evidence, but how these emotions affect the deliberative process itself, and what actions flow from these emotions.<sup>103</sup>

Mock jury studies have found that holding all other evidence constant, jurors presented with gruesome photographs are significantly more likely to render guilty verdicts in criminal trials or to find liability in civil trials than jurors who are not shown any photographs.<sup>104</sup> For example, Bright and Goodman-Delahunty<sup>105</sup> presented mock jurors with a lengthy trial transcript describing a case against a man on trial for murdering his wife. Mock jurors heard either non-gruesome or gruesome verbal descriptions. Some viewed no photographs, some viewed neutral photographs, and some viewed gruesome photographs. The mock jurors rendered case judgments, and also completed measures of their own emotions before and after reading the case materials. The verbal descriptions had no effect on verdicts, but the visual stimuli did: mock jurors who viewed gruesome photographs rendered more guilty verdicts and rated the prosecution's evidence as stronger than did jurors who viewed neutral photographs or no photographs. Viewing the photographs caused the jurors to become angry toward the defendant, and in turn, this anger led to an increase in juror confidence in the strength of the prosecution evidence<sup>106</sup> and to more guilty verdicts. In short, the photos made jurors angry, and these angry jurors required less proof to convict and were more convinced that their verdicts were right. This finding is consistent with several other studies demonstrating that increased anger is associated with mock jurors perceiving more criminal intent,<sup>107</sup> assigning less importance to

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103. See Joseph P. Forgas, *Introduction: The Role of Affect in Social Cognition*, in FEELING AND THINKING: THE ROLE OF AFFECT IN SOCIAL COGNITION, at i (Joseph P. Forgas ed., 2000).

104. D. A. Bright & J. Goodman-Delahunty, *The Influence of Gruesome Verbal Evidence on Mock Juror Verdicts*, 11 PSYCHIATRY PSYCHOL. & L. 154, 154 (2004) [hereinafter *Gruesome Verbal Evidence*]; D.A. Bright & J. Goodman-Delahunty, *Gruesome Evidence and Emotion: Anger, Blame, and Jury Decision-Making*, 30 LAW & HUM. BEHAV. 183 (2006) [hereinafter *Gruesome Evidence and Emotion*]; Kevin S. Douglas et al., *The Impact of Graphic Photographic Evidence on Mock Jurors' Decisions in a Murder Trial: Probative or Prejudicial?* 21 LAW & HUM. BEHAV. 485 (1997). But see Rachel K. Cush & Jane Goodman-Delahunty, *The Influence of Limiting Instructions on Processing and Judgments of Emotionally Evocative Evidence*, 13 PSYCHIATRY PSYCHOL. & L. 110 (2006).

105. See *Gruesome Verbal Evidence*, *supra* note 104.

106. Mock jurors were asked to rate the degree to which the prosecution evidence was sufficient to support conviction, on a seven-point scale ranging from not at all sufficient to completely sufficient. *Id.*

107. Karl Ask & Afroditi Pina, *On Being Angry and Punitive: How Anger Alters Perception of Criminal Intent*, 2 SOC. PSYCHOL. & PERSONALITY SCI. 494 (2011).

mitigating factors,<sup>108</sup> and experiencing more moral outrage,<sup>109</sup> which all, in turn, lead to more pro-prosecution case judgments. Studies investigating the impact of a videotaped crime scene which included the murder victim led to similar findings. One study found that viewing the video lowered the mock jurors' standard for reasonable doubt and increased their perception that the defendant had committed the crime.<sup>110</sup> Another found that a video reenactment of an accident increased mock jurors' negative emotions and that as these emotions escalated, so did the jurors' judgments of the plaintiff's liability.<sup>111</sup>

We are aware of only two studies that have investigated the difference in impact between black and white and color gruesome photos.<sup>112</sup> However, one of these studies focused on a civil damage verdict and award in a case in which the victim survived,<sup>113</sup> and the other on a criminal verdict and sentence in a murder case.<sup>114</sup> The studies provide some evidence that participants are more punitive after viewing color photographs of a plaintiff's injury, as compared to black and white photos or no photos at all.<sup>115</sup> Unfortunately, the study that did find a difference between the effects of black and white and color photos<sup>116</sup> did not measure the mock jurors' emotions. The study that found no difference in verdict between jurors exposed to black and white versus color photos did find that both types of photographs increased several of the mock jurors' self-reported negative emotions (such as anxiety, stress, anguish and shock) and physiological reactions (such as sweaty palms and nervous stomachs) as compared to those exposed to no photographs. Participants exposed to color rather than black and white photos reported feeling more disturbed, and to having more physiological reactions generally. This is an intriguing result that might profitably be followed up with additional studies.

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108. Leah C. Georges et al., *The Angry Juror: Sentencing Decision in First-Degree Murder*, 27 APPLIED COGNITIVE PSYCHOL. 156 (2013).

109. Jessica M. Salerno & L. C. Peter-Hagene, *The Interactive Effect of Anger and Disgust on Moral Outrage and Judgments*, 24 PSYCHOL. SCI. 2069 (2013).

110. S. M. Kassin & D. A. Garfield, *Blood and Guts: General and Trial-Specific Effects of Videotaped Crime Scenes on Mock Jurors*, 21 J. APPLIED SOC. PSYCHOL. 1459 (1991).

111. Vicki L. Fishfader et al., *Evidential and Extralegal Factors in Juror Decisions: Presentation Mode, Retention, and Level of Emotionality*, 20 LAW & HUM. BEHAV. 565 (1996).

112. Douglas et al., *supra* note 104; D.H. Whalen & F.A. Blanchard, *Effects of Photographic Evidence on Mock Juror Judgment*, 12 J. APPLIED SOC. PSYCHOL. 30 (1982).

113. Douglas et al., *supra* note 104.

114. Whalen & Blanchard, *supra* note 112.

115. *Id.* at 40. This effect did not manifest itself when the injuries were not severe, or when the defendant was not perceived as highly blameworthy.

116. *Id.*

The emotional influence of gruesome photographs probably operates outside of jurors' conscious awareness.<sup>117</sup> In a study by Douglas and colleagues,<sup>118</sup> despite the fact that mock jurors who viewed gruesome photographs rendered more guilty verdicts, exhibited more emotional physical reactions, and reported greater emotional distress, they rated themselves as acting just as fairly as did mock jurors in non-gruesome-photograph conditions. In fact, research shows that emotions affect judgments most strongly when the emotions are unnoticed.<sup>119</sup> Similarly, by the time jurors render their verdict the emotional influence on their judgments might be outside of their awareness because the initial emotion elicited by the disturbing evidence has lessened to a non-specific mood.<sup>120</sup> These findings raise important questions about how the legal system can effectively address these subliminal influences on judgment. Several studies have examined the effects of limiting instructions on jurors' evaluation of emotional evidence,<sup>121</sup> but the takeaway is ambiguous, and this is an important area for further study.

We will turn to a fuller exploration of possible explanations and implications of these findings regarding gruesome photographs in Part IV, in conjunction with discussion of similar findings about the impact of victim impact testimony. The question is whether the photos influence judgment in ways that are relevant or irrelevant, acceptable or unacceptable. Do they evoke emotional reactions that are integral and appropriate to the jurors' task of assessing blameworthiness, or emotional reactions that are irrelevant to the decisional task? Do they evoke emotions that have a deleterious impact on the deliberative process? For example, do they elicit anger that spurs jurors not only to punish but also to become less careful about whether the evidence supports a guilty verdict, or about what punishment is appropriate? Do they elicit anger or disgust or sympathy that overwhelms other emotions? Do they set off a biased search for information consistent with the anger they elicit? Do they swamp the jury's ability to weigh the remainder of the evidence?

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117. For a review of relevant social psychological research, see LEE ROSS & RICHARD E. NISBETT, THE PERSON AND THE SITUATION: PERSPECTIVES OF SOCIAL PSYCHOLOGY (1991).

118. Douglas et al., *supra* note 104.

119. For example, Schwarz and Clore found that anger is more likely to affect our judgments after it dissipates into irritation, because it is then less easily linked to a specific impetus and thus less likely to be corrected. Norbert Schwarz & Gerald L. Clore, *Mood as Information: 20 Years Later*, 14 PSYCHOL. INQUIRY 296 (2003).

120. *Id.*; see also Leah C. Georges, Richard L. Weiner, & Stacie R. Keller, *The Angry Juror: Sentencing Decision in First-Degree Murder*, 27 APPLIED COGNITIVE PSYCHOL. 156 (2013) (mock jury study demonstrating that the greater the jurors' anger, the more likely they were to choose a death sentence, regardless of how early in the trial their anger arose).

121. See, e.g., Cush & Goodman-Delahunty, *supra* note 104 (suggesting that instructions delivered after the evidence is viewed arrive too late to disturb the jurors' judgments but that instructions delivered before the evidence is viewed may result in over-correction bias).

And to the extent the photos do elicit emotions that exert harmful effects on deliberation, what steps can be taken to ameliorate these effects?

#### IV. ILLUSTRATING THE PROBLEM: VICTIM IMPACT STATEMENTS

As we have discussed, the analysis of whether emotional evidence helps or hinders decision-making requires asking three questions: What sort of information is the evidence in question meant to convey? How do emotions affect the process of communicating that information? And does the influence of emotion advance or impede the goals of the proceeding? In this part, we turn to our second example of how these questions might be approached: victim impact statements. Victim impact statements raise many of the same issues as gruesome photos. Both types of evidence evoke powerful feelings of anger and sympathy that may affect the deliberative process. In both situations, the lack of a framework for evaluating the emotional impact of the evidence is becoming increasingly problematic as litigants seek to introduce evidence based on new technologies. But in one respect, victim impact doctrine differs markedly from the doctrine of gruesome photos: in the case of victim impact evidence, the goals of introducing the evidence are deeply ambiguous. Without a better understanding of what legal issues the statements are meant to help the jury evaluate, it is difficult to determine whether the emotions the statements evoke advance or impede the deliberative process.<sup>122</sup>

##### A. *The Doctrinal Issues*

In *Payne v. Tennessee*,<sup>123</sup> the Supreme Court upheld the right of family members of murder victims to testify at the penalty phase of capital trials, reversing *Booth v. Maryland*,<sup>124</sup> which had held that the Eighth Amendment prohibited such testimony. The Court in *Booth* had reasoned that the victim's unique characteristics are irrelevant to the sentence unless they have "some bearing on the defendant's personal responsibility and moral guilt,"<sup>125</sup> and had expressed concern that such evidence "could well distract the sentencing

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122. Teneille Brown, reflecting on the inconsistent attitudes toward sympathy in application of Rule 403 in crime scene photo cases and victim memorial video cases, suggests that "[t]he irony may be that the rule aimed textually at limiting bias is in fact encouraging the exact opposite in practice: bias stemming from discretion and institutional norms." Brown, *supra* note 10, at 75.

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

124. *Booth v. Maryland*, 482 U.S. 496, 502 (1987).

125. *Id.* at 502, 505; see Susan Bandes, *Empathy, Narrative, and Victim Impact Statements*, 63 U. CHI. L. REV. 361, 396 n.177 (1996) (in which I argue in favor of this view).

jury from its constitutionally required task.”<sup>126</sup>

The Court in *Payne* not only minimized these concerns, it emphasized that the unique characteristics of murder victims provide highly relevant information to the capital jury. *Payne* treats evidence of a victim’s uniqueness as relevant to capital sentencing, but disclaims the relevance of the worthiness of individual victims. The puzzle at the heart of *Payne* is the precise relevance of the murder victim’s unique characteristics to the sentencing decision.

It is here that the distinction between probative value and prejudicial effect becomes incoherent unless the role of emotion is acknowledged and examined. The *Payne* Court defended victim impact evidence as a means of balancing the scales,<sup>127</sup> of counteracting vividness with vividness:

[T]he State has a legitimate interest in counteracting the mitigating evidence which the defendant is entitled to put in, by reminding the sentencer that just as the murderer should be considered as an individual, so too the victim is an individual whose death represents a unique loss to society and in particular to his family.<sup>128</sup>

The Court went on to say that “human nature being what it is, capable lawyers trying cases to juries try to convey to the jurors that the people involved in the underlying events are, or were, living human beings, with something to be gained or lost from the jury’s verdict.”<sup>129</sup> It found that turning the victim into a “faceless stranger at the penalty phase of a capital trial . . . deprives the State of the full moral force of its evidence and may prevent the jury from having before it all the information necessary to determine the proper punishment for a first-degree murder.”<sup>130</sup>

Thus, much of the Court’s language implicitly acknowledged the emotional power of the evidence, while explicitly relying on its informational value. Indeed, much of the Court’s reasoning presaged the language of *Old Chief*, which extolled the “persuasive power of the concrete and particular” and the importance of evidence “not just to prove a fact but to establish its human significance, and so to implicate the law’s moral underpinnings.”<sup>131</sup>

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126. *Booth*, 482 U.S. at 507.

127. See Bandes, *supra* note 125, at 402–05, for an argument that victim impact evidence does not balance the scales, but rather exacerbates the already skewed balance of the capital trial.

128. *Payne*, 501 U.S. at 825 (quoting *Booth*, 482 U.S. at 517 (White, J., dissenting)).

129. *Id.* at 826.

130. *Id.* at 825 (internal quotation marks and internal citation omitted).

131. *Old Chief v. United States*, 519 U.S. 172, 187–88 (1997); see *supra* text accompanying notes 26–30. The *Old Chief* case construed FRE 403, which does not govern capital sentencing. *Old Chief*, 519 U.S. at 180. The Court in *Payne* provided little guidance on what limits would govern the admissibility of victim impact evidence in capital cases, referring only to the limits provided by the Due Process Clause in situations where the evidence renders the proceeding fundamentally unfair. *Payne*, 501 U.S. at 825. However, many courts apply Rule 403 or at least

Several problems flow from the Court's failure to grapple with the emotional power of the contested evidence.

First, if the probative purpose of the evidence is to evoke the life lost with vividness and particularity, what is the measure of undue prejudice? Arguably, the informational value of the statement is its ability to convey the family's grief and to communicate the emotional impact of the loss of someone who was loved and valued. Many of the usual markers of prejudice—heightened emotionality in delivery and the tendency to elicit strong emotions—seem identical to the features that, according to the *Payne* Court, would make the testimony effectively vivid, meet the jury's expectations about how the family of a murder victim ought to feel, and convey the full moral force of the evidence.

This entanglement of the probative and the prejudicial has become increasingly problematic for victim impact doctrine. For example, in mass killing cases like the McVeigh and Moussaoui trials, involving dozens or hundreds of victims, courts struggle with the cumulative emotionality of dozens of victim impact statements. Judge Matsch in the McVeigh case expressed his intention to limit victim impact evidence to "facts, rather than the emotional impact."<sup>132</sup> But how can the two be distinguished? If the statements are introduced to prove the uniqueness of each life lost and to turn each victim from a faceless stranger into a unique human being, then each statement ought to be introduced, and none of the statements are cumulative. If the purpose is to make the pain and loss occasioned by each murder vivid, then the sheer power of the grief in the courtroom is probative: it is a function of the devastation wreaked by the defendant's acts.<sup>133</sup> Yet as Judge Matsch observed about the McVeigh sentencing hearing, "the compelling emotional need for witnesses to pay homage to their loved ones and to find some way

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apply standards drawn from Rule 403 when ruling on the admissibility of victim impact testimony. Jerome Deise & Raymond Paternoster, *More Than a "Quick Glimpse of the Life": The Relationship Between Victim Impact Evidence and Death Sentencing*, 40 HASTINGS CONST. L.Q. 611, 620 (2013). Even to the extent the *Old Chief* holding is not directly applicable to the limits on victim impact testimony, its perspective on what constitutes probative value is highly relevant.

132. This discussion draws substantially on a portion of Susan A. Bandes, *Victims, "Closure," and the Sociology of Emotion*, 72 LAW & CONTEMP. PROBS. 1, 23 (2009), and on Wayne A. Logan, *Confronting Evil: Victims' Rights in an Age of Terror*, 96 GEO. L.J. 721, 722 (2008).

133. A separate but related set of questions is raised by victim and survivor participation in trials: the needs of the victims and survivors themselves, for example their need to be heard and to pay homage to their loved ones. See, e.g., JODY L. MADEIRA, *KILLING MCVEIGH: THE DEATH PENALTY AND THE MYTH OF CLOSURE* 17 (1991). These issues are beyond the scope of this article. I have discussed the notion of "closure" elsewhere. See Bandes, *supra* note 132. The question of how victim impact testimony and other opportunities for victim and survivor participation affect the victims and survivors themselves is one that is ripe for empirical investigation.

of sharing their intense pain—rolled over everyone.”<sup>134</sup>

To evaluate the impact of this emotionality, one first must acknowledge that the testimony does elicit emotion as well as convey some sort of information. As one federal district court judge observed:

I cannot help but wonder if *Payne* . . . would have been decided the same way if the Supreme Court Justices in the majority had ever sat as trial court judges in a federal death penalty case and had observed first hand, rather than through review of a cold record, the unsurpassed emotional power of victim impact testimony on a jury. It has now been over four months since I heard this testimony . . . and the jurors’ sobbing during the victim impact testimony still rings in my ears.<sup>135</sup>

This observation is telling. As an appellate court, the Supreme Court in *Payne* did not hear the wrenching victim impact testimony in an open courtroom: it read it in a cold evidentiary record.<sup>136</sup> Its resulting opinion treats such statements as pure conduits for information, offering no recognition of the emotional power of hearing them in an open courtroom. It thus simultaneously ignores the impact of its insulation from in-court testimony on its own reasoning and rests its decision on the power of in-court testimony. The opinion offers no good explanation as to why in-court testimony at the trial level is preferable to a cold evidentiary record. Without such criteria, it is difficult to weigh the probative or prejudicial nature of other media presentations, such as video victim impact evidence, discussed below.

The second problem arising from the Court’s failure to acknowledge the emotional impact of the evidence is that many victim characteristics, for example race and ethnicity, are not only irrelevant to sentencing but impermissible factors under the Fourteenth Amendment. Other victim characteristics, such as social class or physical attractiveness, are also irrelevant and objectionable factors.<sup>137</sup> The Court briefly acknowledged the concern that the sort of proof it was permitting might influence the sentencing jury to impose sentences based on the worthiness or unworthiness of victims. It observed that:

[A]s a general matter . . . victim impact evidence is not offered to

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134. Bandes, *supra* note 132, at 23 (citing Richard Burr, *Litigating with Victim Impact Testimony: The Serendipity that Has Come from Payne v. Tennessee*, 88 CORNELL L. REV. 517, 521 (2003)).

135. United States v. Johnson, 362 F. Supp. 2d 1043, 1107 (N.D. Iowa 2005).

136. See *Payne*, 501 U.S. at 826.

137. Statutory schema may include determinations that the murder of certain categories of persons, such as law enforcement agents, render a crime death-eligible. This is a separate question from whether juries may make individual sentencing decisions based on victim characteristics.

encourage comparative judgments of this kind—for instance, that the killer of a hardworking, devoted parent deserves the death penalty, but that the murderer of a reprobate does not. It is designed to show instead *each* victim’s “uniqueness as an individual human being,” whatever the jury might think the loss to the community resulting from his death might be.<sup>138</sup>

The Court expressed confidence that “[i]n the majority of cases . . . victim impact evidence serves entirely legitimate purposes [but that if] evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief.”<sup>139</sup> Justice Souter in his concurrence, acknowledging that such evidence can be “so inflammatory as to risk a verdict impermissibly based on passion, not deliberation,” also expressed confidence in the power of the trial and appellate courts to guard against such risks.<sup>140</sup> Here we turn to psychological studies investigating whether the Court’s optimism was warranted.

### B. Psychological Studies

#### 1. The Identifiable Victim Effect

As a general matter, the *Payne* Court’s emphasis on the power of particularizing the victim is borne out by research in the fields of psychology and behavioral economics on the “identifiable victim effect.”<sup>141</sup> As Ray Paternoster and Jerome Deise summarize, people often feel emotionally unmoved by “statistical victims”<sup>142</sup> who are faceless and unidentified. “An identified victim, however, arouses strong emotions . . . including empathy and sympathy” that arouse a desire to help the victim.<sup>143</sup> Identified victims

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138. *Payne*, 501 U.S. at 823.

139. *Id.* at 825.

140. *Id.* at 836 (Souter, J., concurring) (citations omitted).

141. See Ray Paternoster & Jerome Deise, *A Heavy Thumb on the Scale: The Effect of Victim Impact Evidence on Capital Decision Making*, 49 CRIMINOLOGY 129, 133 (2011) (discussing the effect and attributing its original identification to economist Thomas Schelling).

142. *Id.* (citation omitted).

143. *Id.* at 138. In a recent article examining the role of pathos in constitutional law, Jamal Greene discusses one of the best-known appeals to the emotional power of identifying the victim: Justice Blackmun’s “Poor Joshua!” language in his dissent in *DeShaney v. Winnebago Cnty. Dep’t of Soc. Servs.*, 489 U.S. 189, 213 (1989) (Blackmun, J., dissenting). Jamal Greene, *Pathetic Argument in Constitutional Law*, 113 COLUM. L. REV. 1389, 1413 (2013). Justice Blackmun’s invocation of the human consequences of the Court’s decision for the plaintiff (irreversible and debilitating brain damage) is often regarded as inappropriately emotional, and as inappropriately

are those “about whom we have some personalizing or humanizing information.”<sup>144</sup>

Economist Thomas Schelling and others tested this effect using scenarios focused on the impetus for charitable giving, finding increased willingness to contribute money to identifiable victims.<sup>145</sup> The difficulty in the context of victim impact statements lies in the ambiguity about what the statements are meant to accomplish. The *Payne* court spoke of victims and their families as having “something to be gained or lost from the jury’s verdict.”<sup>146</sup> This may suggest that the Court regards a death sentence as an outcome from which victims and their families “gain.”<sup>147</sup> Yet proponents of victim impact statements have been ambiguous on the question of whether the success of the statements can be measured, at least in part, by their impact on sentencing, often emphasizing that the statements do not correlate with increased sentences.<sup>148</sup> As discussed below, there is evidence that victim impact statements in cases involving serious crimes do lead to increased

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focused on the particular harm to the plaintiff. Greene, *supra* at 1412 (discussing a critique by Jeffrey Rosen). Yet as Greene demonstrates quite thoroughly throughout his article, the move to identify a victim and personalize his or her stake in the case is a common feature of judicial opinions (albeit generally couched in less openly sentimental language), just as it is a common feature of discourse more generally. *See id.* at 1437 (discussing Justice Scalia’s dissent in *Arizona v. United States*, 132 S. Ct. 2492, 2510 (2012), invoking the “human realities” of illegal immigration’s effects on the jobs, property, and even lives of legal citizens of the state); *id.* at 1394 (discussing Justice Kennedy’s dissent in *Stenberg v. Carhart*, 530 U.S. 914, 958–59 (2000) (Kennedy, J., dissenting), invoking in gruesome detail the pain of a fetus in a late-term abortion who “bleeds to death as it is torn limb from limb.”).

144. *See* Paternoster & Deise, *supra* note 141, at 138.

145. *Id.* (citation omitted).

146. *Payne*, 501 U.S. at 826.

147. *See* Bandes, *supra* note 132, at 13–16 (discussing the range of attitudes toward the death penalty among those who have lost family members to murder); *see also* Andrew Cohen, *When Victims Speak Up in Court—in Defense of the Criminals*, ATLANTIC, Jan. 28, 2014, [http://www.theatlantic.com/national/archive/2014/01/when-victims-speak-up-in-court-in-defense-of-the-criminals/283345/?single\\_page=true](http://www.theatlantic.com/national/archive/2014/01/when-victims-speak-up-in-court-in-defense-of-the-criminals/283345/?single_page=true).

148. *See* Paul G. Cassell, *Barbarians at the Gates? A Reply to the Critics of the Victims’ Rights Amendment*, 1999 UTAH L. REV. 479, 540–44. *But see* Susan A. Bandes, *Reply to Paul Cassell: What We Know About Victim Impact Statements*, 1999 UTAH L. REV. 545, 549–51. Proponents of victim impact statements argue that they provide information about the level of harm experienced by the victim and thus increase proportionality of sentences and victims’ satisfaction with case outcome. *See, e.g.*, Edna Erez, *Victim Participation in Sentencing: Rhetoric and Reality*, 18 J. CRIM. JUST. 19, 24 (1990). Yet proponents also claim that victim impact statements do not result in more punitive sentencing decisions. *See, e.g.*, Edna Erez & Leigh Roeger, *The Effect of Victim Impact Statements on Sentencing Patterns and Outcomes: The Australian Experience*, 23 J. CRIM. JUST. 363, 373 (1995); Edna Erez & Linda Rogers, *Victim Impact Statements and Sentencing Outcomes and Processes: The Perspectives of Legal Professionals*, 39 BRIT. J. CRIMINOLOGY 216, 223 (1999); Madeline Henley, Robert C. Davis & Barbara E. Smith, *The Reactions of Prosecutors and Judges to Victim Impact Statements*, 3 INT’L REV. VICTIMOLOGY 83 (1994).

punitiveness, though this conclusion is subject to several qualifications.<sup>149</sup> Another measure of the effectiveness of victim impact statements is whether they serve their intended purpose of humanizing the victim and communicating the impact of the loss without serving the unintended and improper purpose of encouraging invidious distinctions among victims. There is some evidence on this question as well. As discussed below, however, many empirical questions remain.

## 2. Punitive Effect and Impact on Sentencing

As Bandes and Blumenthal have summarized: “[m]ore than a decade of empirical research has shown that victim impact statements increase punitiveness in jurors. Studies consistently, though not invariably, show that hearing these statements increases the probability of mock jurors rendering a death sentence, at times more than doubling the likelihood.”<sup>150</sup>

Numerous laboratory studies have found that mock jurors who are exposed to victim impact statements are more punitive toward capital defendants than are mock jurors who have otherwise heard identical evidence, but have not been exposed to such statements. Not only were the jurors who heard victim impact testimony more likely to sentence the defendant to death,<sup>151</sup> but they also rated the prosecution’s case as stronger on the question of guilt or innocence—a question on which victim impact evidence should have no bearing.<sup>152</sup> This increase in punitiveness resulting from victim impact statements did not vary according to the heinousness of

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149. See *infra* Part IV.B.2.

150. Bandes & Blumenthal, *supra* note 14, at 167–68 (citations omitted). Mock jurors are also more punitive when they hear a victim impact statement in the context of a robbery and assault case. Olga Tsoudis & Lynn Smith-Lovin, *How Bad Was It? The Effects of Victim and Perpetrator Emotion on Responses to Criminal Court Vignettes*, 77 SOC. FORCES 695, 712 (1998).

151. Lynne Forsterlee et al., *The Effects of a Victim Impact Statement and Gender on Juror Information Processing in a Criminal Trial: Does the Punishment Fit the Crime?*, 39 AUSTRALIAN PSYCHOLOGIST 57, 64 (2004); James Luginbuhl & Michael Burkhead, *Victim Impact Evidence in a Capital Trial: Encouraging Votes for Death*, 20 AM. J. CRIM. JUST. 1 (1995); Mila Green McGowan & Bryan Myers, *Who is the Victim Anyway? The Effects of Bystander Victim Impact Statements on Mock Juror Sentencing Decisions*, 19 VIOLENCE & VICTIMS 357, 365 (2004); Bryan Myers & Jack Arbuthnot, *The Effects of Victim Impact Evidence on the Verdicts and Sentencing Judgments of Mock Jurors*, 29 J. OFFENDER REHABILITATION 95, 95 (1999); Bryan Myers et al., *Victim Impact Statements and Crime Heinousness: A Test of the Saturation Hypothesis*, 19 PSYCHOL. CRIME & L. 129, 129 (2011) [hereinafter *Crime Heinousness*]; Bryan Myers et al., *Victim Impact Statements and Mock Juror Sentencing: The Impact of Dehumanizing Language on a Death Qualified Sample*, 22 AM. J. FORENSIC PSYCHOL. 39, 39 (2004).

152. Edith Greene et al., *Victim Impact Evidence in Capital Cases: Does the Victim’s Character Matter?*, 28 J. APPLIED SOC. PSYCHOL. 145, 154 (1998).

the murder<sup>153</sup>—a finding that undercuts the assumption in the *Payne* concurrence that it would be the heinousness of the crime, not the presentation of the statements, that would inflame the jurors' emotions.<sup>154</sup> The limited study of actual capital juries also suggests that victim impact statements increase the likelihood of a capital sentence.<sup>155</sup>

As discussed below, there are serious methodological concerns about how much can be learned from the use of mock juries in research on the emotional dynamics of capital cases.<sup>156</sup> In a recent study, Paternoster and Deise addressed several of these concerns by using subjects taken from an actual list of potential jurors rather than college students, by determining whether these potential jurors were death qualified,<sup>157</sup> and by using videotapes of victim impact testimony in actual capital trials rather than crafted statements.<sup>158</sup> They sought to identify the emotions evoked by victim impact testimony and their impact on capital sentencing. They concluded that participants viewing victim impact evidence were more likely to impose a death sentence than participants who did not view this evidence. Participants viewing victim impact evidence reported feeling more anger about the murder and more sympathy and empathy toward the victim. They also reported seeing the victim and victim's family in a more favorable light and seeing the offender in a less favorable light. The researchers found that of all

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153. *Crime Heinousness*, *supra* note 152, at 129. However, in a separate study, Myers and colleagues found that the degree of harm to the victims' surviving family members as a result of the loss of the victim did affect the likelihood of a death sentence. Bryan Myers et al., *Victim Impact Testimony and Juror Judgments: The Effects of Harm Information and Witness Demeanor*, 32 J. APPLIED SOC. PSYCHOL. 2393, 2393 (2002).

154. *Payne v. Tennessee*, 501 U.S. 808, 832 (1991) (O'Connor, J., concurring).

155. Adalberto Aguirre, Jr. et al., *Sentencing Outcomes, Race, and Victim Impact Evidence in California: A Pre- and Post-Payne Comparison*, 11 JUST. PROF. 297, 297 (1999); see also 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, 290 (James R. Acker et al. eds., 2006) (citing a trend toward an increase in death penalty verdicts post-*Payne*). But see Theodore Eisenberg et al., *Victim Characteristics and Victim Impact Evidence in South Carolina Capital Cases*, 88 CORNELL L. REV. 306, 331–33 (2003) (finding no such increase based on individuals' first sentencing votes rather than on ultimate verdicts).

156. One significant problem with these studies is that the researchers often do not account for the variations in emotionality in delivery of the statements, though these variations have been shown to affect the impact of the statements. See, e.g., Mary R. Rose et al., *Appropriately Upset? Emotion Norms and Perceptions of Crime Victims*, 30 LAW & HUM. BEHAV. 203, 217–18 (2006); Tsoudis & Smith-Lovin, *supra* note 150, at 711.

157. See *Witherspoon v. Illinois*, 391 U.S. 510 (1968) (holding that prospective capital jurors must be struck for cause if they are unwilling to impose a death sentence under any circumstances).

158. Deise & Paternoster, *supra* note 131, at 615; Paternoster & Deise, *supra* note 141, at 134–35, 140.

the emotions evoked by the victim impact statements, only the increase in sympathy and empathy toward the victim and the victim's family increased the likelihood that the jury would vote for the death penalty. Thus, these results support the "identifiable victim" effect and illustrate its influence on sentencing decisions.<sup>159</sup>

### 3. The Problem of the "Worthy" Victim

Victim impact testimony is meant to give the jury a glimpse of the victim through the family member's testimony.<sup>160</sup> It is clear enough that in-court testimony is more vivid and evocative than a written victim impact statement, but what features of the in-court testimony are the jury to evaluate? It seems ghoulish to suggest that the jury will evaluate the depth and strength of the witness's grief.<sup>161</sup> Yet if communicating grief and the pain of loss are the aims of victim impact testimony, this seems unavoidable. An even more troubling possibility is the one the Court in *Payne* all but dismissed: that jurors will evaluate the comparative worth of victims based on their favorable impression of the victims' families,<sup>162</sup> or on the victims' adherence to stock "good victim" narratives<sup>163</sup> or even on pernicious factors such as race,<sup>164</sup> class,

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159. Paternoster & Deise, *supra* note 141, at 153; see also Amy L. Wevodau et al., *The Role of Emotion and Cognition in Juror Perceptions of Victim Impact Statements*, 27 SOC. JUST. RES. 45 (2014) (demonstrating that presence of VIS in a sexual assault case increased sentence length and decreased tendency to blame the victim).

160. In previous articles, Bandes has addressed the arguments against victim impact statements in capital trials in detail. See, e.g., Bandes, *supra* note 125 (addressing the *Payne* majority's arguments, including the problem of prior notice, the comparative valuation of victims, and the argument for leveling the playing field between defendant and victim); Susan A. Bandes, *Repellent Crimes and Rational Deliberation: Emotion and the Death Penalty*, 33 VT. L. REV. 489, 498–502 (2009) (addressing assumptions about emotion underlying *Payne*); Bandes & Blumenthal, *supra* note 14, at 161 (reviewing empirical evidence on effects of victim impact statements and suggesting directions for further study); Bandes, *supra* note 148; Bandes, *supra* note 132 (addressing a more recent, albeit deeply held and widely accepted, argument for victim impact statements: the argument that they provide closure for the families of murder victims).

161. Rose et al., *supra* note 156 (in mock jury studies, found that emotionally evocative victim impact statements elicited more punitive sentences).

162. Greene et al., *supra* note 152.

163. Scott E. Sundby, *The Capital Jury and Empathy: The Problem of Worthy and Unworthy Victims*, 88 CORNELL L. REV. 343, 374–75 (2003). Sundby concluded from a review of interviews by the Capital Jury Project that capital jurors were more empathetic toward victims of "good" character during the guilt phase of a capital trial, and that their level of empathy affected the likelihood of a death sentence. *Id.* As he notes, more research needs to be conducted on whether victim impact testimony increased this effect, or just confirmed what jurors had already concluded. *Id.*; see also Rose et al., *supra* note 156.

164. The Baldus studies, and subsequent studies validating their findings, demonstrate that race plays a significant role in jurors' valuation of victims, and that this comparative valuation

and ethnicity. Alternatively, the humanizing effect of the statements may arouse strong feelings in the jurors, not as a function of comparative worth, but simply because the victims are transformed from faceless stranger into identifiable individuals. This last possibility seems consistent with *Payne's* goals, but leaves open the question of what jurors are meant to do with their emotional responses to the pain and grief the statements elicit.

The Paternoster and Deise study found that victim impact evidence increased not only jurors' negative emotions toward the defendant, but also their positive emotions toward the victim and the victim's family. The researchers hypothesized that these heightened feelings of sympathy and empathy led jurors to want to assist the victim's family, and that the only available outlet for these emotions was to impose a death sentence.<sup>165</sup> This study does not speak to the question of invidious comparisons among victims. It does raise the psychological question of exactly how these combined feelings of anger and empathy worked. For example, did these emotions help the jury resolve the difficult moral question it faced, or did they interfere with the jurors' ability to remain open to the defendant's mitigation evidence? Did they encourage the jurors to become overly confident of their own ability to decide correctly? The study also raises the normative legal question of whether those who kill "identifiable" victims deserve a death sentence more than those whose victims command less empathy.

There is some evidence to support the troubling possibility that victim impact statements lead to invidious comparisons, though it is neither consistent nor strong.<sup>166</sup> One study of mock jurors exposed to actual videotaped statements found that jurors not only rated respectable victims more favorably than less respectable victims, but also believed that the victims' death had a greater emotional impact, rated the murders as more serious, and had more compassion for the victims' family members.<sup>167</sup> A second study by the same researchers replicated these findings and in addition found that mock jurors also rated the respectable victims to be more similar

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has a significant effect on death penalty verdicts. See DAVID C. BALDUS ET AL., EQUAL JUSTICE AND THE DEATH PENALTY (1990); Raymond Paternoster et al., *An Empirical Analysis of Maryland's Death Sentencing System With Respect to the Influence of Race and Legal Jurisdiction: Final Report*, A.C.L.U. MD. 1, available at [http://www.aclu-md.org/uploaded\\_files/0000/0376/md\\_death\\_penalty\\_race\\_study.pdf](http://www.aclu-md.org/uploaded_files/0000/0376/md_death_penalty_race_study.pdf) (last visited Nov. 11, 2014).

165. Paternoster & Deise, *supra* note 141, at 153.

166. *Id.* at 138 (summarizing studies).

167. Greene et al., *supra* note 152.

to the jurors (than the less respectable victims) and rated their families to have suffered more physically and financially.<sup>168</sup>

These studies give credence to the concern that jurors are engaged in the comparative valuation of victims as part of their assessment of defendants' guilt and punishment. Even more troubling, these comparisons may be fueled not only by stock "good victim" narratives, but also by pernicious factors like race and ethnicity.<sup>169</sup> The dynamics of empathy play an important role in this equation. People tend to impute their own internal states to those they perceive as similar, but "employ stereotypes to infer the internal states of those they view as dissimilar."<sup>170</sup> Empathy is more effortful across racial lines, as Craig Haney and Mona Lynch have discussed in detail.<sup>171</sup> William Bowers and his coauthors have documented the impact of this empathic racial divide on the ability to evaluate the intent, motives and attributes of others.<sup>172</sup> Empathic accuracy is also challenged by other differences, including

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168. Edith Greene, *The Many Guises of Victim Impact Evidence and Effects on Jurors' Judgments*, 5 PSYCHOL. CRIME & L. 331 (1999). However, these studies did not measure the effects of these reactions on verdict or sentence.

169. Interviews with actual capital jurors have highlighted the importance of victim race in the context of victim impact statements. One study, using the Capital Jury Project dataset, found that victim impact statements were almost twice as likely in cases involving white victims as in those involving black victims, and that jurors who heard victim impact statements reported being significantly more able to identify with the victim's family than jurors who did not hear such statements. In cases that involved a non-white as compared to a white victim, jurors reported that the fact that the victim had a loving family was less important and that the family's loss and grief was less important to their sentencing decision. Karp & Warshaw, *supra* note 155.

170. *Id.* at 156; see also Jennifer L. Eberhardt et al., *Looking Deathworthy: Perceived Stereotypicality of Black Defendants Predicts Capital-Sentencing Outcomes*, 17 PSYCHOL. SCI. 383 (2006) (reporting that stereotypes, such as the belief that black people are more criminally inclined, can affect jurors' evaluation of credibility and blameworthiness).

171. CRAIG HANEY, DEATH BY DESIGN: CAPITAL PUNISHMENT AS A SOCIAL-PSYCHOLOGICAL SYSTEM (2005); Mona Lynch & Craig Haney, *Mapping the Racial Bias of the White Male Capital Juror: Jury Composition and the "Empathic Divide,"* 45 LAW & SOC'Y REV. 69 (2011); see also Sheri Lynn Johnson, *The Color of Truth: Race and the Assessment of Credibility*, 1 MICH. J. RACE & L. 261, 264–65 (1996) (discussing influence of race on credibility assessments); Joseph W. Rand, *The Demeanor Gap: Race, Lie Detection, and the Jury*, 33 CONN. L. REV. 1, 4 (2000) (presenting evidence that jurors are unable to accurately judge the demeanor of witnesses of a different race).

172. William J. Bowers et al., *Death Sentencing in Black and White: An Empirical Analysis of the Role of Jurors' Race and Jury Racial Composition*, 3 U. PA. J. CONST. L. 171, 257–58 (2001).

ethnicity,<sup>173</sup> age,<sup>174</sup> mental illness,<sup>175</sup> and deviations from cultural scripts of appropriate behavior more generally.<sup>176</sup> The empathy research and its implications for the evaluation of victim impact statements will be addressed in more detail in Part IV.

### C. Video Victim Impact Evidence

Video presentations present several interesting questions about the impact of empathy on legal decision-making. For example there is some evidence that videotaped testimony evokes less empathy than in-court testimony,<sup>177</sup> though video also presents opportunities for close-ups and other artistry that might ameliorate the effect of the decision maker's lack of proximity to the witness. Video victim impact statements raise an additional set of issues about the dynamics of empathy by giving capital juries the opportunity to view the face of the murder victim. Face-to-face encounters enable empathy,<sup>178</sup> but empathy is not always accurate.<sup>179</sup> With empathy comes the danger of selective empathy.

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173. See, e.g., Deborah Franklin, *Disgust or Anger? Some Looks Don't Translate*, NAT'L PUB. RADIO (Aug. 14, 2009), [www.npr.org/blogs/health/2009/08/to\\_spot\\_an\\_eastwest\\_difference.html](http://www.npr.org/blogs/health/2009/08/to_spot_an_eastwest_difference.html).

174. Martha Grace Duncan, "So Young and So Untender": *Remorseless Children and the Expectations of the Law*, 102 COLUM. L. REV. 1469, 1500 (2002).

175. Georgina Stobbs & Mark Rhys Kebbell, *Jurors' Perception of Witnesses with Intellectual Disabilities and the Influence of Expert Evidence*, 16 J. APPLIED RES. INTELL. DISABILITIES 107 (2003) (finding that mock jurors found such witnesses to be honest but not reliable and that expert testimony can help ameliorate prejudicial assumptions).

176. Sundby, *supra* note 163.

177. The use of testimony via videoconferencing raises interesting issues in this regard. Although it arguably permits the expression and evaluation of demeanor, there is evidence that remoteness affects evaluation of the witness adversely. Moreover, videoconferencing, like other visual evidence, involves choices in framing, close-ups, angle and other aspects of filming that may affect the presentation of the witness to the trier of fact. Poulin, *supra* note 17; see also Gail S. Goodman et al., *Face-to-face Confrontation: Effects of Closed-circuit Technology on Children's Eyewitness Testimony and Jurors' Decisions*, 22 LAW & HUM. BEHAV. 165 (1998); Wendy P. Heath & Bruce D. Grannemann, *How Video Image Size Interacts with Evidence Strength, Defendant Emotion, and the Defendant-Victim Relationship to Alter Perceptions of the Defendant*, BEHAV. SCI. & L. 496 (2014) (showing that videos of defendant testimony projected on a large 9-foot screen (as compared to a smaller 27-inch television screen) tended to intensify jurors' reactions to the case evidence by leading to more guilty verdicts when the case was strong and fewer guilty verdicts when the case was weak); Sara Landström et al., *Witnesses Appearing Live Versus on Video: Effects on Observers' Perception, Veracity Assessments and Memory*, 19 APPLIED COGNITIVE PSYCHOL. 913 (2005).

178. Jonathan Cole, *Empathy Needs a Face*, 8 J. CONSCIOUSNESS STUD. 51 (2001).

179. See, e.g., William Ickes, *Empathic Accuracy: Its Links to Clinical, Cognitive, Developmental, Social, and Physiological Psychology*, in THE SOCIAL NEUROSCIENCE OF EMPATHY 57, 57 (2011).

The Supreme Court recently denied certiorari in two cases involving victim impact testimony in the form of emotionally powerful films about the lives of the victims.<sup>180</sup> One of these included music by Enya, a voiceover by the murder victim's mother, and a concluding shot of wild horses running free (depicting "the kind of heaven" in which the victim's mother said her daughter belonged).<sup>181</sup> The other contained 118 photographs of the victims at various stages of life, including childhood and the early years of marriage, and concluding with photographs of the victims' graves.<sup>182</sup> The California Supreme Court held the videos admissible, finding that they "expressed no outrage," and contained no "clarion call for vengeance," but "just implied sadness."<sup>183</sup> It found that the videos conveyed information about what the defendant took from the victim, for example her ability to enjoy her favorite activities and her opportunity to contribute to the unique framework of her family.<sup>184</sup> As Justice Stevens pointed out in his dissent, "no member of the [California] court suggested that the evidence shed any light on the character of the offense, the character of the offender, or the defendant's moral culpability."<sup>185</sup> Yet neither the California court, which equated emotion with intensely expressed passion<sup>186</sup> and thereby overlooked the emotional power of the videos, nor Justice Stevens, who opined that emotion should have been excised from the proceeding entirely, took a realistic approach. The sharp distinction between evidence that evokes emotion and evidence that conveys information muddies the courts' analysis and leaves them with no framework for determining whether this particular information, and these particular emotions, belong in the courtroom.<sup>187</sup>

The most obvious way in which video victim impact evidence is different from written testimony or in-court testimony is in its ability to embody the murder victim in the courtroom. In one sense, this appears to be precisely the goal the *Payne* decision articulated. It turns the victim from an abstract, faceless stranger into an identifiable person. As both cognitive psychologists and neuroscientists have documented, this transformation has a significant emotional impact on decision-making, though the precise dynamics and their consequences are matters of continuing study and controversy.

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180. *Kelly v. California*, 555 U.S. 1020 (2008).

181. *People v. Kelly*, 171 P.3d 548, 557–58 (Cal. 2007).

182. *People v. Zamudio*, 181 P.3d 105, 135 (Cal. 2008).

183. *Kelly*, 171 P.3d at 559.

184. *Id.* at 570–71.

185. *Kelly*, 555 U.S. at 1022 (Stevens, J., dissenting).

186. See Bandes, *supra* note 132, at 505.

187. Some portions of this discussion of video victim statements appear in somewhat different form in Bandes, *Repellent Crimes*, *supra* note 160, at 498–503.

In the neuroscientific realm, a number of fMRI studies have compared brain activation differences when subjects consider moral dilemmas that involve a personal element versus one that is more remote and abstract. Participants contemplating the more personal moral violation had increased activity in brain areas associated with emotion, and decreased brain activity in areas associated with cognitive processes such as working memory.<sup>188</sup> As discussed above, this transformation from the abstract and faceless to the known and identifiable—sometimes labeled the “known victim effect”<sup>189</sup>—has been shown to encourage feelings of empathy, sympathy and a desire to help.<sup>190</sup>

The video montage is an emotionally powerful medium. As Charlie Mintz notes, “one way that films can be uniquely manipulative is through the power of the human face.”<sup>191</sup> Video can bring us closer to human faces, it can humanize, and it can show tears or other expressions that elicit compassion.<sup>192</sup> As Christine Kennedy argues, the video creates “a single cohesive story of the victim’s life,” thus “increasing [the jury’s] sense of identification with the victim and anger toward the defendant.”<sup>193</sup> Moreover, video presents itself as seamless, disguising the choices made in filming and editing. This is similar to the naïve realism effect discussed above in the context of still photos.<sup>194</sup> But video is arguably more involving, more encompassing.<sup>195</sup> We are

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188. Jessica Salerno & Bette Bottoms, *Emotional Evidence and Jurors’ Judgments: The Promise of Neuroscience for Informing Psychology and Law*, 27 BEHAV. SCI. & L. 273, 286 (2009) (citing *inter alia* Joshua D. Greene et al., *The Neural Bases of Cognitive Conflict and Control in Moral Judgment*, 44 NEURON 389 (2004)).

189. Thomas Schelling, *The Life You Save May be Your Own*, in PROBLEMS IN PUBLIC EXPENDITURE ANALYSIS, cited in Paternoster & Deise, *supra* note 141, at 138.

190. Paternoster & Deise, *supra* note 141, at 140 (citing Deborah Small et. al., *Sympathy and Callousness: The Impact of Deliberative Thought on Donations to Specific and Identifiable Victims*, 102 ORG. BEHAV. & HUM. DECISION PROCESSES 143, 144 (2007)).

191. Charlie Mintz, Justice at 24 Frames a Second: Victim Impact and Mitigation Video in Capital Trials 20 (June 1, 2010) (unpublished Honors thesis, Stanford University) (on file with author).

192. *Id.*

193. Christine Kennedy, *Victim Impact Videos: The New Wave of Evidence in Capital Sentencing Hearings*, 26 QUINNIPAC L. REV. 1069, 1098–99 (2008).

194. Courts display a complex doctrinal attitude toward videos. They tend to treat day-in-the-life videos as demonstrative evidence akin to a chart or a graph, and thus subject to limited discovery—i.e., the outtakes are generally not discoverable. They treat surveillance videos as substantive evidence and thus subject to broader discovery. Although we are aware of no rulings on the “outtakes” from video victim impact statements, presumably courts would treat them as demonstrative evidence. See, e.g., *Cisarik v. Palos Community Hosp.*, 579 N.E.2d 873, 874 (Ill. 1991).

195. *But see* Norbert L. Kerr, *Explorations in Juror Emotion and Juror Judgment*, in EMOTION AND THE LAW: PSYCHOLOGICAL PERSPECTIVES 97, 123–24 (Brian H. Bornstein & Richard L. Wiener eds., 2010) (raising possibility based on a study he conducted that photos were

accustomed to sitting back and “passively accepting information from screens.”<sup>196</sup> As one author put it, “the medium of film possesses a unique ability to speak to our conscious and subconscious minds.”<sup>197</sup>

Moreover, as Regina Austin points out, each medium comes with its own genre-specific associations and expectations. These particular videos look like home movies, and elicit all the associations evoked by home movies. They present “an idyllic or uncomplicated portrait of family life,” they evoke “romanticized, utopian suppositions about” the family life portrayed, and they evoke an “intolerable nostalgia” when shown in the context of a murder trial.<sup>198</sup> One concern expressed by scholars is that in folding the victim into the genre of “families like ours,” these videos relegate the defendant to the out-group.<sup>199</sup> A related concern is that such videos may encourage distinctions based on the “social worth or class, race, age, and gender of the victim—factors that may be readily discerned from a victim impact video.”<sup>200</sup> Thus video statements may pose a particularly strong risk of encouraging selective empathy.

Or perhaps, as Charlie Mintz suggests, victim impact videos like these may contribute to a fuller understanding of what is at stake, “stirring jurors’ emotions to create genuinely moral decision-making.” “They may [instill] humanity into the trial” and help “to bring closer to hand that which is most important.”<sup>201</sup> This is the discussion that needs to occur: a normative discussion about whether victim impact videos advance the goals of the criminal justice system, informed by accurate information about how the emotions elicited by the videos affect decision-making.

The deleterious impact of the courts’ misconceptions about emotion is perhaps most obvious in their treatment of the soundtracks that accompany the montages, featuring music by Enya and Celine Dion. No court claimed that the music was probative on any relevant issue, but courts have nevertheless been willing to countenance this irrelevant testimony because they minimize the emotional impact of the music and its possible prejudicial effect. The California Supreme Court discounted the possibility of harmful emotional influence, characterizing the music as soft background music of a

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more involving for various reasons, including that jurors had to physically handle them and were closer to the images).

196. Mintz, *supra* note 191, at 24.

197. Emily Holland, *Moving Pictures . . . Maintaining Justice? Clarifying the Right Role for Victim Impact Videos in the Capital Context*, 17 BERKELEY J. CRIM. L. 147, 170 (2012).

198. Regina Austin, *Documentation, Documentary, and the Law: What Should Be Made of Victim Impact Videos?* 31 CARDOZO L. REV. 979, 987–88 (2010).

199. *Id.* at 998–99.

200. *Id.* at 990.

201. Mintz, *supra* note 191, at 2.

sort ubiquitous in videotapes.<sup>202</sup> The judicial reaction to the Enya soundtrack in *Kelly* mirrors its reaction to the “informational” visual aspects of the video. It searches for hot, passionate outbursts and, finding soft background music instead, assumes there is no emotional effect.<sup>203</sup>

This observation supports Austin’s concern that victim impact videos will trigger irrelevant and prejudicial associations with home movies.<sup>204</sup> More generally, it misunderstands the emotional power of music. Music heightens emotion (and thus may amplify the sadness the jurors already feel)<sup>205</sup> but it also communicates directly. As Bennett Capers argues, music can tell a story without language—a story that is communicated outside of conscious awareness, and that cannot be rebutted or even transcribed. Thus it has all the hallmarks of the sort of emotional influence law should avoid. It conveys no information relevant to the legal issue, yet it exerts a strong effect on the deliberative process. Most problematic, this influence bypasses consciousness and thus is insulated from evaluation and counterargument.<sup>206</sup> In common parlance, it manipulates rather than informs.

## V. OUR BRAINS ON EMOTIONAL EVIDENCE

Many of the claims underlying admissibility decisions about gruesome photographs and victim impact statements are premised on assumptions about human behavior that are empirical in nature, and thus ought to be informed by empirical evidence. As we have seen, it is simplistic and inaccurate to regard emotion as an across-the-board interference with decision-making. Emotional responses impart information, and that information may or may not be relevant to the decision-making task at hand. The anger elicited by a gruesome photo may be relevant to sentencing (for example to a determination of heinousness) but not to the question of whether the defendant committed the crime. The sadness elicited by the Enya soundtrack accompanying a victim impact video, on the other hand, is difficult to defend as relevant to any issue in capital sentencing.

Emotion has more subtle effects on decision-making that have received little attention in the legal literature. It affects not only how we react to

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202. People v. Kelly, 171 P.3d 548, 571–72 (Cal. 2007).

203. Bennett Capers, *Crime Music*, 7 OHIO ST. J. CRIM. L. 749, 768–69 (2010) (citing *Kelly*, 171 P.3d at 570–71).

204. See Austin, *supra* note 198, at 987–88; Mintz, *supra* note 191, at 15 (the home movie quality can “greatly increase juror identification, channeling the punitive response . . .”).

205. Salazar v. State, 90 S.W.3d 330, 339 (Tex. Crim. App. 2002); Mintz, *supra* note 191, at 14.

206. For fuller discussions of the music in video victim impact cases, see Austin, *supra* note 198, at 993–97; Capers, *supra* note 203; and Mintz, *supra* note 191.

evidence, but also how we encode and process the evidence in the first place. Moreover, strong emotions elicited by evidence might affect a decision maker's ability to remain open to other evidence. For example, when a victim impact statement elicits a juror's anger toward the defendant or empathy toward the victim, those emotions may interfere with the juror's ability to remain open to the defendant's mitigation evidence. Relatedly, strong emotional reactions may trigger a biased search for information that confirms the initial emotional reactions. Thus jurors angered and disgusted by gruesome photos may seek out evidence that confirms or exacerbates their anger at the defendant and screen out evidence that would induce sympathy for the defendant.

Many contemporary social psychological models of emotion and decision-making predict that evidence that elicits strong negative emotions will lead to more punitive case judgments, as well as offer explanations for *how* this might happen. Along these lines, Feigenson and Park have proposed an influential model of how emotion might influence legal decision-making.<sup>207</sup> As they explain,<sup>208</sup> there are several possible "relationships between decision makers' emotions and their attributions of legal responsibility and blame."<sup>209</sup>

First, a decision maker's emotions can affect information-processing strategies. For example, studies have found that "anger leads to less systematic information processing" than other emotions such as sadness or happiness.<sup>210</sup> Sadness, for example, might actually *help* jurors process testimony. Semmler and Brewer<sup>211</sup> induced sadness in mock jurors by including details of physical and psychological trauma experienced by the victim and defendant (compared to inducing a neutral mood in the absence of these details). They found that sad jurors reported details of testimony inconsistencies more accurately than did jurors in a neutral emotional state.<sup>212</sup> Anger, in contrast, results in shallower processing and more reliance on shortcuts and stereotypes.<sup>213</sup> For example, one study found that people induced to be angry perceived a Hispanic person as more guilty of assault than a non-Hispanic person, in contrast to people who were induced to be in

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207. Neal R. Feigenson & Jaihyun Park, *Emotions and Attributions of Legal Responsibility and Blame: A Research Review*, 30 LAW & HUM. BEHAV. 143, 143 (2006).

208. See *supra* Part III for a fuller discussion of these issues.

209. Feigenson & Park, *supra* note 207, at 149.

210. *Id.* at 147.

211. Carolyn Semmler & Neil Brewer, *Effects of Mood and Emotion on Juror Processing and Judgments*, 20 BEHAV. SCI. & L. 423, 428 (2002).

212. *Id.*

213. Jennifer S. Lerner & Larissa Z. Tiedens, *Portrait of the Angry Decision Maker: How Appraisal Tendencies Shape Anger's Influence on Cognition*, 19 J. BEHAV. DECISION MAKING 115, 122 (2006) (citation omitted).

a sad or neutral mood.<sup>214</sup> The authors concluded that angry participants' greater reliance on the race stereotype resulted from their more heuristic, less effortful processing of information.<sup>215</sup>

Moreover, some emotions, such as anger, disgust, and happiness, "are typically associated with a greater sense of certainty" than others like hope, anxiety, and some types of sadness.<sup>216</sup> This certainty goes hand in hand with a disinclination to process information systematically and to a "greater susceptibility to heuristic cues," willingness to take shortcuts, and reliance on stereotypes.<sup>217</sup> Because anger and disgust are associated with certainty<sup>218</sup> and diminished information processing,<sup>219</sup> these emotional reactions might exacerbate the effect of other emotions on subsequent legal judgments. The angrier legal decision makers are, for example, the more they might rely on visceral gut reactions like disgust as heuristics for their judgments. A recent mock jury study lends support to this hypothesis.<sup>220</sup> As mock jurors' disgust in reaction to emotionally disturbing photographs of a murder victim increased, their moral outrage toward the defendant also increased, which in turn increased the jurors' confidence in a guilty verdict.<sup>221</sup> This effect got stronger as jurors' anger increased.<sup>222</sup> Thus, it was the unique combination of anger *and* disgust that increased moral outrage, which in turn made the jurors believe that a guilty verdict was appropriate.<sup>223</sup>

The second way that emotion might affect how probative evidence is processed is by biasing what information gets processed so that decision

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214. Galen V. Bodenhausen, Lori A. Sheppard & Geoffrey P. Kramer, *Negative Affect and Social Judgment: The Differential Impact of Anger and Sadness*, 24 EUR. J. SOC. PSYCHOL. 45, 50–51 (1994).

215. *Id.* at 58–59. A recent study has found, however, that angry people do have the motivation and capacity to process analytically and that the previous finding that anger leads to greater reliance on heuristic processing occurs selectively when the heuristic cue (such as race) is perceived as relevant to the decision. Wesley G. Moons & Diane M. Mackie, *Thinking Straight While Seeing Red: The Influence of Anger on Information Processing*, 33 PERSONALITY & SOC. PSYCHOL. BULL. 706 , 706 (2007). This conclusion—that angry people's reliance on heuristics such as racial stereotypes is actually a result of analytic processing—does not provide comfort.

216. Feigenson & Park, *supra* note 207, at 147–48.

217. *Id.* at 147.

218. Phoebe C. Ellsworth & Craig A. Smith, *From Appraisal to Emotion: Differences Among Unpleasant Feelings*, 12 MOTIVATION & EMOTION 271, 294 (1988).

219. Bodenhausen, Sheppard & Kramer, *supra* note 215, at 50–51; Larissa Z. Tiednes & Susan Linton, *Judgment Under Emotional Certainty and Uncertainty: The Effects of Specific Emotions on Information Processing*, 6 J. PERSONALITY & SOC. PSYCHOL. 973, 979–81 (2001).

220. See Salerno & Peter-Hagene, *supra* note 109, at 2074.

221. *Id.*

222. *Id.*

223. *Id.*

makers favor evidence that is congruent with their emotions.<sup>224</sup> For example, a juror's negative emotions resulting from seeing or hearing emotional evidence may initiate negatively biased information processing, which in turn focuses attention more on the emotion-congruent aspects of the case. If jurors are angry after hearing a victim impact statement during a death penalty sentencing hearing, they might be more likely to recall subsequent negative information (e.g., an officer testifying that the crime was particularly heinous) than positive information (e.g., a defendant's mother testifying to the positive aspects of his character). In turn, it is reasonable to assume that this prosecution-oriented bias would lead to more punitive sentences.

This theory is supported by Bright and Goodman-Delahunty's<sup>225</sup> finding that jurors who viewed gruesome photographs rated the prosecution's evidence as stronger than jurors who did not view the photographs, and by similar findings about jurors who viewed victim impact statements.<sup>226</sup> Because the two groups heard exactly the same case otherwise, this suggests that the jurors who saw the photographs or heard the victim impact statements focused more on the emotion-congruent testimony (e.g., traumatic details of the crime, negative information about the defendant, etc.) than did other jurors. This is also supported by Greene and her colleagues' finding that jurors who heard a victim impact statement about a highly respectable victim took into account a defendant's difficult childhood less than did jurors who heard about a less respectable victim.<sup>227</sup> Both groups heard the information about the difficult childhood, but given this theory, jurors who heard the impact statement about a highly respectable victim might have paid more attention to information that confirmed their anger toward the defendant.<sup>228</sup>

As another example of how social psychological theories might explain the effect of emotional evidence on jurors' judgments, consider Jonathan Haidt's model for the role of emotion in moral reasoning.<sup>229</sup> This social intuitionist model gives emotion an integral role in decision-making by asserting that visceral, emotional reactions drive moral judgments and that deliberation comes after intuition and serves merely to justify the initial moral judgment.<sup>230</sup> If true, this would suggest that not only could negative emotion

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224. See Feigenson & Park, *supra* note 207, at 144–45 (for example, jurors in a negative mood or influenced by a negative emotion may perceive or recall more negative information about a party, and that negative information may influence liability decisions).

225. See *Gruesome Verbal Evidence*, *supra* note 104, at 154.

226. See, e.g., Greene et al., *supra* note 152, at 154.

227. *Id.*

228. *Id.*

229. Jonathan Haidt, *The Emotional Dog and Its Rational Tail: A Social Intuitionist Approach to Moral Judgment*, 108 PSYCHOL. REV. 814 (2001).

230. *Id.* at 814.

resulting from jurors' emotional reactions color their understanding and processing of the evidence, but that this emotion might interfere with the jurors' capacity to consider subsequent evidence that contradicted their initial reaction. So, for example, this theory would predict that the reason a victim's emotional statement increases jurors' anger and makes them react more punitively is that the statement induced an immediate visceral response that biased or overwhelmed subsequent deliberation.<sup>231</sup> However, Haidt has also argued that this "moral dumbfounding" effect can be ameliorated by debate with others,<sup>232</sup> which has interesting implications for the process of jury deliberation.

#### A. *The Dynamics of Empathy in the Deliberative Process*

The Court in *Payne v. Tennessee*<sup>233</sup> upheld the use of victim impact statements to humanize victims (even those who do not fit stock images of victimhood)<sup>234</sup> and to convey the impact of the loss. The question of whether they are serving this purpose, or are instead encouraging the comparison of victims based on irrelevant or invidious characteristic, can be informed by empirical studies. Studies in the cognitive sciences on how empathy works are on point. Empathy is a capacity that not everyone possesses in equal measure.<sup>235</sup> Some have more empathic accuracy than others.<sup>236</sup> Some are more aware of their empathic limitations than others. Empathy is selective. It tends to flow most easily toward those like us, or toward those in whose shoes we can imagine ourselves.<sup>237</sup> Selective empathy based on victim characteristics is an important research topic beyond the realm of victim

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231. See Janice Nadler & Mary R. Rose, *Victim Impact Testimony and the Psychology of Punishment*, 88 CORNELL L. REV. 419, 420 (2003); Tsoudis & Smith-Lovin, *supra* note 150, at 695–96; see also Thalia Wheatley & Jonathan Haidt, *Hypnotic Disgust Makes Moral Judgments More Severe*, 16 PSYCHOL. SCI. 780, 783 (2005) (finding that subjects primed to feel disgust made more severe moral judgments).

232. See Haidt, *supra* note 229, at 817, 820; see also Paul Bloom, *How Do Morals Change?*, 464 NATURE 490, 490 (2010).

233. 501 U.S. 808, 827 (1991).

234. See *id.* at 823 (suggesting that victim impact statements can humanize unsympathetic victims).

235. See, e.g., William Ickes, *Empathic Accuracy: Its Links to Clinical, Cognitive, Developmental, Social, and Physiological Psychology*, in THE SOCIAL NEUROSCIENCE OF EMPATHY 57, 57 (Jean Decety & William Ickes eds., 2009).

236. *Id.*

237. John R. Chambers & Mark H. Davis, *The Role of the Self in Perspective-Taking and Empathy: Ease of Self-Simulation as a Heuristic for Inferring Empathic Feelings*, 30 SOC. COGNITION 153, 154 (2012) (finding that most theories of empathy argue that "the self is a template that observers apply to the target during perspective-taking," but in addition it is possible that observers will be more empathic if they can easily imagine themselves in the same situation).

impact evidence. The Baldus studies and others establish that the race of victims exerts a powerful influence on juries.<sup>238</sup> Although there is little research investigating how mock jurors' empathy, specifically, might differ based on victim characteristics, findings demonstrating that mock jurors' case judgments differ depending on victim characteristics such as gender,<sup>239</sup> sexual orientation,<sup>240</sup> and attractiveness<sup>241</sup> suggest that this would be a fruitful future line of research.

The dynamics of empathy operate across legal contexts. A fuller, more realistic understanding of the dynamics of empathy can inform any situation in which people endeavor to discern the intentions and motivations of others. However, each legal context brings its own emotional dynamics, as well as its own expectations about whether empathy is being properly directed. *Payne* assumes that the murder victim must be made vivid because otherwise he is a faceless abstraction in a courtroom where the defendant is present and free to present witnesses to his character during mitigation.<sup>242</sup> In a sense, it determines that in capital cases, the legal system should intervene to help facilitate empathy for the victim. In *Payne*'s aftermath, defendant mitigation videos have entered the scene, raising questions about their impact on sentencing.<sup>243</sup> They, too, are meant to humanize their subjects. As Craig Haney put it, they counter the prosecution's "master narrative" portraying the defendant's crime as entirely the product of free choice with a counter-narrative placing the defendant in the context of his past history and his present life.<sup>244</sup> There is also discussion of whether a capital defendant's family should be able to offer execution impact statements<sup>245</sup> in order to make

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238. BALDUS ET AL., *supra* note 164, at 160–88. The Baldus studies also demonstrate that the race of victims exerts a powerful influence on prosecutorial decision-making. *Id.*

239. Ronald Mazzella & Alan Feingold, *The Effects of Physical Attractiveness, Race, Socioeconomic Status, and Gender of Defendants and Victims on Judgments of Mock Jurors: A Meta Analysis*, 24 J. APPLIED SOC. PSYCHOL. 1315, 1327 (1994).

240. Robert J. Cramer et al., *Hate Crimes on Trial: Judgments About Violent Crime Against Gay Men*, 20 PSYCHIATRY, PSYCHOL. & L. 202, 202 (2013); Jessica M. Salerno et al., *Excusing Murder? Conservatives' Acceptance of the Gay Panic Defense*, PSYCHOL. PUB. POL'Y & L. (forthcoming 2014).

241. Bill Thornton & Richard M. Ryckman, *The Influence of a Rape Victim's Physical Attractiveness on Observers' Attributions of Responsibility*, 36 HUM. REL. 549, 549 (1983).

242. Payne v. Tennessee, 501 U.S. 808, 825–26 (1991). *But see* Bandes, *supra* note 125, at 402–05 (taking issue with this assumption).

243. See, e.g., Salerno & Bottoms, *supra* note 188, at 282–83 (raising the question of whether the anger these videos might elicit toward the defendant's family for his childhood mistreatment might backfire by leading to indiscriminate punitiveness).

244. Mintz, *supra* note 191, at 22 (citing Craig Haney, *Evolving Standards of Decency: Advancing the Nature and Logic of Capital Mitigation*, 36 HOFSTRA L. REV. 835, 842–43 (2008)).

245. See, e.g., Wayne A. Logan, *When Balance and Fairness Collide: An Argument for Execution Impact Evidence in Capital Trials*, 33 U. MICH. J.L. REFORM 1 (1999).

vivid the loss *it* will face if the defendant is subjected to the death penalty. Whether these forms of evidence are relevant to the capital sentencing decision is in part a normative legal question, one that depends on the appropriate role of the victim, the jury, and the punishment in the capital context. It is also an interesting question for cognitive psychology: how does each form of evidence influence the empathy of the decision maker, and with what impact on the ultimate judgment? A better understanding of how empathy works will be useful in the criminal context more broadly, as well as in the civil context (one obvious example is personal injury law).<sup>246</sup> The salient point is that both the psychological dynamics and the normative goals will vary according to context.

#### *B. Limitations of Current Studies and Suggestions for Future Research*

A few broader observations about future directions in research are in order. First, two limitations of many of the current jury studies are particularly problematic for the investigation of emotional dynamics: the fact that so many studies involve individual jurors rather than group deliberation, and the fact that so many studies use mock jurors instead of actual jurors. Future research should address the fact that actual juries deliberate, as opposed to the individual mock jurors in most of the studies we have reviewed. Studies that do not include the jury deliberation component cannot capture the effects of group dynamics on the emotions of individual jurors, nor can they capture the unique dynamics of group-level emotion.<sup>247</sup> They may also misrepresent what final post-deliberation verdicts would be in a real jury context.<sup>248</sup>

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246. Consider for example the “golden rule” imposed by many states that forbids lawyers in tort cases to exhort jurors to put themselves in the shoes of the plaintiff. See Edward J. McCaffery, Daniel J. Kahneman & Matthew L. Spitzer, *Framing the Jury: Cognitive Perspectives on Pain and Suffering Awards*, 81 VA. L. REV. 1341, 1383–84 (1995) (discussing the golden rule and its variations in numerous jurisdictions); see also Brown, *supra* note 10, at 76–78; Jody Lyneé Madeira, *Lashing Reason to the Mast: Understanding Judicial Constraints on Emotion in Personal Injury Litigation*, 40 U.C. DAVIS L. REV. 137 (2006). Additionally, day-in-the-life videos present interesting questions about the evocation of empathy. See Madeira, *supra*, at 169–72; Jessica M. Silbey, *Judges as Film Critics: New Approaches to Filmic Evidence*, 37 U. MICH. J.L. REFORM 493, 561–65 (2004).

247. Bandes & Blumenthal, *supra* note 14, at 172–74; see also Brian Myers, Emalee Weidemann & Gregory Pearce, *Psychology Weighs in on the Debate Surrounding Victim Impact Statements and Capital Sentencing: Are Emotional Jurors Really Irrational?*, 19 FED. SENT’G R. 13, 18 (2006) (noting that exposure to the strong emotions of others, particularly negative emotions, can elicit similar emotions in others through a process called emotional contagion).

248. Shari Seidman Diamond, *Illuminations and Shadows From Jury Simulations*, 21 LAW & HUM. BEHAV. 561, 564–65 (1997).

Deliberation can force jurors to be accountable to other people, not only for their decision, but also for the reasons behind their decision. For example, jurors who are affected by emotion in the manner proposed by Haidt's social intuition model (i.e., whose opinions are based solely on an emotional reaction and not articulable reasoning) might fail to convince their fellow jurors, while jurors whose opinions are based on more conscious deliberation might be more persuasive. Making decisions in a group can increase cognitively complex thinking and encourage sharing of critical arguments.<sup>249</sup> When individuals are accountable and anticipate justifying their views to others, they process information more thoroughly, an effect that can reduce the effects of bias on decisions, including the effects of stereotypes.<sup>250</sup> The gender and racial composition of juries have a strong influence not only on verdicts, but also on the quality of the deliberation leading to the verdict.<sup>251</sup> For example, in a trial with a black defendant, white mock jurors on racially diverse juries not only were more lenient pre-deliberation, but also contributed a wider range of information and made fewer errors during deliberation, compared to racially homogeneous juries.<sup>252</sup> Finally, jurors also correct one another's errors.<sup>253</sup> Thus, potential biases against the defendant resulting from overly emotional evidence might be attenuated after group deliberation.<sup>254</sup>

Alternatively, deliberation might also maximize initial biases, or do little more than develop the picture that was formed before deliberation among the majority of jurors.<sup>255</sup> For example, a mock jury experiment revealed that group deliberation minimized the effect of jurors' pre-existing stereotypes

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249. Edward F. Wright & Gary L. Wells, *Does Group Discussion Attenuate the Dispositional Bias?*, 15 J. APPLIED SOC. PSYCHOL. 531 (1985).

250. Dennis D. Stewart, *Stereotypes, Negativity Bias, and the Discussion of Unshared Information in Decision-Making Groups*, 29 SMALL GROUP RES. 643 (1998).

251. See, e.g., Samuel R. Sommers, *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations*, 90 J. PERSONALITY & SOC. PSYCHOL. 597 (2006).

252. *Id.*

253. Phoebe C. Ellsworth, *Are Twelve Heads Better Than One?*, 52 LAW & CONTEMP. PROBS. 205, 223 (1989).

254. As found in laboratory research by Kaplan, Miller, and Miller. See Martin F. Kaplan & Charles E. Miller, *Judgments and Group Discussion: Effect of Presentation and Memory Factors on Polarization*, 40 SOCIOOMETRY 337 (1977); Martin F. Kaplan & Lynn E. Miller, *Reducing the Effects of Juror Bias*, 36 J. PERSONALITY & SOC. PSYCHOL. 1443 (1978).

255. Robert J. MacCoun & Norbert L. Kerr, *Asymmetric Influence in Mock Jury Deliberation: Jurors' Bias for Leniency*, 54 J. PERSONALITY & SOC. PSYCHOL. 21 (1988); Marla Sandys & Ronald C. Dillehay, *First-Ballot Votes, Predeliberation Dispositions, and Final Verdicts in Jury Trials*, 19 LAW & HUM. BEHAV. 175 (1995); see Dennis J. Devine, Laura D. Clayton, Benjamin B. Dunford, Rasmy Seying & Jennifer Pryce, *Jury Decision Making: 45 Years of Empirical Research on Deliberating Groups*, 7 PSYCHOL. PUB. POL'Y & L. 622 (2001).

about juvenile offenders on their case judgments, but exacerbated the effect of similar stereotypes about juvenile offenders that were activated during trial via attorneys' opening and closing statements.<sup>256</sup> In a recent study by Kurzban, DeScioli, and O'Brien,<sup>257</sup> participants were angrier at and more likely to punish a member of their group who had committed a small moral violation when another person witnessed the punishment decision than when their decisions were anonymous. They punished more in others' presence because they felt they "should." Thus, the public aspect of jury deliberation might exacerbate the punitiveness of individuals' sentencing decisions, especially when the crime is emotionally inflammatory.

Further, a mock jury study will never be completely representative of the dynamics of a real jury. The level of emotional engagement and motivation in an actual jury situation involving real victims, witnesses and defendants ought to be higher,<sup>258</sup> and this difference ought to be especially pronounced in a capital case.<sup>259</sup> Differences in emotional engagement might either minimize or exacerbate the effects of emotional evidence.<sup>260</sup>

In addition, the current research on legal decision-making almost exclusively targets juries, but juries decide an increasingly minuscule number of criminal cases. Overwhelmingly, criminal cases are resolved by judges, either via plea bargain or by bench trial.<sup>261</sup> The lack of focus on judges is

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256. Tamara M. Haegerich, Jessica M. Salerno & Bette L. Bottoms, *Are The Effects of Juvenile Offender Stereotypes Maximized or Minimized By Jury Deliberation?*, 19 PSYCHOL. PUB. POL'Y & L. 81 (2013).

257. Robert Kurzban, Peter DeScioli & Erin O'Brien, *Audience Effects on Moralistic Punishment*, 28 EVOLUTION & HUM. BEHAV. 75, 81 (2007).

258. See, e.g., Richard E. Petty, John T. Cacioppo & Rachel Goldman, *Personal Involvement as a Determinant of Argument-Based Persuasion*, 41 J. PERSONALITY & SOC. PSYCHOL. 847 (1981).

259. See, e.g., Mark Costanzo & Sally Costanzo, *Jury Decision Making in the Capital Penalty Phase*, 16 LAW & HUM. BEHAV. 185, 191 (1992) (arguing that the nature of the death penalty decision may render it an inappropriate topic for jury simulation studies); Edith Greene, *The Many Guises of Victim Impact Evidence and Effects on Jurors' Judgments*, 5 PSYCHOL. CRIME & L. 331, 345 (1999) (describing difficulties in simulating the decision whether to impose a death sentence).

260. Obviously, it would be difficult to create a jury deliberation experience inside an fMRI machine, but psychophysiology measures could be utilized to monitor jurors' emotion levels during deliberations. Studies could manipulate the presence versus absence of victim impact statements or gruesome photographs and assess whether the emotion levels during deliberation are affected and if this heightened emotion affects the quality or depth of jury deliberation. Monitoring of jurors' physiology continuously throughout the jury deliberation process could allow researchers to test whether discussion of the evidence becomes less effortful and thorough as emotion levels rise or fall.

261. See, e.g., ROBERT A. KAGAN, ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW 83 (2001); Susan A. Bandes, *Protecting the Innocent as the Primary Value of the Criminal Justice System*, 7 OHIO ST. J. CRIM. L. 413, 426 (2009) (book review).

partly a function of the long-held article of faith that judging transcends—or ought to transcend—emotional influences.<sup>262</sup> To better understand what emotion contributes to the probative value or the prejudicial effect of evidence, it is necessary to study and compare the entire range of legal decision makers.

Finally, although the research to date has raised very important questions and provided intriguing evidence for many of the phenomena we discuss, many questions are left open. Much of the research we have reviewed regarding more nuanced effects of gruesome photographs and victim impact statements (e.g., whether color versus black and white photographs have different effects, whether victim impact statements lead mock jurors to make invidious comparisons among different types of victims) are based on one or two studies, often with conflicting results. Thus, an important first step is conducting more research replicating these intriguing findings and attempting to resolve the contradictions among previous findings. Second, given the substantial body of research demonstrating that emotionally evocative evidence can affect legal judgments, new questions arise about the parameters of this effect: what is the impact of cumulative photos of the same disturbing subject matter, or of the size of the displayed photos, or of handling the photos physically versus viewing them on a screen? Third, as new forms of evidence are introduced into court proceedings (e.g., day-in-the-life videos, surveillance videos, defendant mitigation videos, 360 degree “Panoscan” crime scene images, crime scene “virtual tours”), future research can investigate what emotions exposure to various media evoke.

Research needs to focus not only on *what* information these emotions convey, but the effect of emotion on *how* information is processed. It should focus on whether evidence impacts deliberation directly, or more indirectly through psychological processes such as biased information processing or increased reliance on heuristics or stereotypes. It should investigate what effects the emotions elicited by various forms of evidence have on the decision maker’s ability to process the other evidence in the case. The legal system too often approaches the question of emotion’s impact on deliberation armed only with instinct and folk knowledge.

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262. Terry A. Maroney, *The Persistent Cultural Script of Judicial Dispassion*, 99 CALIF. L. REV. 629 (2011).

## VI. CONCLUSION

Ultimately, judgments about whether evidence is probative or prejudicial are legal judgments. Empirical evidence can inform these debates though it cannot resolve them.

The problem with evaluating gruesome photos lies in determining the value added by the medium. Sometimes photos help illustrate a genuine issue of fact such as condition of the body or angle of a bullet, and sometimes they capture a detail that ought to be outside the frame of the trial—the child’s bloody handprint. Even when they are illustrative, their function is usually to recapitulate other testimony in a more visual, vivid way—and therein lays the difficulty in sorting the probative from the prejudicial. The probative value of photos is intimately tied to their persuasive power, which in turn is intimately tied to their emotional impact. Conversely, the prejudicial effect of photos is a function of that same emotional impact. The prejudicial effect of photos is a function not only of the information they convey but also of *how* visual evidence is processed. If its effects are powerful in ways that cannot be articulated or evaluated, the evidence should be regarded as harmful to the deliberative process.

These questions of proof and prejudice become far murkier in the victim impact context because the legal function of the evidence is so ambiguous. According to the Supreme Court, the vividness of the evidence—its ability to “bring the victim alive” for the jury—is its primary function. It thus becomes difficult to determine what sorts of victim evidence are relevant. Childhood photos of an adult murder victim do not show an accurate glimpse of the murder victim at the time of the murder, but they do help convey the enormity of the loss suffered by the victim’s family.<sup>263</sup> But this is a difficult standard to cabin. A murder takes away the entirety of a life—it recasts the past as a tragic reminder and it robs the victim of a future. The concern is that the

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263. A recent thoughtful article by an author sympathetic to the use of victim impact statements argues that the resistance of the narratives to temporal limits may serve a salutary purpose. Erin Sheley, *Reverberations of the Victim’s “Voice”: Victim Impact Statements and the Cultural Project of Punishment*, 87 IND. L.J. 1247, 1263–66 (2012). Sheley argues: “the space for free-flowing narrative control afforded by the victim statement may in fact provide the only means for certain types of harms to be conveyed in the trial setting.” *Id.* at 1263. While acknowledging the difficulties of introducing testimony about events that precede a crime and are not attributable to the defendant, she notes that the past, present and future harms may “reinforce each other” and shape the bereaved witness’s “own understanding of his suffering” and convey a truer and fuller picture of the suffering and its individual and societal impact. *Id.* at 1266. Although the discussion is admirably nuanced, it underlines the problem—the lack of any articulable standards for what evidence is relevant to the issue of the pain caused by the loss.

*Payne* criteria provide no real limiting principle,<sup>264</sup> no consistent way of assessing or weighing probative value or prejudicial effect.

Whether the emotions elicited by victim impact evidence provide relevant information is a legal question about the appropriate role of victims and their families in criminal trials and about the nature of the “reasoned moral decision”<sup>265</sup> capital jurors are asked to render.<sup>266</sup> Whether the emotions elicited help or hinder the deliberative process is also a psychological question. Cognitive science can illuminate how anger, sympathy, selective empathy and other emotions affect the capital jury’s ability to deliberate fairly on the evidence in its entirety, as required by the Eighth and Fourteenth Amendments.<sup>267</sup> It can investigate whether the statements have proved to encourage invidious comparisons among victims.<sup>268</sup> And it can investigate the comparative effects of different types of evidence (statements, photos, videos) on the deliberative process.

A more informed and realistic understanding of the emotional impact of evidence can lead to better decisions about admissibility. More than that, it can lead to solutions that are better suited to addressing identified problems. Some of the concerns raised by the studies we discuss can be addressed by a variety of means, including jury instructions, expert testimony, rules on the handling or presentation of evidence, diverse juries, and judicial education, among others. Other concerns may require more sweeping reform. For example, if it can be determined that victim impact evidence offers no relevant information to jurors, and instead encourages invidious distinctions among victims, or blocks the jury’s ability to hear the defendant’s mitigation

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264. As Holland points out, the evidentiary jurisprudence on the admissibility of day-in-the-life videos is far more developed. Holland, *supra* note 197, at 183. Although the author wonders whether this is because they are more established, or because they involve civil litigants with deep pockets, there are other plausible reasons. One is the immense reluctance of criminal courts to limit victim impact testimony by bereaved relatives in capital trials generally. See Bandes, *supra* note 132. The other is that in day-in-the-life videos it is much clearer what facts are at issue—did the plaintiff engage in these activities much in the past and will he be disabled from doing so in the future, for example.

265. *Morgan v. Illinois*, 504 U.S. 719 (1992).

266. Emotionally evocative evidence such as videographic evidence has the potential to humanize various stakeholders in the capital sentencing phase. Although victim impact statements have received the most attention, videos can also be used to humanize the defendant’s family, see *supra* note 250 on execution impact videos, or the defendant himself. See Mintz, *supra* note 191, at 16–25 (discussing defendant mitigation videos).

267. See Bandes, *supra* note 125, at 403 n.213 (arguing that capital jurors generally begin the sentencing phase already angry and disgusted at the defendant, and that the real challenge of the sentencing phase is to ensure that anger does not block the jurors’ ability to remain open to the defendant’s mitigation evidence).

268. *Id.* at 406 (arguing that victim impact evidence in capital trials may create arbitrary or invidious distinctions that violate the Eighth and Fourteenth amendments).

evidence, such findings arguably fatally undermine the reasoning of *Payne*. A somewhat less sweeping reform would be to limit victim impact evidence more effectively. These are complex and pressing legal questions, and they will only grow more complex as the judicial system grapples with new technologies. These issues ought to be debated in light of the best information available.